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What Role Can Regulations Play? A South African Public Law Perspective on the Potential Response through Regulations to Constitutional Reservations about the Copyright Amendment Bill, B-13B of 2017

Jonathan Klaaren
University of the Witwatersrand, Johannesburg, jonathan.klaaren@wits.ac.za

WHAT ROLE CAN REGULATIONS PLAY? A SOUTH AFRICAN PUBLIC LAW PERSPECTIVE ON THE POTENTIAL RESPONSE THROUGH REGULATIONS TO CONSTITUTIONAL RESERVATIONS ABOUT THE COPYRIGHT AMENDMENT BILL, B-13B OF 2017

Jonathan Klaaren[1]

[1] University of the Witwatersrand, Professor, School of Law & Wits Institute of Social and Economic Research (WiSER). Please contact at jonathan.klaaren@wits.ac.za.

INTRODUCTION

This working paper addresses several issues in South African law relevant to determining whether and to what extent regulations may address genuine problems in the Copyright Amendment Bill [CAB]. Regulations are of course not yet drafted for this Bill and the Bill remains a Bill and is not yet an Act. Indeed, as discussed further below, the Bill is currently under consideration in Parliament as part of a section 79 process. In addition to its focus on the CAB, this paper identifies a set of emerging South African public law issues associated with similarly situated legislation.

After a background section that places the CAB within the currently ongoing joint process between Parliament and President and outlines the three constitutional reservations to the CAB raised by the President (section one), this working paper addresses the boundaries on regulations and the potential role regulations to the CAB can play in three parts: constitutional issues (section two), new public law issues (section three), and accepted principles and parameters for drafting regulations in South Africa (section four).

In section five, more specific questions and issues regarding the CAB are discussed. These include the question of whether the regulations can add new definitions of terms (e.g. to the definition of performers to exclude extras) as well as some specific issues raised with respect to the bill by informed critics, such as how the bill (particularly section 22(3)) might be read to apply retroactively and the degree to which the royalty rights in the bill (section 6A, et seq.) and reversion rights may be assigned through contract. This working paper does not give a view on how to resolve legitimate problems, but rather outlines options available to address such problems in regulations – arguing that such options do exist in regulatory drafting, both in the current period of section 79

consideration of the Bill and, assuming the Bill is enacted in at least roughly similar form, in the period between its enactment and its being brought into force. Regulations can play a potential significant and constructive role in both these periods in addressing genuine constitutional issues.

I. BACKGROUND TO THE POTENTIAL ENACTMENT OF THE COPYRIGHT AMENDMENT BILL, 2017

Conducting litigation or engaging in other legal efforts such as the drafting of regulations may be likened to the production of a film. In such terms, the movie pitched and analyzed in this working paper is the drafting of the regulations to the not-yet-enacted CAB (B13B-2017), which is in front of the President of the Republic of South Africa.

There were at least three movies made prior to the one being pitched below – one could even term the drafting of regulations a sequel. The first movie consists of the production of the currently valid law, the Copyright Act, 98 of 1978. This Act followed those of 1916 and of 1965 (Act 63 of 1965). The 1978 Act has largely been administered by the Department of Trade and Industry [dti].[2] Part of its administration currently falls under the Companies and Intellectual Property Commission, an agency created in the 2008 Companies Act reform process (replacing another 1978 piece of legislation, the Companies Act). For enforcement, a High Court judge currently sits as the Copyright Tribunal and hears licensing disputes.[3]

The second movie consists of the drafting and passage of the CAB, 2017. This production took place from at least 2015 and has been shot mostly in Parliament, concluding with National Council of Provinces passage on 29 March 2019. There were plenty of points of drama in this production.

The third movie – and one that is still playing – is the enactment process of the CAB. One might of course consider this to be part and parcel of the drafting and passage of the CAB, but it appears to warrant separate billing and treatment. In order to be enacted, the CAB needs to be signed into law by the President in terms of section 79 of the Constitution. This section provides an opportunity for the President to surface serious doubts ("reservations") concerning the constitutionality of the draft legislation if he has them. The President is empowered through a procedural veto to send the draft legislation back to Parliament for reworking by Parliament in line with his concerns.

The President exercised this procedural veto over the CAB in June 2020, writing an 11-page referral letter detailing three constitutional reservations.[4] As of July, Parliament is now dealing with the President's

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[2] Copyright Act 98 of 1978 § 1(xxviii) (S. Afr.).

[3] *Id.* §§ 29-36.

[4] Sean Flynn. *South African President's Reservations to Copyright Bill Not Supported by Law*. InfoJustice Blog (Jul. 13, 2010), http://infojustice.org/archives/42499

letter and considering its options. Most political activity is thus understandably focused on advocating for and against Parliament modifying or sending the Bill back to the President for his reconsideration. This joint Parliamentary and Presidential process to consider the constitutionality of passed but not yet enacted legislation is one of the structural features of South African constitutional government.[5]

When read closely and properly, the President's letter sending the Bill back to Parliament states three reservations: one procedural and two substantive. The President's first reservation is a procedural one about tagging. In paragraph 22.1 of his referral letter of 16 June 2020, the President wrote: "I am of the view that the Bills have been incorrectly tagged and that they ought to have been classified and passed as section 76 Bills. This is primarily because their provisions have an impact on 'Trade' and 'Cultural matters' as contemplated in Schedule 4 of the Constitution." Section 75 outlines the ordinary process for passing national legislation, which was followed for the CAB. The section 76 process is an exception which requires a more substantial role for the NCOP and the Provinces themselves for legislation that substantially affects the concurrent regulatory authority of the Provinces granted in the Constitution. Notably, however, the Provinces do not have any such authority over intellectual property.

Under the President's overbroad interpretation any draft legislation that "impacts" trade or culture must follow section 76. Thus, almost all bills of any significance would require special handling, and the NCOP's carefully crafted constitutional role would be fundamentally changed. Parliament is not bound by the President's view of the legislative process. Albeit in dialogue with the President through s 79, Parliament must work out for itself how to "tag" its bills and it can stick to its initial decision on classifying the CAB as a section 75 bill.

Of particular relevance for this working paper, the President's second reservation is a substantive one about the regulation of unfair contracts, overlapping with the issue of retrospectivity. In paragraph 22.2 of his referral letter of 16 June 2020, the President wrote: "The retrospective application of the proposed new sections 6A, 7A, and 8A of the Copyright Bill to copyright assigned before the new sections come into operation may indeed be unconstitutional on the ground that it constitutes an arbitrary deprivation of property under section 25 of the Constitution."

This reservation is an arguably serious one, yet, as detailed more fully below, it disregards an easily available interpretation of the CAB in which the Bill only regulates (1) unfair contracts and does so (2) only going forward. This working paper argues that to the extent the current Bill language has any constitutional problem, it can be taken care of in the regulations to be drafted in the period preceding its coming into effect.

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[5] Jonathan Klaaren, "Structures of Government in the 1996 South African Constitution: Putting Democracy Back Into Human Rights," *South African Journal on Human Rights* 13, no. 1 (January 1997): 3–27.

The President's third reservation is a substantive one about fair use. In paragraph 22.3 of his referral letter of 16 June 2020, the President wrote: "The new exceptions introduced by sections 12A, 12B, 12C, 12D, and 19B and 19C of the Copyright Bill are also likely to be declared unconstitutional on the basis that they are in breach of section 25(1) of the Constitution and the Three-Step test binding South Africa under international law."

While not directly relevant to this working paper, this reservation raises fascinating and far-reaching questions regarding the interaction of international and constitutional law in South Africa. These widened copyright exceptions, favouring fair use and enhancing the role of libraries, are designed to make sure (for example) that contemporary creatives can quote parts of past works in making their own new ones, and that textbook publishers cannot price South African students out of the market. The legal landscape is filled with such examples of reasonable limitations on private property for the good of the public. As for the "Three-Step Test", this international standard has not prevented other countries from enacting far-reaching copyright exceptions. There is no reason why this international standard should be applied more restrictively to South Africa through its own constitution.

II. DRAFTING REGULATIONS FOR THE COPYRIGHT AMENDMENT BILL

A. *The Constitutional Significance of Regulations*

Once the drama of section 79 consideration is over (and assuming that an amended Bill in some form is enacted), what might currently be considered an important sub-plot to the enactment process of the CAB will emerge as a full-blown storyline in its own right, one with true spin-off potential. While most attention is focused on the joint Presidential and Parliamentary consideration of the constitutionality of the Bill, work has already started on a further process that will need to unfold in order to bring the signed Bill (at that point an Act) into force – the drafting of regulations for the Copyright Amendment Act.

Even once it is signed by the President, the amendment Act will need regulations to be drafted so as to be brought into force. This necessity emerged dramatically in a case the Constitutional Court decided in 2000, *Pharmaceutical Manufacturers*.[6] This case is primarily known for deciding the proposition that a court with the requisite jurisdiction has the power to review and set aside a decision by the President of South Africa to bring an Act of Parliament into force in terms of the principle of legality. Perhaps negotiating the delicate political waters of a litigation process involving the Presidency, that case was decided on the basis of assumed error by government lawyers working for the Department of Health.[7]

At a deeper level of detail than the availability of judicial review, *Pharmaceutical Manufacturers* also decided a number of threshold issues

[6] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) (S. Afr.).

[7] *Id.* at 53-54 para.68.

regarding the necessity of drafting regulations. Since the *Pharmaceutical Manufacturers* decision, the South African government – working here through the Office of the State Attorney and the Office of the State Legal Advisor – has not been caught since with bringing an Act into force without the necessary regulations.

The principal constitutional question here is when are regulations necessary for the implementation of an Act? Regulations would, presumably, most of the time be helpful to the implementation of legislation, but when are they necessary? According to the Constitutional Court, the question it faced was whether "the regulatory base necessary for the operation of the Act was not in place when [the President published a proclamation to bring the Act into force] because schedules had not been made to replace the repealed schedules of the 1965 Act, and other essential regulations contemplated by the Act had not been made",[8] '[t]he President's decision to bring the Act into operation in such circumstances cannot be found to be objectively rational on any basis whatsoever".[9] The Court thus introduced three concepts: the Act's "regulatory base", "essential regulations", and other subordinate legislation beyond "essential regulations" – which in this case meant the schedules listing the drugs to be considered as medicines and those to be available for over-the-counter dispensing. The *Pharmaceutical Manufacturers* Court did not pronounce on the question of the alleged missing essential regulations and instead decided the case on the basis – ultimately a farther-reaching basis – of the missing subordinate legislation beyond the regulation, the schedules.

We should briefly canvass here two further constitutional matters that may extend the running time of the enactment movie. First, as an authoritative and publicly available senior counsel opinion on the CAB, the Cowen et al. Opinion (para. 53 note 49), notes: once the CAB is signed by the President and becomes an Act of Parliament, it is open to constitutional challenge in the ordinary course even before it comes into force, if a right has been infringed.[10] A further point to articulate here is that the regulation drafting process may occur simultaneously with constitutional challenges to the legislation. The precedent for such a constitutional challenge occurred in a public welfare context (the potential legislation exclusion of permanent residents from the extension of South Africa's social security net).[11] A challenge to legislation before it comes into force and while regulations are being drafted would likely demonstrate the required standing and secure at least a hearing in court. In this scenario, the challenge to the Act would most likely be raised by interests sufficiently aggrieved by the legislation and desirous of an outcome whereby the legislation is struck down, changed, or delayed or

[8] *Id.* at 5-6 para. 5.

[9] *Id.* at 68 para 89.

[10] *See* Susannah Cowen et al., *Legal Opinion of Advocate Cowan* (2019), https://www.re-createza.org/legal-opinion-on-the-bill.

[11] *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC) at 55-58 paras. 90-92 (S. Afr.); *see also* Max Du Plessis, Glenn Penfold, and Jason Brickhill, CONSTITUTIONAL LITIGATION (Juta 2013).

even where the process of drafting regulations is either delayed, disrupted, or influenced by the simultaneous ongoing constitutional challenge to the empowering legislation.

Another gateway to constitutional challenge that might extend the running time of the enactment movie is found in another section of the Constitution. This section provides a limited supplementary or additional legislative role to a minority of the members of the first house of Parliament. In terms of section 80, one-third of the members of the National Assembly may approach the Constitutional Court directly in respect of the constitutionality of an Act before it is brought into force. This route to a constitutional challenge to legislation has never been exercised since 1994. One might imagine a scenario where agreement in Parliament to such an exercise would be a "quid pro quo" for Presidential signature. In this case, the simultaneous process of drafting regulations might well be voluntarily paused, modified or delayed by government.

B. *New Public Law Issues*

With the above distinction of the sequel from its three related but earlier productions made in Section I and the constitutional issues explored in Section II, we turn now to the main show of this working paper – drafting regulations for the CAB. Apart from the audiences built up by the earlier movies, why should cinema-goers care to look at the CAB from the point of view of drafting regulations? Apart from the constitutional arguments in Section II, there are two reasons, one generally accepted and non-controversial and the second also significant but much less recognized.

First, as is the case with most but not all legislation, the CAB must be accompanied by subordinate legislation (including here regulations) in order to be successfully implemented. The necessity of subordinate legislation for the implementation of Parliamentary Acts has been a constant feature of the South African polity since the first decades of the 20th century. The necessity of such delegated public power was affirmed first in the post-apartheid era in the case of *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others*.[12] Regulations are recognized as crucial for legislation. In one notable recent instance, draft regulations to the Carbon Tax Bill were drafted and made public while consideration of the Carbon Tax Bill was ongoing.

In post-apartheid South Africa, the process of drafting regulations for implementation of an Act has often been fairly lengthy. While there is apparently no comprehensive study available to provide a precise figure, the process of drafting regulations appears to take at least 6-12 months. A 2016 study of the Office of the State Legal Advisor shows that most of the drafting of legislation and regulations is done within line departments rather than undertaken in the specialist units of state lawyers. This governmental lawyering unit did however report a 85% compliance rate in turning around within 40 days certifications of legislative instruments

[12] 1995 (4) SA 877 (CC) (S. Afr.).

drafted elsewhere and submitted to the Office.[13] The practice with legislative instruments administered by the dti seems to be for in-house drafting of subordinate legislation.[14]

At this point, a new and directly relevant sub-plot emerges to our movie – the implementation of the CAB (once in force) through the drafting of regulations. This new sub-plot relates to an earlier piece of dti- drafted and dti-administered piece of legislation, the Intellectual Property Law Amendment Act (Act. No. 28 of 2013) (IPLAA). IPLAA introduces amendments that make traditional works (which include indigenous works) subject to copyright protection. As is apparent from its title, this legislation has been enacted. However, it has not yet been brought into effect. The apparent reason that this Act from seven years ago has not been brought into effect is that its regulations have not yet been drafted.[15] As currently drafted, IPLAA contains a reference to the Copyright Act. Regarding this specific issue of the IPLAA, Cabinet currently understands that another piece of draft legislation, the Indigenous Knowledge Systems Bill, will remove the reference in the IPLAA to the Copyright Act.

Again, here the dti is not necessarily out of line with relatively common South African government practice as a number of amendment bills across the state have become stuck in this stage and have never been brought into effect. The Refugees Amendment Act 33 of 2008, administered by the Department of Home Affairs and brought into effect on 1 January 2020, twelve years after enactment, are a case in point.[16]

Second, a less-usual function for subordinate legislation – interpretation interacting with the ongoing formulation and interpretation of the primary legislation -- is highlighted by the fact that the CAB has been considered by the Presidency to have serious concerns regarding its constitutionality and thus sent back to Parliament. The President is in part concerned that a plausible interpretation of the legislation would result in its unconstitutionality. This concern would obviously need to be grounded in a specific substantive or procedural constitutional challenge. While arguable, and apparently not yet decided in the Constitutional Court, a concern of this sort arguably rises to the level of a serious and genuine doubt regarding constitutionality on the part of the President in terms of section 79. It is a feature of the South African constitutional design that drafting of regulations may occur simultaneously with this process – this is why these legal issues may well be termed "new" public law issues.

A tangential but nonetheless related situation occurs in the remedial phase of constitutional adjudication. Due to the post-apartheid reconfiguration of the distribution of judicial and legislative control over

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[13] Jonathan Klaaren, *Civil Government Lawyers in South Africa*, 60 N.Y.U. L. Rev. 365–77 (2016).

[14] There is scope here to research and draft a table on this issue.

[15] *See* Susannah Cowen, Jonathan Berger, and Mehluli Nxumalo, *Opinion on CAB and the Constitution* (2019), http://libguides.wits.ac.za/Copyright_and_Related_Issues/Opinion at para 23.

[16] It may be worth further research to canvass the department's IP Acts as a whole.

statutes, there have been occasions for South African courts to consider draft legislation. For instance, in a recent Constitutional Court argument regarding a SARS customs and search case, advocates used a draft amendment act in arguing the remedy already tabled.[17] The Court referred approvingly to this use in its reasoning.

What is highlighted by the above episode in the third movie is the element of continuity (really here, dynamic interaction) between that interpretive exercise (of the CAB) and the drafting of regulations. In effect, it appears as if the CAB has been sent back for further legislative clarification (i.e. amendment) on some controversial parts *in order to avoid unconstitutional interpretations.* This could be termed a "clarify and avoid" legal strategy as part of the section 79 consideration process.

An earlier instance of this apparently occurred with the Protection of State Information Bill (B6 of 2010). Ignoring major other issues of potential unconstitutionality, this Bill was first sent back by the Presidency under Jacob Zuma in 2013 on the basis that some relatively minor parts of the Bill were irrational and made in error and made no sense. Arguably, there was an interpretation available to the Presidency and to Parliament that the version in fact could be interpreted in conformity with the Constitution on this point. But the Parliament instead amended the draft legislation, correcting these errors, and sent it back to the Presidency (where it still remains). While there are other plausible interpretations of this episode of constitutional politics at least one is the one sketched out above. Indeed, the Presidency now appears to wish to essentially disregard this earlier referral and, in what it admits is an unprecedented situation, has in June 2020 referred the Protection of State Information Bill to Parliament a second time, but this time with serious reservations.

On this theory, if all of some of the outstanding legitimate complaints about the CAB (either complaints of policy or of legislative interpretation running afoul of the Constitution) can be addressed by draft regulations, then this demonstration of and commitment to a specific interpretation of the Bill may give the President the space he needs to sign the Bill and allow the regulation process to move forward. Within the bounds of the Constitution, promises can be made to "fix problems" in the regulations or commitments undertaken to (or tactics embarked upon) to delay hard questions to the regulations. Without question, this argument may in some instances be taken too far. For instance, a survey of existing Copyright Act subordinate legislation and necessary changes and addition prompted by the CAB might theoretically provide an argument relevant to the tagging argument in the third movie (enactment).[18] This may be a step too far for South African legal culture. There is much more to say here but that is another production.

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[17] *Gaertner and Others v Minister of Finance and Others* 2014 (1) SA 442 (CC) (S. Afr.).
[18] Cowen et al., *supra* note 8, at paras. 83.1 and 87.

C. *Accepted Principles and Parameters for Statutory Interpretation and Regulatory Drafting*

As most legal practitioners and scholars realize, regulations implement principal legislation and often become just as if not more significant to persons, firms, and industries working with the primary legislation. Regulations can structure further levels of implementation including guidance documents. One example might be a "Guide to Best Practices in Fair Use" for certain sectors of the creative industries. Such guidance documents may be drafted on private or government initiative.[19] There exists to some extent a current debate in South African administrative law over whether or not interpretations of primary legislation relied upon by implementing bureaucrats and relatively longstanding may be given any interpretative weight due to that fact.[20] There is no South African doctrine parallel to the American *Chevron* interpretation. In part due to these features and to their potential impact, regulatory drafting process can be just as contested as the legislative drafting process and perhaps more so.

The *Chevron* question has, however, recently appeared in the Constitutional Court. In *Marshall* (see note 19) , with the pleadings closed, the Chief Justice issued directions dated 22 November 2017, inter alia, inviting the parties within defined timelines to file written submissions on: "the extent to which a court may consider or defer to an administrative body's interpretation of legislation, such as [the Interpretation Note] and whether [the SCA's] approach was in accordance with this". As confirmed in *CSAR v Bosch*, South African practice had been to use such documents if uncontested as tipping pieces of evidence in marginal cases of statutory interpretation.[21] This practice began with the pro-plaintiff decision of *R v Detody*, which confirmed the non-application of segregationist pass laws to women in 1926.[22] Strikingly, a unanimous Constitutional Court reconsidered and nearly overturned this theme of statutory interpretation, even in the face of its consistency with *Endumeni*.[23] The reasoning of the Court in *Marshall* was such:

> [9] The rule thus originated in the context of legislative supremacy where statutory interpretation was aimed at ascertaining the intention of the legislature. In that particular context custom could "tip the balance" in cases of ambiguous legislation. *Bosch* recognised that the rule had to be adapted to contextual statutory interpretation. The rationale for relying on

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[19] *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC) (S. Afr.) (regulations drafted by a private body considered as PAJA administrative action).

[20] *See* inter alia Allison Anthony, Administrative Justice Association of South Africa (AdjASA) Conference 2019: Administrative Justice in and Beyond the Courts (Mar. 5-6, 2019); *see also Marshall and Others v Commission for the South Africa Revenue Service* 2019 (6) SA 246 (CC) (S. Afr.).

[21] *Bosch and Another v Commissioner of South African Revenue Services* (A 94/2012) [2012] ZAWCHC 188; [2013] 2 All SA 41 (WCC); 2013 (5) SA 130 (WCC) (20 November 2012).

[22] *Rex v Detody* 1926 AD 198.

[23] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) (S. Afr.).

> consistent interpretation by those responsible for the administration of legislation also changed from "custom" to the assistance that could be gained from their evidence in determining "the meaning that should reasonably be placed upon those words". [10] Missing from this reformulation is any explicit mention of a further fundamental contextual change, that from legislative supremacy to constitutional democracy. Why should a unilateral practice of one part of the executive arm of government play a role in the determination of the reasonable meaning to be given to a statutory provision? It might conceivably be justified where the practice is evidence of an impartial application of a custom recognised by all concerned, but not where the practice is unilaterally established by one of the litigating parties. In those circumstances it is difficult to see what advantage evidence of the unilateral practice will have for the objective and independent interpretation by the courts of the meaning of legislation, in accordance with constitutionally compliant precepts. It is best avoided."[24]

This section covers two major topics: the current South African law on legal interpretation (including statutory interpretation) and the current South African law on regulatory drafting.

To begin with the first, as has become clear, the 2012 case of Endumeni Municipality fundamentally changed and replaced the pre-existing paradigm of legal interpretation in South Africa. Interpretation may be defined as 'process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract'.25 Endumeni effected its revolution by challenging as a fiction the concept underlying the pre-existing approach, the notion of a discoverable and coherent intention of the legislature (or other drafting institution) that passed the statute (or other legal instrument). As Wallis J wrote: '[T]here is no such thing as the intention of the legislature in relation to the meaning of specific provisions in a statute, particularly as they may fall to be interpreted in circumstances that were not present to the minds of those involved in their preparation. Accordingly to characterise the task of interpretation as a search for such an ephemeral and possibly chimerical meaning is unrealistic and misleading.'26

The previous approach could be found in the 1995 case of Coopers & Lybrand v Bryant, decided by the Appellate Division under the interim Constitution.27 Here, the proper approach to interpretation was summarised as being that one should first "ascertain the literal meaning of the words" and thereafter have regard to context and background circumstances, applying extrinsic evidence of surrounding circumstances

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[24] *Marshall and Others v Commission for the South Africa Revenue Service* 2019 (6) SA 246 (CC) at 5-6 paras. 9-10 (S. Afr.).
[25] *Supra* note 20, at para. 18.
[26] *Id.* at para. 21.
[27] 1995 (3) SA 761 (AD).

when encountering ambiguity.[28] Decided 17 years after Coopers & Lybrand, Endumeni Municipality may be understood as the culmination of a gradual shift away from a literal process of interpreting contracts and statutes to one where both text and context have a role to play.

There is little doubt that Endumeni Municipality has now become the dominant text in South African legal interpretation. A recent Constitutional Court judgement, ACSA v Big Five, confirms and exemplifies the trendline of the past 8 years. There the Court noted that in the litigation before it, "[t]here is no dispute about the principles of interpretation. The correct approach to the interpretation of documents was summarised by the Supreme Court of Appeal in Endumeni Municipality:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

In a legal academic article published in the *Pochefstroom Electronic Law Journal*, the authoring judge of *Endumeni Municipality*, Malcolm Wallis, a judge on the Supreme Court of Appeal, has written on the topic of 'Interpretation Before and After National Joint Municipal Pension Fund v Endumeni Municipality 2012 4 SA 593 (SCA).'[29] Wallis makes several points relevant to the content, spirit, and application of the new *Endumeni* legal interpretation paradigm. First, consistent with the gradual shift away from a literal interpretation, Wallis notes that both text and

[28] *Id* at 768 A-E.

[29] Malcolm Wallis, *Interpretation Before and After Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 4 SA 593 (SCA)*, POCHEFSTROOM ELECTRONIC LAW JOURNAL (2019).

context have a role to play, and which will predominate will depend on the circumstances of each case.[30] Second, he notes two of the principles underlying *Endumeni*.[31] First, *Endumeni* demands of judges that they articulate their reasons, both linguistic and contextual, for arriving at their decisions on questions of the construction of documents. Second, it is desirable to have a single reasonably clear standard for the interpretation of documents that enables lawyers and courts to go about their business of interpreting documents, without becoming bogged down in the "how" of interpretation. Third, Wallis observes that "[s]tatutes directed at ameliorating a distinct social problem are entitled to a more generous construction, given that purpose, than a technical regulatory statute such as the *Companies Act*."[32] Fourth, Wallis observes that *Endumeni* by no means represents a rolling back of the movement towards allowing reference to parliamentary drafting materials in the interpretation of statutes. "Legislative history is another source of relevant context that can be of great assistance in resolving problems of interpretation and can on occasions prove decisive in clarifying what is otherwise obscure."[33] As he notes, "[t]he explanatory memorandum prepared by the committee that drafted the *Labour Relations Act* 66 of 1995 has been referred to on countless occasions as providing relevant context to the provisions of the LRA."[34] Wallis is here drawing on a context of English and South African law. The rule against the admissibility of parliamentary materials has (controversially) been abolished in England.[35]

The above observations may imply several propositions particularly relevant to the interpretation of the amended Copyright Act. First, the third observation made by Wallis implies that we should make a distinction between two of the principal purposes of the amended Act: the "feed the starving artists" purpose (e.g. redistribution within the creative industries) and the purpose to introduce fair use within the copyright regulatory regime (more technical). A more generous construction may be attributed to provisions reflective of the first purpose. Second, the fourth observation made by Wallis confirms that an explanatory memorandum to accompany the regulation drafting process may be worthwhile. Further, it indicates that existing parliamentary materials (such as the explanatory memorandum for the Copyright Amendment Act) are worth engaging with at level of statutory interpretation as well as at level of regulatory drafting. Fifth, Wallis observes that as important element of interpretation is to consider the statute as a whole. Here, "the provisions of the *Interpretation Act* 33 of 1957 operate as interpretative guides in certain situations, and section 39(2) of the Constitution contains the injunction that legislation must be interpreted in accordance with the

[30] *Id.* at 8.
[31] *Id.* at 21-22.
[32] *Id.* at 17.
[33] *Id.* at 18.
[34] *Id.*
[35] *Pepper (Inspector of Taxes) v. Hart* [1993] 1 All ER 42 (HL) (noting that it is not yet authoritative in South Africa (citing *S v. Makwanyane and Another* 1995 (3) SA 391 (CC) at 7-9 paras. 14-15)).

spirit, purport and objects of the Bill of Rights."[36] Sixth, although South Africa is not a party to the *Vienna Convention*, section 233 of the Constitution requires courts where possible to construe all law in accordance with international law.[37] Seventh, Wallis makes a final observation about the place of social content and particularly commercial context in legal interpretation. Here, Wallis appears to be distancing himself from a call for interpretation in line with commercial sensibility. He is careful to state "… commercial sensibility … is an expression to be found in the English judgments, which focus particularly on commercial contracts. It is not an expression used in *Endumeni*. What I said was that a sensible construction was to be preferred to one that was insensible or unbusinesslike. And provided judges heed the warning that followed, that it is not for them to impose their personal sense of what would be sensible or desirable in place of what the parties to the contract or the legislative body have actually said, this should not be problematic. …. When one speaks of a contract being unbusinesslike, the danger of course lies in failing to resist the temptation to rescue one party from the consequences of a bad bargain, but I would have thought that it was clear that this is not the judicial role."[38]

To move to the second topic of this section, the legal doctrines relevant to drafting regulations in South Africa are nearly all derived from instances of judicial review. And many do not originate in cases of regulations but instead derive from judicial review of exercises of discretion. Perhaps the primary example is the case of *Dawood*. In that early Constitutional Court case, the court held that legislatures cannot grant unfettered discretion to administrator and must provide at least some minimal guidelines. This constitutional holding aligns well with the usual practice of statutory interpretation in judicial review holding that a legislature (e.g. Parliament) may frame an administrative power given in a statute widely or narrowly. This is referred to as a wide or a narrow discretion – e.g. the breadth of the discretion allowed to the administrator to exercise. Statutes with narrow discretions are often detailed and technical, providing sufficient statutory textual fodder for reviewing courts to ascertain a standard against which to measure administrative action. [It may be worth reviewing the cases interpreting the Copyright Act to date; presumably they mostly concern exercises of discretion.]

Despite the lack of decided cases specifically considering the drafting of regulations, it effectively certain that regulatory interpretation will follow *Endumeni*. In a case decided around the same time as *Endumeni*, the Constitutional Court reversed another decision of the Supreme Court of Appeal, attempting to find and articulate the same balance between text and context that Wallis has articulated in *Endumeni*: "… Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this Court, O'Regan J succinctly put the question in *ACDP*

[36] Wallis, *supra* note 26, at 18.
[37] *Id.* at 19.
[38] *Id.* at 19-20.

v Electoral Commission as being "whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose". This is not the same as asking whether compliance with the provisions will lead to a different result."[39]

As background, the making of regulations (e.g. the unified process of their drafting and their promulgation) is best considered as satisfying the definition of administrative action in terms of the Promotion of Administrative Justice Act and thus needs to satisfy the legal requirements incorporated in that legislation – which itself largely implements the content of section 33 in the Constitution, the right of just administrative action. Even if the making of regulations were not to be considered administrative action, the doctrines below would most likely apply as a matter of the principle of legality.[40] There is no recognized general South African law requiring regulations to undergo a process of notice and comment – instead, there may be specific participation processes specified in the primary legislation. Further, a process akin to notice and comment is a discretionary option that may be undertaken by the drafter of the regulations in terms of PAJA section 4.

Given the above understanding, we can formulate, as a working framework, five legal doctrines that both empower and constrain drafting regulations for the amended Copyright Act. First, regulations must be intra vires their empowering legislation or other empowering legal instrument.[41] In elaborating upon this doctrine, one rule of construction is that the words of a regulation made under powers derived from a statute cannot be relied upon as an aid to the construction of the statute itself.

Second, regulations, like other laws, must be written in a clear and accessible manner.[42] According to the Constitutional Court, "[t]he doctrine of vagueness is founded on the rule of law, which … is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly. The doctrine of vagueness must recognise the role of government to further legitimate social and economic objectives. And should not be used unduly to impede or prevent the furtherance of such objectives." (footnotes omitted).

Third, regulations must not be based on errors of law.[43] On

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[39] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC) at 17-18 para. 30 (S. Afr.).

[40] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) (S. Afr.).

[41] *See University of Cape Town v Minister of Education & Culture* 1988 (3) SA 203 (CC); *see also Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) and Others* 2018 (2) BCLR 157 (CC) at 34-35 paras. 89-92 (S. Afr.).

[42] *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC) at 55-56 para. 108 (S. Afr.).

[43] *Security Industry Alliance v Private Security Industry Regulatory Authority and Others* 2015 (1) SA 169 (SCA) (S. Afr.).

recommendation from the Private Industry Security Regulatory Authority, the Minister of Police amended regulations with the effect that firms in the security industry would need to pay some security guards more.[44] These firms objected. The threshold issue of administrative action was determined to be clear.[45] While the Authority had complied with the participation process in the empowering legislation, the firms objected that the consultation was mechanical.[46] More significantly, they also claimed that the Authority was materially influenced by an error of law in understanding regulations could not differentiate between large and small firms.[47] The reviewing court agreed with the firms. The legal interpretive error was that the regulations could differentiate – see Act section 35(2): "Different regulations may be made in terms of subsection (1) with reference to different categories or classes of security service providers." The evidence of the view of the Authority was in Authority's "analysis of comments".[48] The statutory interpretation exercise shows "contrary to the view conveyed to the Minister by the Authority that current legislation did not permit it to classify businesses by size or income in order to arrive a differentiated fees, it was so permitted."[49]

Fourth, regulations must be rational. The controlling test in this area of SA administrative law may be stated as: "is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at."[50] In renewing a station community broadcasting license but refusing to extend its area beyond legacy Ciskei and Transkei to the city of Port Elizabeth, it was rational for the telecommunications regulator to consider the then-current absence of broadcasting policy and to wish to maintain a level playing field in areas such as Port Elizabeth. However, it was not rational for the regulator to impose license condition of 20% iXhosa and 20% Afrikaans language content quotas in total when the only information supporting this was applicant's undertaking to provide 20% iXhosa and 20% Afrikaans of the local content (which was 25% of the total content).

Fifth, regulations must be proportionate and reasonable.[51] In this case, regulations presumptively prohibiting use of off-road vehicles on beaches were challenged but found not to be unreasonable because of various and wide-ranging automatic exemptions.

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[44] *Id.* at paras. 4-5.
[45] *Id.* at para. 15.
[46] *Id.* at para. 17.
[47] *Id.* at para. 18.
[48] *Id.* at para. 19.
[49] *Id.* at para. 25.
[50] *Trinity Broadcasting, Ciskei v Independent Communications Authority of SA* 2003 (4) All SA 589 (SCA) (S. Afr.).
[51] *SA Shore Angling Association v Minister of Environmental Affairs and Tourism* 2002 ZAECHC 12 (S. Afr.).

III. ISSUES FOR REGULATIONS ON THE CAB

In order to produce and draft the regulations for the CAB, we need to consult with and to some extent consolidate four sets of texts and doctrines (four scripts). These are **first** (and most significant) the text of the Copyright Act, as amended by the CAB. This text has not yet been produced or finalized but can, for current purposes, be read from the texts of the current Act and the Bill. This set of texts also includes other parliamentary materials, such as the explanatory memorandum to the Bill. The **second** set of texts and doctrines is the case of *Endumeni* and related cases, which enunciates a new South African paradigm of statutory interpretation (this has been covered above in section four). The **third** is a set of cases and doctrines (mostly consisting of instances of judicial review) that provide some clear parameters for South Africa regulatory drafting (this has been covered above in section four). The **fourth** set is the set of the Copyright Regulations and any other current subordinate legislation to the Copyright Act. These regulations and notices are the hard sub-statutory law that the regulations to be drafted will supplement, replace and incorporate or change, or repeal.

A. *Issues for Regulatory Clarification*

In relation to the Copyright Act (as amended), the first question is to identify which provisions of the amended Act need regulations either in order to have effective implementation or to clarify and avoid controversial substantive constitutional questions. Here, there are four primary provisions which are controversial. In each of these four areas in different ways, draft regulations can potentially alleviate constitutional concerns.

First, the creator royalty sharing provisions (sections 5A-9A) are claimed to violate the right to property. As explored further below, the role that draft regulations may play here is both to clarify and avoid a plausible interpretation of the amended Act that would be unconstitutional (as explored below) and to supplement the amended Act: creating a constitutionally-compliant institution to resolve disputes between creators and rights-holders regarding these royalties. Second, the fair use provisions (section 12A) are claimed to violate the right to property. The role that draft regulations may play here is to clarify that that the implementation and operation of fair use is constitutionally compliant. Third, the creator reversion provisions (section 22) are claimed to violate the right to property. In relation to these provisions, the draft regulations can also clarify and avoid a plausible interpretation of the amended Act that would be unconstitutional (as explored below). Finally, the amended Act has a significant different enforcement mechanism from the original 1978 Act, featuring an expanded role of the Copyright Tribunal (section 29). Here, draft regulations can update and extend the existing regulations allowing the Tribunal to operate. While this is not an area of direct constitutional concern, an oft-stated concern with the amended Act as a whole is that it attempts to strike a balance between creator and rights-holders interests but does not have the tools to finely assess or calibrate that balance in cases where either creators or rights-holders are refusing to cooperate in the process of negotiation.

B. *Existing Regulations*

We can turn briefly now to the existing regulations to the Copyright Act. Unfortunately, there is no South African government documentation that consolidates into one text all currently existing regulations for an Act. The original set of regulations to the Copyright Act is contained in Government Notice no. R2530 in Government Gazette no. 6252 of 22 December 1978 (in operation since 1 January 1979) (the 1979 regulations). These have been supplemented by several further pieces of regulations. The 1979 regulations are organized into five chapters. Chapter 1 covers reproduction regulations. These regulations will need to be revised in light of the fair use provisions of the amended Act. Chapter 2 covers sound recording royalties. This chapter may serve as a starting point for the extension of royalties to creators in other sectors beyond music and sound recording. Chapter 3 covers authors of cinematograph films. Chapter 4 provides the Copyright Tribunal Regulations. This chapter will require revision in light of the extensive changes to the Tribunal in the amended Act. Chapter 5 covers some miscellaneous topics.

While it is not a necessary golden thread that needs to be woven between a regulation drafting initiative and a legal opinion on the constitutionality of the CAB, this working paper adopts for purposes of consistency the statutory interpretation of the purposes of the Copyright Act Bill (which is of course distinct from the analysis of the amended Act) from Cowen et al. (Opinion para 27). These are: (1) to modernize South African copyright law and update the 1978 Act, including to bring our legislation in line with the needs of the fast-evolving digital age; (2) to bring South African law in line with international standards and to implement the content of international treaties relating to copyright (both those to which South Africa is already a party and those it intends to accede to); (3) to promote socio-economic development and poverty reduction, innovation and a knowledge economy in the interests of all South Africans; (4) to balance the need to incentivize creativity and knowledge development with the need to facilitate access to works in the public interest; (5) to protect and advance the interests of authors and creators; (6) to promote the rights of others including the right of access to education and the right to equality especially to protect the rights of persons with disabilities. The fifth and the sixth of these purposes would seem at first blush to fall within the category identified by Wallis as ones to be applied generously.

Continuing the theme of a golden thread, it may be worth making a comment on the element of continuity. For instance, as discussed in the Cowen et al. Opinion (paras. 137-138), a constitutional concern has been expressed that the CAB impermissibly delegates powers to the Minister of Trade and Industry to make regulations in respect of sections 6A(7)(b), 7A(7)(b), and8A(5)(b). This is countered by Cowen et al. (paras. 139-145). There is some doctrinal and interpretative overlap here with the regulatory making power. The SA doctrine of appellate estoppel that enforces this sort of consistency was expressed in *Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation)*

and Others (April 8, 2017) (Constitutional Court).

The date on which the President signs the CAB into law as an amendment to the Copyright Act is different from the date on which the amendments themselves will come into force. As noted in Cowen at al. Opinion, page 25, at note 49, in terms of section 38(1) the CAB comes into force on a date to be fixed by the President by proclamation in the Gazette. The amendments may be brought into force on diverse dates, as is common practice in South Africa. As is also common practice, there is no statutory provision for a specific date or process for the general CAB regulations to come into force.

In the CAB, there are two different processes legislated for drafting regulations depending on the subject matter of the regulations. This may contribute to different regulations coming into effect on different dates. The general process for regulations is specified and governed by section 38(1) for the regulations required to put the CAB amendments into force. In terms of this general process for regulations, the CAB (clause 33 amending section 39 of the Act) requires that "[b]efore making any regulations in terms of subsection (1), the Minister must publish the proposed regulations for public comment for a period of not less than 30 days." The CAB is adding this procedural requirement as the Copyright Act currently has no general 30-day public comment requirement. Further, there is no requirement for different regulations to be brought into effect at the same time.

A supplemental set of additional requirements to the regulation drafting process is identified in clauses 5 (inserting section 6A(7)), 7 (inserting section 7A(7)) and 9 (inserting section 8A(5)) of the CAB regarding the creator royalty regulations. At issue in these sections is the right of the author of a copyrighted work to share in royalties in respect of literacy or musical works, visual artistic works, and audio-visual works. For regulations dealing with this subject matter, the drafting will be in two parts. First, the Minister must develop (a) draft regulations setting out the process to give effect to the application of each section to eligible works; (b) conduct an impact assessment of the proposed process; and (c) table the draft regulations and impact assessment in the National Assembly (one of the houses of Parliament). Second, once this first process is complete, the Minister may then make these regulations through the Act's usual section 39 regulation process. There is considerable scope here for interpretation, as well as for considering the interaction of this process with the PAJA. The creator royalty regulations are thus subject to two instances of public comment and should be specifically considered for approval by the National Assembly.

The usual practice for statutory definition of regulation-making powers in South Africa is to list specific matters for which regulations can be made (sometimes with specific consultation requirements such as with the Minister of Finance), as well as to enact a non-specific regulation-making power (e.g. "The Minister may make regulations as to any matter required or permitted by this Act to be prescribed by regulations.") as well as often a general incidental regulation-making power (e.g. "The Minister

may make regulations generally, as to any matter which he considers it necessary or expedient to prescribe in order that the purposes of this Act may be achieved."). The Copyright Act currently adopts this structure and the amendments of the CAB work within that structure.

In its clause 33, the CAB adds specific regulation-making powers in five areas, amending section 39 of the Act. The first area is strengthening the Tribunal: "*(c*F*)* prescribing rules regulating the processes and proceedings of the Tribunal." The second area includes regulations covering both the controversial areas of creator royalty rights and reversion rights: "*(c*G*)* prescribing compulsory and standard contractual terms to be included in agreements to be entered in terms of this Act." The third area is one not discussed in this working paper, technological protection measures: "*(c*H*)* prescribing permitted acts for circumvention of technological protection measures contemplated in section 28B after due consideration of the following factors." These regulations may only be made "after due consideration of the following factors: (i) The availability for use of works protected by copyright; (ii) the availability for use of works for non-profit archival and educational purposes; (iii) the impact of the prohibition on the circumvention of technological protection measures applied to works or protected by copyright on criticism, comment, news reporting, teaching, scholarship or research; or (iv) the effect of the circumvention of technological protection measures on the market for or value of works protected by copyright." The fourth area is royalty rates: "*(c*I*)* prescribing royalty rates or tariffs for various forms of use." The fifth area is also not one discussed in this working paper, regulating the distribution and collection processes of the collecting societies: "*(c*J*)* prescribing the percentage and period within which distribution of royalties must be made by collecting societies" and "*(c*K*)* prescribing the terms and manner relating to the management of unclaimed royalties, code of conduct and any other matter relating to the reporting, operations, activities and better collection processes of royalties by a collecting society."

We focus here on the overlapping second and fourth areas of competence for drafting regulations. These regulations include within their subject matter two key innovations of the CAB: both the controversial additional creator royalty rights in the CAB (amended section 6 (literary or musical works), section 7 (visual artistic works), section 8 (audiovisual works), and section 9 (sound recordings)) and the controversial reversion right in the CAB (clause 23 amending section 22(3) of the Act). The Cowen et al. Opinion did not consider the new section 22(3) reversion right nor is s 22(3) strictly speaking part of the President's reservations but s 22(3) was mentioned in passing in the President's referral letter.

The insertion of new sections 6A, 7A and 8A into the Act will mean that authors of literary, musical or visual works have an inalienable right to a fair royalty on the exploitation of their work. These sections operate both in respect of works where the right to royalties has already been assigned and in respect of works where the right to royalties has yet to be assigned. In respect of the first category of works, the insertion of the

sections does 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.[52]

There are arguably two readings for the new sections 6A, 7A, and 8A. In one reading, these sections apply only to works with unfair royalties. This is an interpretation without constitutional concerns. In a second reading, the new sections can be read to apply to all works. This is an interpretation arguably with constitutional concerns, regarding the arbitrary deprivation of the right to property.

There are two readings of the new section 22(3). In one reading, it can be read as prospective only. This is an interpretation without constitutional concerns. In a second reading, it can be read retrospectively. This is an interpretation arguably with constitutional concerns, regarding the arbitrary deprivation of the right to property.

There are at least three potential routes drawing upon the regulatory drafting function to alleviate the arguable constitutional concern. One route is to explicitly adopt the prospective interpretation of section 22(3) in the regulations. This would directly address any plausible issue of unconstitutionality and is perhaps the best option. A second route is to use the regulations to limit the category of holders of the reversion right. For instance, extras in audiovisual works could be defined not to be holders of the reversion right in section 22(3). A third route would be to specify for enforcement a non-intrusive form of the reversion right. For instance, extras holding a reversion right might be limited to satisfaction of that right only through compensation, eliminating the potential for a provision that might holdup the production of the audiovisual work.

[52] Susannah Cowen, Jonathan Berger, and Mehluli Nxumalo, "Opinion Re: Copyright Amendment Bill and the Constitution," October 13, 2019, paras. 133–135.