



PHOTO: Blind SA and SECTION27 protesters marching

#ENDINGTHEBOOKFAMINE

FOR PEOPLE WHO ARE BLIND OR VISUALLY IMPAIRED

A Guide to Accessible Format Shifting following the
21 September 2022 Constitutional Court Judgment

ISBN: 978-0-6397-6423-8



PHOTO: Protesters marching on the busy Johannesburg streets

SECTION27

 First Floor, South Point Corner Building
87 De Korte Street, Braamfontein
Johannesburg, 2017

 011 356 4100

 info@section27.org.za

 www.section27.org.za

 @section27news


 @section27news

 @section27

 Section27

+SECTION27
catalysts for social justice

BLIND SA

 5 Fuchs Street, Alrode, Alberton
Johannesburg, 1451

 011 839 1793/4

 president@blindsa.org.za

 www.blindsa.org.za

 @BlindRSA

 BlindSA

 BLIND SA

CONTENTS



4	SUMMARY
5	BACKGROUND
8	HOW TO CONVERT PUBLISHED WORKS INTO ACCESSIBLE FORMATS – LEGALLY
8	What is an accessible copy?
11	Who can make accessible copies? Individuals or 'beneficiary persons'.
12	A step by step example – accessible copies for a university student
13	Who else can make accessible copies? Organisations or 'permitted entities'.
15	A step by step example – accessible copies made by a permitted entity
16	IMPORTING AND EXPORTING ACCESSIBLE FORMAT COPIES
17	PUTTING THE RIGHTS OF PERSONS WITH DISABILITIES FIRST
20	LIMITATIONS TO THE JUDGMENT
20	Types of works
21	Suspension of declaration of invalidity
21	WHERE TO FROM HERE?

We acknowledge Julia Chaskalson and Dr Sanya Samtani for their leading role in the production of this Guide.

END THE
BOOK
FAMINE



SUMMARY

The Constitutional Court has declared the Copyright Act of 1978 unconstitutional and invalid to the extent that it limits access to literary and artistic works in accessible formats. The Court granted an immediate exception to copyright for persons with disabilities, allowing them to convert literary and artistic works into accessible formats without first getting authorisation from the copyright holder. Previously, as a result of the Copyright Act of 1978, people with disabilities would need to get authorisation from copyright holders to convert books into formats they could read. The Constitutional Court has now removed this requirement. This opens the door for persons with disabilities, improving access to books and other printed published works.

The Constitutional Court aims to remove the historical gap in access to books, as well as other literary and artistic works, between persons with disabilities and those without. People with disabilities must be granted the same access to books and other literary and artistic works as people without disabilities.

You can read the full judgment here: <https://section27.org.za/wp-content/>

BACKGROUND

For decades, people who are blind or visually impaired have been denied access to books in accessible formats. This was largely because publishers did not publish books in accessible formats. The books that are published, needed to be converted for people with visual and print disabilities to access them. The 1978 Copyright Act, however, did not allow people with disabilities to do so. Because of the Act, persons who are blind and visually impaired would have to get permission from the copyright holder of any published work in order to convert it into an accessible format like Braille, large print font, audio, Digitally Accessible Information System (DAISY). Copyright holders were not required to grant these requests, and many requests got ignored or denied. The process of getting permission to convert a text could be time consuming, costly, and oftentimes impossible for the person making the request. Converting a book into an accessible format without permission from the copyright holder could open a person up to criminal and civil penalties – in effect, making Braille a crime.

This resulted in a widespread Book Famine for people who are blind or visually impaired, with only 0.5% of published works available in accessible formats in South Africa. Learners and teachers described not having enough copies of accessibly formatted books to enable learning; and outside of the school environment, recreational books in accessible formats were few and far between, largely inaccessible to the majority of people with visual disabilities. Students at universities would miss deadlines and exams because the required articles, textbooks or journals could not be converted into accessible formats in time. These are just some examples of how copyright undermined the rights to equality, dignity, basic and further education, freedom of expression and cultural life of one's choice for persons with visual disabilities.



IMAGE: Blind SA Vice president Christo de Klerk and Blind SA President Ntshavheni Netshituni conducting an interview at the Constitutional Court

Following years of activism and significant delays in Parliament over copyright law reform, Blind SA, represented by SECTION27, decided to challenge the Copyright Act in court. Describing the Act as unconstitutional for violating the rights of persons with disabilities, we asked the court to grant immediate relief allowing persons who are blind or visually impaired to convert books into braille and other accessible formats. The High Court of South Africa (Gauteng Division, Pretoria) granted this order on 21 September 2021 after the case was heard before Judge Mbongwe. Our case was entirely unopposed by the government, who agreed to follow the court's decision.

You can read our arguments at the High Court here:
<https://bit.ly/S27arguments>

“

The Constitutional Court's judgment giving access to reading materials for print disabled South Africans by declaring unconstitutional the Copyright Act of 1978, and through the expansion of the proposed Section 19D is a milestone because it makes life easy for students and those who read for leisure. Without accessing reading material in alternative formats the places print disabled in a state of redundancy because they do not have a choice but to rely on available, sometimes outdated material. This victory, therefore, brings light in the lives of the print disabled.”

**Ntshavheni Netshituni,
President of Blind SA**

BACKGROUND CONT.

The next step took us to the Constitutional Court. The highest court in the country had to assess the unconstitutionality of the Copyright Act and decide whether or not to confirm the High Court order according to standard procedure. At a hearing on 10 May 2022, Blind SA and SECTION27 again argued the unconstitutionality of the Copyright Act before 9 judges, and explained the need for immediate relief to improve access to books for people who are blind.

On 21 September 2022, the Constitutional Court delivered a unanimous judgment confirming that the Copyright Act is unconstitutional for violating the rights of persons with disabilities – a victory for communities of blind and visually impaired people across South Africa! This judgment has paved the way for ending the book famine for persons who are blind and visually impaired, and will vastly and immediately improve availability of books in accessible formats.

IMAGE: The Blind SA and SECTION27 team at the Constitutional Court after the famous victory



HOW TO CONVERT PUBLISHED WORKS INTO ACCESSIBLE FORMATS – LEGALLY

The Constitutional Court judgment gives clear guidance and definitions about who can convert texts into accessible formats, for what purpose, and how to go about it.

What is an accessible copy?

The judgment says that an accessible copy is a copy of a work in “alternative manner or form which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability” [para 6; Section 13A(1)(a)]. In other words, this version of a published work allows someone who is blind or visually impaired to access it to the same degree that a sighted person could understand and use a print book.

An accessible copy can be a copy of any literary published work – it could be a textbook that someone needs for school or university, but it could also be a book that one reads for recreation. Accessible copies are not just for educational materials, but all literary materials. This also includes art work that is part of a textbook.

The process of conversion must “respect the integrity of the original work” [para 6; Section 13A(1)(a)] but the judgment also acknowledges that adaptations to original works may be necessary to make the work accessible for people with different needs. One does not have to solely reproduce the book identically, but can adapt it to make it as accessible as possible for the needs of the user. The accessible copy may be adapted as long as:

-
- The adaptations are only needed to help navigate information in the accessible format
 - The adaptations do not introduce new changes other than what is needed to help make the work accessible to the beneficiary person. [para 6; Section 13A(2)(b)]

An example of this could be related to artistic images which accompany text in a published work. If a textbook includes an artistic image, this image would need to be adapted for it to be accessed by the user of the accessible copy through image descriptions, for instance. Artistic images are allowed to be adapted so that they are suitable to the braille format. But an adaptation could not add altogether new artistic elements to the accessible copy.

That said, the judgment allows for quite a lot of freedom with respect to the process of conversion. The judgment remarks:



“Those who serve the interests of persons with print and visual disabilities should be given the greatest latitude to produce literary works in accessible format copies and to develop technologies to do so that are ever better at rendering the original work in the best possible way, tailored to the varied incidents of the impairments such persons suffer.” [para 89]

In other words, converting an artistic or literary work into an accessible format must suit the needs of the user and make it as accessible as possible – the Court is trying to ensure that persons with disabilities can get the same level of understanding and utility from the accessible copy as a sighted person can with the original. The Court also leaves it open for new technologies to improve the process of conversion and its outputs.

Importantly, the judgment does not prescribe what type of accessible format must be used. Different accessible formats suit different persons' accessibility needs and so these rules apply to conversions involving braille, DAISY, large print and audio or combinations of accessible formats. What comes first is the accessibility needs of the user.



IMAGE: Protesters sitting outside the Constitutional Court



Who can make accessible copies? Individuals or 'beneficiary persons'.

People who are 'beneficiary persons' can convert published works into accessible formats without getting permission from the copyright holder.

A 'beneficiary person' is: 

- Someone who is blind;
- Someone who is visually impaired;
- Someone who has a perceptual or reading disability which cannot be improved to be like a sighted person;
- Someone who has a physical disability which prevents them from holding or handling a book to enable effective reading, or
- Someone who has a physical disability which prevents them from focusing or moving the eyes to enable effective reading. [para 6; Section 13A(1)(b)(i-iii)]

The judgment also notes that not all 'beneficiary persons' experience the same challenges or live in the same context [para 73]. The judgment is aware that a poor learner with a visual disability may face additional challenges in accessing published works in comparison to a wealthier person with a visual disability. The judgment aims to reach all groups of beneficiary persons and improve access to reading materials for them, especially those who are vulnerable or living in poverty.

Beneficiary persons are only allowed to convert books that they have accessed legally – in other words, books lawfully borrowed from a library, borrowed from another individual or bought from a bookshop. Beneficiary persons are allowed to convert books into accessible formats for exclusive, personal, non-commercial use. This means that a beneficiary person cannot make multiple accessible copies or for the purpose of selling them for a profit.



A beneficiary person is allowed to get help making the conversion into an accessible format. The judgment allows caretakers or caregivers to assist beneficiary persons in making accessible copies of published books. This means that if you cannot make the accessible copy yourself, a family member, friend, or caregiver can help you.

A step by step example – accessible copies for a university student



If you are a blind or visually impaired student studying at a university, and you need access to an academic chapter in an accessible format for an assignment, you can convert the materials you need into a format that suits your needs.



You must have lawful access to the materials – in other words, from a text that you have bought or borrowed, or have lawful access to through your university (a lecturer included a chapter in a course pack).



You no longer have to ask for authorisation from the copyright holder to make this conversion. You can make the conversion today!



You can convert this yourself, or you can get a permitted entity or caregiver to act on your behalf and assist you in making the conversion. Your university library or disability unit is likely to qualify as a permitted entity which can assist you in making the conversion [see below].



You are allowed to adapt elements of the chapter in order to facilitate accessibility. In other words, if there are visual elements or graphs in the chapter that you need, these can be adapted so that you can make sense of them in the best possible way, eg., through the person assisting you with the copy writing out descriptions of these elements.



This accessible format copy is for your personal use – you are not allowed to sell it on the market.



It is so exciting that the ConCourt has handed the judgement in Blind SA's favour. This creates more opportunities for blind people to freely exercise their right to education. Students will no longer be limited to few available books when they do their assignments and exams because they will no longer depend on others to read for them, if they don't want to, it means they cannot get valuable information from such written works. For students who have to do research, they will be able to get more references for their literature reviews, without having to worry whether a certain topic has been exhaustively researched or not because they don't have access to such publications. Personally, I am already thinking of enrolling for my MA degree to enhance my knowledge to serve even better based on my own research findings. This Act has frustrated my life and many blind people who have an interest to research on different aspects that affect persons with disabilities."

Thandile Butana,
Development Officer at Blind SA

Who else can make accessible copies? Organisations or 'permitted entities'

The judgment also allows 'permitted entities' to convert published books into accessible format copies.

A permitted entity is a government institution, or a non-profit organisation whose main activities include:

- **education,**
- **training,**
- **adaptive reading or information access to 'beneficiary persons'**

on a not for profit basis. A permitted entity can have any of these services as their main activities or institutional obligations as long as they operate on a non-profit basis [para 6; Section 13A(1)(d)].

Many persons with visual disabilities will have ordinarily accessed the majority of their reading materials through permitted entities like these, and these institutions have now been given more freedom to serve the needs of beneficiary persons.

A permitted entity does not have to be 'prescribed' or given a special license from government in order to produce, supply or distribute accessible copies – any organisation, institution or government department which primarily aims to educate, train or provide information and adaptive reading services to beneficiary persons is allowed to convert works into accessible copies.

Some examples of permitted entities include:

- **Provincial education departments**
- **Blind SA**
- **Libraries**
- **Schools for learners with disabilities**
- **University disability units, libraries or copyright departments.**

A permitted entity can convert published works into accessible formats without copyright authorisation, in order to supply these to beneficiary persons. The permitted entity is allowed to supply these copies through non-commercial lending (borrowing books from a library) or by distributing the accessible copies in a physical or electronic copy (sharing the accessible copy with a beneficiary person, either in hard copy or through an access controlled electronic link).

The permitted entity is only allowed to do this with books that they have lawful access to.

The permitted entity is allowed to supply these accessible copies only for the use of beneficiary persons.

The permitted entity is not allowed to make a profit from these activities. Permitted entities may however be allowed to charge nominal fees to cover the costs of converting published works.

Permitted entities are allowed to get accessible format copies from other permitted entities. This means that if one permitted entity has created a braille master copy of a certain book, it can lend that master copy to another permitted entity they do not have to start from scratch.



This will allow immediate production of accessible formatted publications since we [Blind SA] do not have to wait for copyright permission which was time consuming, and in the majority of cases not received."

**Jace Nair,
CEO of Blind SA**

A step by step example – accessible copies made by a permitted entity



If you are a government institution or non-profit organisation that works to help persons who are blind or visually impaired, by providing education, training or access to information on a non-profit basis, you can convert literary or artistic published works into accessible formats.



You no longer have to ask for authorisation from the copyright holder to make this conversion for a beneficiary person. You can make the conversion for your beneficiaries today!



You can convert copies of materials that you have legal access to – in other words, materials that a beneficiary person has brought to you to convert; books that you have borrowed from a library or individual; books that you have bought.



You can also get accessible copies from other permitted entities. You can share your accessible copies with other permitted entities.



You can lend or share the accessible copies to your beneficiaries as long as you do not make a profit from the lending or sharing.



You can also share or distribute the accessible copies in an electronic or hardcopy format, depending on what best suits the needs of the user of the accessible copy.

IMPORTING AND EXPORTING ACCESSIBLE FORMAT COPIES

The judgment does not focus specifically on rules surrounding the importation or exportation of accessible copies of books. The judgment may seem to avoid explicitly dealing with access to international libraries of accessible copies of books [para 61].

But when you interpret this judgment alongside the original 1978 Copyright Act in a little more detail, you can see that importation and exportation of accessible copies is no longer an infringement of copyright, and is therefore allowed:

- **Section 23 of the Act describes infringements to copyright. 'Unauthorised use' of works under copyright is one such infringement.**
- **Converting a book into an accessible format without authorisation of the copyright holder used to be an 'unauthorised use', which made it an infringement. Importing or exporting accessible copies, without authorisation of the original copyright holder – whether they were in South Africa or in other countries – was a secondary infringement, as it traded in copies made through an 'unauthorised use'.**
- **But the Constitutional Court has now said that making an accessible copy of a published literary or artistic work for the use of a beneficiary person no longer requires authorisation from the copyright holder.**
- **This means that making accessible copies for beneficiary persons is no longer an unauthorised use.**
- **Importantly, this means that importing accessible copies and exporting copies overseas, as long as they are for the sole use of beneficiary persons and as long as they fulfil the same conditions that apply to the making of an accessible format copy within South Africa, is no longer a secondary infringement of the Act. Of course, if they do not fulfil these conditions then they will be considered infringing uses.**
- **For a list of these conditions, see the previous section of this guide.**

But when you interpret this judgment alongside the original 1978 Copyright Act in a little more detail, you can see that importation and exportation of accessible copies is no longer an infringement of copyright, and is therefore allowed:

PUTTING THE RIGHTS OF PERSONS WITH DISABILITIES FIRST

Over and above explaining the legal process for accessible format shifting, this judgment represents an important recognition of the rights of persons with disabilities, especially the rights to equality, dignity, basic and further education, freedom of expression, language and participation in the cultural life of one's choice. The Court declared sections 6 and 7 of the 1978 Copyright Act, when read with section 23 of the Act, as unconstitutional, invalid and inconsistent for infringing on the rights of persons with disabilities to the extent that these sections limited access to published works for persons with disabilities.

The Constitutional Court acknowledged that “that those with print and visual disabilities suffer from a scarcity of access to literary works that persons without these impairments do not” [para 65] due to the current Copyright Act, which therefore “constitutes unfair discrimination” on the basis of disability [para 69]. “The result,” the judgment reads, “is that persons with visual and print disabilities are denied access to the vast majority of published literary works on the basis of their disability” [para 51]. The fact that no organs of state opposed this application demonstrates that there is widespread understanding in government that copyright has – historically speaking – unfairly discriminated against persons with disabilities by placing artificial obstacles between them, and accessing published literary and artistic works.

IMAGE: SECTION27's executive director Umunyana Rugege speaking to the protesters outside the Constitutional Court





IMAGE: The Constitutional Court Door

Particularly noteworthy was the judgment's acknowledgment of the role that access to accessible format copies of texts has in furthering the rights to equality and dignity. The judgment realises that delays or denials of copyright authorisation has resulted in a scarcity of books, going on to reflect:

"[Para 65] It takes little imagination to appreciate what that scarcity, relative or absolute, does for the life chances of those with print or visual disabilities. That some have nevertheless achieved substantial success is testament to their personal fortitude. It detracts not at all from the reality that those with print and visual disabilities suffer from a scarcity of access to literary works that persons without these impairments do not.

[Para 71] ... Access to the vast universe of knowledge and imagination that is to be found in literary works is a condition for advancement. It also promotes an engagement with the world of ideas, and that is an important attribute of the well-being of persons. That those with print and visual disabilities should be so radically compromised in the access they enjoy to literary works by reason of the requirement of authorisation is to heap indignity upon the adversities these persons face."



The judgment also focused on the impact copyright has had on the realisation of the right to basic and further education, noting that copyright has played a part in learners and students with visual disabilities being unable to access the books that they require for their education, which the judgment called a “substantial impairment” [para 73].

The court also recognised that processes to resolve constitutional defects with copyright, including the legislative process in Parliament, have had “inordinate delay[s]” [para 8] at the expense of the rights of people with disabilities. The judgment realised that immediate, just and equitable relief was necessary. This is why there is immediate interim relief which allows beneficiary persons or permitted entities to make accessible copies without copyright authorisation from the date of the judgment, while Parliament resolves issues with the Act. Acting Justice David Unterhalter, who wrote the judgment, stated that “persons with print and visual disabilities should not have to wait further to secure a remedy. The Parliamentary process has already taken too long. The need to address the infringement of rights is pressing. There must be a remedy granted that provides immediate redress” [para 102].

In addition to the confirmation of unconstitutionality of the Copyright Act, the judgment made the following order:

- **Parliament is ordered to remedy the constitutional invalidity of the current Act within two years of the date of the judgment**
- **As an interim relief, the court has read-in – or included – a set of provisions [S 13A] which immediately permit blind or visually impaired persons to convert books into accessible formats without requiring the authorisation of the copyright holder. This provision draws almost entirely from the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled – a treaty to which South Africa has expressed an intention to become a party.**

By acknowledging the unfair discrimination and rights' violations experienced by persons with visual disabilities because of copyright, this judgment has validated the life experiences of a vulnerable community and has laid the foundation for righting historical wrongs. Overall, this judgment is a triumph for the rights of persons with disabilities in recognising their legal capacity as full members of society with a right to read. It details who can make accessible format copies for which purposes, and how to go about doing so to the best interest of users who have disabilities.



The judgement will go a long way in ending the book famine for print disabled persons. Books will no longer be unavailable because of the estimated 90% of publishers refusing to grant copyright permission to make their books accessible. It will no longer be necessary to spend a lot of time and money to make books accessible which are already accessible abroad, but which have been unavailable to us on account of the old copyright restrictions.

**Jace Nair,
CEO of Blind SA**

LIMITATIONS TO THE JUDGMENT

Types of works

This judgment only applies to literary works and artistic that have been published.

What is a literary work? [Copyright Act 1978 section 1(1)(xxvii)]

- **Novels, stories and poetry**
- **Dramatic works, stage directions, film scripts, broadcast scripts**
- **Textbooks, political documents, biographies, essays and articles**
- **Encyclopaedias and dictionaries**
- **Letters, reports, memoranda**
- **Lectures, addresses, sermons**
- **Written tables and compilations**

What is an artistic work? [Copyright Act 1978 section 1(1)(iii)]

- Paintings, sculptures, drawings, engravings, photos
- Architecture – buildings, and models of buildings
- Other works of artistic craftsmanship

This judgment therefore does not apply to unpublished works. It also does not apply to films or music.

Suspension of declaration of invalidity

The judgment has suspended the order of unconstitutionality for 24 months, to allow Parliament to remedy constitutional defects with the Act. Since Parliament is already undergoing a process of wide-ranging copyright reform, this remedy allows Parliament to continue its work and crucially, fix the unconstitutionality regarding people with visual and print disabilities identified by the court. The relief granted – allowing an exception to copyright for beneficiary persons and permitted entities – is applicable in the interim, starting immediately from 21 September 2022 until 21 September 2024.

We urge Parliament to cure these defects and complete its process of copyright reform.

WHERE TO FROM HERE?

Parliament has been given 2 years to fix the unconstitutionality of the current Act, and processes with the Copyright Amendment Bill (CAB) are ongoing. Blind SA and SECTION27 have made submissions to Parliament, urging Parliament to ensure the CAB complies with the Bill of Rights, and that legislative reforms promote the rights of persons with disabilities and the right to basic and further education.

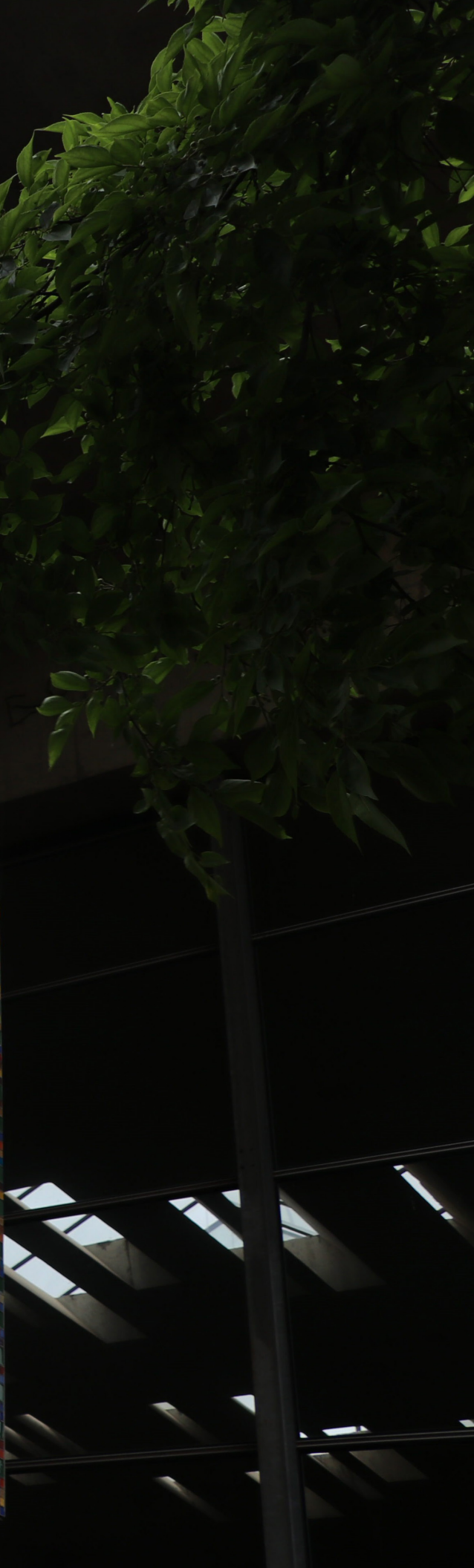
The South African government has committed to ratifying the Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled after it has amended the 1978 Copyright Act in Parliament.

Having been setback for years, it is crucial for the CAB to be passed and Marrakesh to be ratified without further delays.



IMAGE: The signboard at the Constitutional Court

LA O O S I S E K O
O S I S E K E L O
V U M B I W A
S I S E K E L O
L A O T H E O
S I S E K E L O
L C O U R T
L A O T H E O
Y O T E W A
L E H O F
O T H E O



#ENDINGTHEBOOKFAMINE



ISBN: 978-0-6397-6423-8