



Intellectual Property and the Constitutional Court of South Africa: Lessons from the Deployment of Adjudicative Strategies

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Abstract The Constitutional Court of South Africa recently handed down its fourth decision so far in the field of intellectual property. These decisions came against the backdrop of reforms and reform proposals concerning intellectual property rights in South Africa. These reforms and reform proposals were prompted by the need to establish intellectual property laws that are attuned to South Africa’s local context and needs, while complying with South Africa’s international treaty obligations. Parallel to South Africa’s policy and legislative agenda, this paper recognises these four decisions (referred to as the “IP quartet”) as the emergence of an intellectual property rights jurisprudence. The paper analyses the IP quartet and identifies a coherent narrative with respect to the intersection between intellectual property rights and constitutional rights and the appropriate approach to determining their real-life applications. The paper also explains this intellectual property rights jurisprudence and its contribution, and considers the adjudicative strategies employed by the Constitutional Court in applying constitutional provisions to dealing with issues involving intellectual property rights. An explanation of this jurisprudence arising from these cases will: (a) promote an understanding of the scope of intellectual property rights including the appropriate nature of their intersection with constitutional provisions (specifically fundamental rights expressed in Chapter 2 of the South African Constitution); and (b) offer some guidance to lower courts and the executive arm of government on the appropriate approach to the interpretation, conceptualization and application of the intellectual property legal framework.

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1 Introduction

On 8 December 2022, the Constitutional Court of South Africa (CCSA) handed down its fourth decision in the intellectual property (IP) field.¹ While the main issue before the court in this latest decision – *Villa Crop Protection (Pty) Limited v. Bayer Intellectual Property GmbH*² [*Villa Crop*] – was on procedural law, specifically on whether the court of first instance misapplied the principles relating to amendment of pleadings, the CCSA also touched on the extent and nature of constitutional constraints on the scope of IP protection in the course of its decision. Indeed, one of the key issues which the four IP-related decisions – collectively referred to in this paper as the “IP quartet” – addressed was the extent of constitutional constraints on the scope of the IP protection afforded the relevant IP rights holder in South Africa. The IP quartet sits against the general backdrop of the CCSA’s refusal *in re: Certification of the Constitution of the Republic of South Africa* [*Certification decision*] to specifically accord IP rights the status of a stand-alone fundamental human rights or constitutional right instead holding that IP rights would not have that status.³ The question of constitutional constraints on the scope (and purpose) of the relevant IP right (IPR) was directly considered in the first decision – *Laugh It Off Promotions CC v. South African Breweries International (Finance) B.V.*⁴ [*Laugh it off*] – where one of the issues was whether the applicant’s right to freedom of expression was a complete answer to allegations of infringement under that provision, given the scope of the protection of well-known marks under § 34(1)(c) of the Trade Marks Act 194 of 1993.⁵ In the second case – *Ascendis Animal Health (Pty) Limited v. Merck Sharpe Dohme Corporation and 2 Others*⁶ [*Ascendis*] – the CCSA identified the link between the constitutional right of access to courts and the question of “whether all the subsections in § 61 of the (Patents) Act (dealing with revocation of patents) constitute a single cause of action or whether each subsection constitutes a separate and independent cause of action” (parentheses added).⁷ The CCSA found the validity of the respondent’s patent (and by extension, the meaning and scope of patent protection) to be directly relevant.⁸ This was a

¹ That decision was in *Villa Crop Protection (Pty) Ltd v. Bayer Intellectual Property GmbH* (CCT 237/21) [2022] ZACC 42.

² [2022] ZACC 42.

³ Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) 1996 (4) SA 744 (CC).

⁴ *Laugh It Off Promotions CC v. South African Breweries International (Finance) BV t/a Sabmark International and Another* (CCT42/04) 2006 (1) SA 144 (CC).

⁵ *Ibid* at paras. 34–44.

⁶ (CCT 212/18) 2020 (1) SA 327 (CC).

⁷ Para. 27.

⁸ Para. 9.

somewhat similar consideration in *Villa Crop* even when the CCSA was weighing the question of whether there was scope in patent law to permit the applicant to amend its pleadings in the court of first instance to introduce a plea of unclean hands on the part of the patentee. Whether the proposed plea would “destabilise the existing patent system”,⁹ the extent to which the proposed plea relates to the “nature of the South African patent system”, and the duty it places on patentees applying for the grant of patents, were all relevant to this question.¹⁰ In the third case – *Blind SA v. Minister of Trade, Industry and Competition and 4 Others*¹¹ [*Blind SA*] – the CCSA had to delineate both the appropriate copyright exception to allow the making of accessible format copies and the scope of works covered by that exception which “must be done in such a way so as to respect the rights of copyright owners that are not implicated in constitutional infringement”.¹²

The past few years in South Africa have seen both reforms and reform proposals in the field of IP rights (IPRs). These have been prompted by the need to establish IP laws that are attuned to South Africa’s local context and needs while complying with South Africa’s international treaty obligations. The local context in South Africa is characterised by the need for fair and better remuneration for copyright owners, the (increased) need for public access to copyright-protected materials, the need for access to affordable and quality medicines and healthcare, and the protection of traditional cultural expressions and traditional knowledge, etc. Between the legislature and the executive, interventions in the various fields of IP have focused on improving access to knowledge products (copyright) and access to patented medicines, amongst other objectives. In the case of access to knowledge products, South Africa’s Department of Trade, Industry and Competition (DTIC) has championed the introduction of the Copyright Amendment Bill before Parliament and there are expectations that should the Bill become law, it would increase or allow more access to books and other copyright-protected materials.¹³ For access to affordable medicines, the DTIC has indicated since 2018 that a draft Patents Amendments Bill will be released which would see South Africa move from its current depository patent system to a substantive examination system.¹⁴ The expectation is that a substantive examination system will introduce rigour into patent filing and grant and prevent the grant of patent rights to frivolous and “unworthy” inventions, thereby allowing the introduction of more generic medicines in the market.¹⁵

⁹ Para. 23.

¹⁰ Paras. 79–80.

¹¹ (CCT320/21) [2022] ZACC 33.

¹² Paras. 105–106.

¹³ Beiter et al. (2022).

¹⁴ See South Africa Department of Trade and Industry. (2018). Intellectual Property Policy of the Republic of South Africa: Phase 1. Available at https://www.gov.za/sites/default/files/gcis_document/201808/ippolicy2018-phase1.pdf.

¹⁵ “Fix the patent laws campaign supports efforts to increase access to medicines through intellectual property reforms at international and domestic levels” <https://section27.org.za/2022/06/ftpl-patent-law-reform-june-2022/>.

Parallel to South Africa's policy and legislative agenda, this paper recognises the IP quartet as the emergence of an IP rights jurisprudence set against the backdrop of South Africa's Constitution.¹⁶ This paper also identifies and proffers an explanation of both the principles and the pragmatic approach followed by the CCSA. Analysed as a quartet – a “set of four people or things” or “a group/set of four”,¹⁷ the IP-related decisions issued by the CCSA indicate a coherent narrative with respect to the intersection between IPRs and constitutional rights and the appropriate approach to determining their real-life applications. In explaining this IPRs jurisprudence and its contribution, this paper considers the adjudicative strategies employed by the CCSA in applying constitutional provisions to dealing with issues involving IPRs. An explanation of this jurisprudence arising from these cases will: (a) promote an understanding of the scope of IPRs including the appropriate nature of their intersection with constitutional provisions (specifically fundamental rights expressed in Chapter 2 of the South African Constitution); and (b) offer some guidance to lower courts and the executive arm of government on the appropriate approach to the interpretation, conceptualization and application of the IP legal framework.¹⁸ The aim of this paper is neither to criticise nor praise the CCSA but rather to comment on and discuss the implications of the IP quartet for the scope, exercise and use of IPRs in South Africa, and for the future of the decisions of specialist IP courts, appellate courts, and other arms of government in IP matters. While there is some literature analysing the contribution of each of the first two decisions (i.e. *Laugh it off* and *Ascendis*)¹⁹ and a few analysing the contribution of each of the last two decisions (i.e. *Blind SA* and *Villa Crop*),²⁰ little or no attention has been paid to questions relating to the decisions as a whole and the significance of the CCSA's role and participation in IP matters.

Part 2 of this paper briefly explains and clarifies the basis of the CCSA's intervention in IP matters. It discusses the nature of the jurisdiction of the CCSA both generally and specifically in IP matters, highlighting the Court's uniquely South African jurisdictional configuration. This sheds the necessary light on the significance of its role and participation in IP matters. Part 3 provides a brief summary of the facts in the cases that make up the IP quartet. Part 4 explains and extrapolates Roux's combination of principles and pragmatism and uses this as a heuristic device to analyse the reason for judgment in the IP quartet in light of South Africa's constitutional rights and provisions. It also identifies the adjudicative strategies employed by the CCSA in arriving at its decision in the IP quartet. Part 4 also argues that at a theoretical level, some combination of principles and pragmatism seems likely to provide the best way for a constitutional court that

¹⁶ It is noted that the *Certification decision*, in which the CCSA held that the right to hold IPRs is not a universally accepted human right and the Constitution was not defective in that regard, preceded the Constitution of South Africa. The decision and the Constitution that was birthed from it provides the foundation for the IP quartet as discussed in this paper.

¹⁷ Collins Dictionary 2022.

¹⁸ See Part 4, below.

¹⁹ Brickhill (2006); Dean (2005); Deacon and Govender (2007); Okorie (2020); Du Bois (2021); Muhlberg (2019).

²⁰ Okorie (2022a, b).

shares appellate jurisdiction with the Supreme Court of Appeal and the High Court (whilst being superior to those courts), to point the way to how constitutional review of IP laws and the exercise of IP rights should be undertaken. The focus on principle arises from the idea that deciding cases according to law is what courts are required to do in constitutional democracies where there is respect for the rule of law, and the focus on pragmatism from the idea that strategic calculations (and practical considerations) are the ways in which courts indicate their policy preferences.²¹ Part 5 shows how the CCSA's record (or IP jurisprudence) in IP cases can be explained as having been driven by just such a combination of principle and pragmatism, and that this, in turn, explains how the CCSA has used the platform of its constitutional mandate to indicate – not just to lower courts but also to the legislature and the executive – what it considered as the appropriate and constitutional approach to the interpretation and application of IP laws. In doing so, Part 5 discusses the implications of the IP quartet for the scope of IPRs (and specifically, for the impact of the scope of IPRs on the interests of users of IP-protected materials), not only for future decisions of trial courts and appellate courts in South Africa, but also for legislative reforms and actions of executive bodies.

2 The Constitutional Court and Its Adjudicatory Mechanism

By virtue of § 167 of the Constitution of the Republic of South Africa, the CCSA is the apex court in the country and may exercise original, concurrent and/or appellate jurisdiction. The CCSA has original and exclusive jurisdiction to decide on the following: disputes between organs of state concerning the constitutional status, powers or functions of any of those organs of state; the constitutionality of any parliamentary or provincial Bill but only either on the application of members of parliament or a provincial legislature; the constitutionality of any amendment to the Constitution; on referral by the President, the constitutionality of any Bill after its reconsideration to address the President's reservations; whether Parliament or the President has failed to fulfil a constitutional obligation; to certify a constitution passed or amended by a provincial legislature. Accordingly, for such matters, parties are bound to approach the CCSA first, only and directly, and have no recourse to any other court.

For other constitutional matters including any issue involving the interpretation, protection or enforcement of the Constitution,²² or for any other matter when it is in the interests of justice and with its leave,²³ the CCSA has concurrent (original) jurisdiction with the High Court and litigants may choose between them, provided that a party who has elected to submit to the jurisdiction of the CCSA in such matters has no recourse to any other court. The CCSA also enjoys (concurrent) appellate jurisdiction over decisions of other courts on any other matter if it grants leave to appeal either on the grounds that the matter raises “an arguable point of law

²¹ Roux (2009), p. 108.

²² See § 167(7) of the Constitution.

²³ See § 167 (6)(a) of the Constitution.

of general public importance which it ought to consider”²⁴ or, when it is in the interests of justice.²⁵ Such appeals may be directly from the decision of any other court. The CCSA’s decision on whether a matter is within its jurisdiction is final.²⁶ Through these mechanisms of original and appellate jurisdiction the CCSA signals issues that are of general public importance in or to South Africa as well as matters it considers to be in the interests of justice.

Where the Supreme Court of Appeal, the High Court, or a court of similar status has made an order declaring all or any part of an Act of Parliament or a provincial Act invalid, the CCSA has exclusive and original appellate jurisdiction to confirm that order before it can have any effect/force.²⁷ In such cases, the CCSA does not solely review the lower court’s declaration of invalidity but conducts its own evaluation of the relevant statute to satisfy itself as to the constitutional validity or otherwise of the statutory provisions that have been challenged.²⁸

In effect, the CCSA may, in its original, concurrent and appellate jurisdictional capacity, be involved in different types of issues and/or matters from contract to delict to taxation to IPRs. For the purposes of the analysis in this paper the focus will be solely on decisions involving intellectual property rights.

As clarified by the Constitutional Court Rules, 2003, applications to the CCSA are to be made via notice of motion filed supported by an affidavit as to the facts upon which the applicant relies for relief.²⁹ South Africa operates on a system of binding precedent. As the highest court of the Republic, all courts are bound by the decision of the CCSA on a matter.³⁰ The CCSA itself is bound by its own previous decisions on any matter but may depart from it if values based on human dignity, equality and freedom demand.³¹ Put differently, cases which involve questions identical to those on which the Court has already ruled are decided according to those previous decisions. With respect to decisions of other courts, including foreign courts, on a question that has not previously been considered by the CCSA (High Courts have jurisdiction to decide constitutional matters too), the CCSA engages in “judicial comparativism” and judicial debate with those decisions. While doing so it makes sure that it “promote(s) the values that underlie an open and democratic society based on human dignity, equality and freedom”,³² in line with § 39(1)(a) of the Constitution. To paraphrase Rautenbach, “comparing foreign cases [and decisions of lower courts] is not the same as being bound to foreign [or lower courts’] precedents in accordance with the principle of stare decisis followed in South Africa”.³³

²⁴ See § 167(3)(b)(ii) of the Constitution.

²⁵ See § 167 (6)(b) of the Constitution.

²⁶ § 167(3)(c) of the Constitution.

²⁷ See § 167(5) of the Constitution.

²⁸ *Phillips v. Director of Public Prosecutions* 2003 (3) SA 345 (CC); *Blind SA* paras. 45–46.

²⁹ See Rule 11.

³⁰ Pretorius (2020); Wallis (2018); Devenish (2007).

³¹ Devenish (2007), p. 11. 1

³² Rautenbach (2015), p. 1564; Devenish (2007), p. 11.

³³ Rautenbach (2015), p. 1560.

In summary, the analysis in this part shows that the constitutional provisions relating to the jurisdiction of the CCSA particularly help the CCSA to legitimize its interpretation and application of specific principles and indicate its policy preferences in the realm of IP law. What principles have featured across the IP quartet? What strategies have held sway? The next section (Part 3) attempts to briefly lay a theoretical basis for answering these questions by extrapolating Roux's combination of principles and pragmatism.

3 CCSA Case Law Considered: The IP Quartet

This contribution is limited to understanding how the CCSA has interpreted relevant IP legislation within the IP quartet, what adjudicative strategies have guided its decisions, and what narratives (if any) and implications may be discerned in resulting case law. The focus is on CCSA judgments covered from the enactment of the Constitution of South Africa till 2022.³⁴ The CCSA decisions are listed below in chronological order and were selected because they meet the following criterion: the decisions interpret statutory provisions within the primary South African IP framework (as defined in Part 1, above) and IPRs, their infringement and/or defences to their infringement are directly in issue. Accordingly, decisions that do not directly concern statutory IPRs and/or that concern the interpretation of analogous common law rights, such as passing off or unlawful competition, have been left outside the scope of the analysis.³⁵

Consequently, the cases considered are as follows:

- *Laugh It Off Promotions CC v. South African Breweries International (Finance) B.V. [Laugh it off]*
Laugh it off engaged the appellate jurisdiction of the CCSA under § 167(6)(b) of the Constitution, i.e. leave to appeal granted both on the grounds that the matter raised “constitutional issues of considerable private and public moment” and that it is “manifestly in the interests of justice”.³⁶ The applicant was a firm whose business was largely engaged in altering the images and words on trade marks and printing them onto T-shirts which it sold for profit in order to make comment by way of parody. This alteration and social commentary included the respondent's trade marks. The respondent, South African Breweries International (Finance) BV, was the owner of several well-known trade marks and had alleged that the applicant's use of its trade marks amounted to dilution and tarnishment infringement under § 34(1)(c) of the Trade Marks Act. Both at the High Court and at the Supreme Court of Appeal, *Laugh it off* had argued that

³⁴ The *Certification decision* having preceded the coming into effect of the Constitution is excluded from the analysis in this paper.

³⁵ *Minister of Health and Another v. New Clicks South Africa (Pty) Ltd and Others* (CCT 59/2004) 2006 (2) SA 311 (CC) and *Phumelela Gaming and Leisure Limited v. Gründlingh and Others* (CCT31/05) 2006 (8) BCLR 883 (CC) were excluded because they dealt with price control of patented medicines and unlawful competition, respectively.

³⁶ Para. 27.

there was no infringement because the likelihood of detriment to the reputation of the marks as required under § 34(1)(c) was not established and, moreover, it was exercising freedom of expression as guaranteed under § 16(1) of the Constitution.³⁷ Both the High Court and the Supreme Court of Appeal had rejected Laugh it off's arguments and ruled in favour of the respondent holding that the Laugh it off's use of the respondent's trade mark was infringing. In a unanimous decision the CCSA disagreed with both lower courts and held that there was no infringement under § 34(1)(c) of the Trade Marks Act. In the CCSA's view a likelihood of substantial economic detriment to the mark must be established in order to ground infringement under § 34(1)(c) of the Trade Marks Act and oust expression protected under the right to freedom of expression.³⁸

- *Ascendis Animal Health (Pty) Limited v. Merck Sharpe Dohme Corporation and 2 Others [Ascendis]*

Ascendis also engaged the appellate jurisdiction of the CCSA but on a procedural matter – namely, the refusal of an application to amend pleadings at the High Court. However, despite it ostensibly being a procedural matter, the crux of the contention before the CCSA was essentially on the scope of provisions available to challenge the validity of patents. *Ascendis* had filed an application to revoke the respondent's – Merck – patent under § 61(1) of the Patents Act on the grounds that the invention was not patentable in terms of § 25 of the Patents Act. It pleaded that the invention was not new and lacked inventive step.³⁹ The first and second respondents instituted separate proceedings against *Ascendis* for patent infringement. Parties agreed to stay the infringement proceedings and proceed with the revocation proceedings to the end. *Ascendis* proposed to argue its novelty claim in the revocation proceedings first and then only argue the obviousness claim if the novelty claim failed, but the respondents disagreed with *Ascendis*'s proposal.⁴⁰ Nevertheless, *Ascendis* went ahead with its proposed approach. The Commissioner of Patents (equivalent to a High Court) heard the revocation application and revoked the respondents' patent for lack of novelty but did not address the obviousness claim. It stated no reason for not addressing the obviousness claim. The respondents appealed to the SCA against the decision revoking its patent for lack of novelty. *Ascendis* did not appeal or advance any argument on the question of obviousness not being addressed by the lower court. The SCA disagreed with the lower court and held, without addressing the obviousness claim, that the revocation application should be dismissed with costs. Following this decision, the infringement proceedings became ripe for hearing before the Commissioner of Patents. Before that court, *Ascendis* filed an application to amend its defence to remove the novelty defence, retain the obviousness defence and introduce a new defence of inutility under § 61(1)(d) of the Patents Act. The respondents opposed

³⁷ Para. 12.

³⁸ See para. 56.

³⁹ For the facts of this case, see paras. 7–26.

⁴⁰ It must be pointed out that not addressing an obviousness claim in the case of lack of novelty is nothing unusual, because an invention that lacks novelty is usually also obvious.

the amendment application and pled *res judicata* in light of the SCA's judgment. The High Court refused the amendment application and agreed with the respondents that the issue of the validity of the respondents' patent – which was the cause of action in the revocation proceedings – was *res judicata*. Both the High Court and the SCA refused Ascendis' application for leave to appeal against the decision refusing its amendment application.

The CCSA was unanimous in its decision to grant leave to appeal. However, on the appeal itself – whether the High Court was correct to hold that the issue of the validity of the respondents' patent was *res judicata* – the CCSA was split 5–5 in its decision. Five of the ten Justices who heard the appeal upheld the appeal while the other five dismissed the appeal.⁴¹ The implication was that the High Court's decision on the matter stood.⁴²

– *Blind SA v. Minister of Trade, Industry and Competition and 4 Others [Blind SA]*

Blind SA, a non-profit organisation established to promote the interests of blind people in South Africa, had obtained an order from the High Court declaring certain provisions of the Copyright Act unconstitutional and invalid for limiting the access of persons with visual and print liabilities. In line with § 172(2)(d) of the Constitution as discussed above, Blind SA had to apply to the CCSA for a confirmation of the order of constitutional invalidity in order for it to take effect. In a unanimous decision, the CCSA held that §§ 6 (nature of copyright in literary or musical works) and 7 (nature of copyright in artistic works) read with § 23 (infringement) of the Copyright Act are unconstitutional, invalid and inconsistent with the rights of persons with visual and print liabilities relating to equality and non-discrimination, human dignity, education, language and participation in cultural life and freedom to receive or impart information or ideas. This invalidity and unconstitutionality applied to the extent that those provisions of the Copyright Act limit the access of persons with visual and print liabilities to published literary works, and artistic works which may be included in such literary works.⁴³

The case concerns lack of or inadequate access to published literary works in accessible format copies for the use of persons with visual and print disabilities, with the lack due to the difficulty in securing authorisation to lawfully render those works into accessible format copies.⁴⁴

– *Villa Crop Protection (Pty) Limited v. Bayer Intellectual Property GmbH [Villa Crop]*

Villa Crop engaged the appellate jurisdiction of the CCSA. The respondent, Bayer, had instituted patent infringement proceedings against *Villa Crop* before the Commissioner of Patents. *Villa Crop* filed its defence, in which it claimed that Bayer's patent was invalid. It also brought a counterclaim for the revocation

⁴¹ The reasoning behind both sides of the CCSA's split court is discussed in Part 4, below.

⁴² Paras. 1–3.

⁴³ See para. 112.

⁴⁴ Para. 60.

of the patent on the grounds *inter alia* that Bayer had made material, false representations in the prescribed declaration required in respect of its application for patent. Subsequently in the proceedings, Villa Crop gave notice of its intention to amend its pleadings to introduce “a special plea *in limine*”. That plea invited the court to refuse to entertain Bayer’s claim on the basis that Bayer was approaching the Court *mala fide*, dishonestly, and with unclean hands since it (Bayer) made disclosures before the authorities in Europe which to Bayer’s knowledge affected the validity of its South African patent at the time of its patent application. In the circumstances, Villa Crop sought to invoke the doctrine of unclean hands.⁴⁵ The application to amend was refused as was the application for leave to appeal the refusal of the amendment. The Supreme Court of Appeal also refused to grant leave to appeal. The Constitutional Court granted Villa Crop leave to appeal in a 6–3 majority, upheld the appeal and set aside the decision of the lower court (the Court of the Commissioner of Patents) and granted Villa Crop leave to amend its pleadings by the introduction of its special plea of the defence of unclean hands.⁴⁶

4 Adjudicative Strategies Employed in Intellectual Property Cases at the CCSA: Narratives and Coherence

4.1 Adjudicative Strategies Employed in CCSA Case Law Considered

This part deploys the notion of an “adjudicative strategy” in accordance with Roux’s conceptualisation, as the main heuristic device for understanding the CCSA IP case law. According to Roux, “principles” and “pragmatism” are two concepts embodied in the idea of adjudicative strategy (of constitutional courts). Principles relate to the requirements as stated in or necessitated by the relevant laws, while pragmatism relates to the adjustments to the reasons for a principle-based decision in order to ensure its acceptance by the (South African and/or international) community or in a manner that offers the court sufficient room to make more context-specific decisions in future.⁴⁷ Reliance on such strategies has helped the Court define the content of the rules included in relevant South African legislation.⁴⁸

There will be many aspects of the IP system beyond the court’s control. One of these – as has been pointed out elsewhere – is that any court’s capacity to act is contingent on the cases that happen to be brought before them.⁴⁹ If no cases challenging or questioning the scope of IPRs and the calibration of private and public interests in IPRs are brought, there is little that a court can do to establish and/or develop its jurisprudence on IPRs. However, as Roux argued, this form of

⁴⁵ See paras. 57–59.

⁴⁶ See paras. 64–65.

⁴⁷ Roux (2009), p. 108.

⁴⁸ *Ibid* p. 117; Roux (2013).

⁴⁹ Okorie (2019).

constraint is not completely irredeemable and judges have a measure of influence and capacity to shape their jurisprudence by “encouraging certain types of case and discouraging others”.⁵⁰ Given the discretionary aspects of the jurisdiction of the CCSA as highlighted in Part 2 above, it is possible for the court to discourage cases on certain issues by declaring that issue beyond its jurisdiction, or to encourage litigation on some other issue by holding that it has jurisdiction.⁵¹ In making this choice, courts are guided by law and their interpretations of its meaning.⁵²

For the issues and cases where the Court holds that it has jurisdiction or where it assumes jurisdiction, the significance of the adjudicative strategies that the CCSA has relied upon in its IP cases are explored. Adjudicative strategies can explain the court’s understanding of IP and relevant related legislations, principles and rules in its adoption or demonstration of how judicial enforcement of IPRs should be reconciled with a foundational commitment to constitutional rights. In cases requiring a review of the decisions of other courts, adjudicative strategies can be useful in explaining the review standard adopted by the court as well as the significance of that adopted standard. Another consideration is the nature and implications of the order handed down by the CCSA. Court orders, even declaratory orders, compel obedience and in turn, encourage future litigants to seek redress and look to the relevant court as a champion of specific causes.

From the analysis of the IP quartet, the key adjudicative strategies listed below can be extracted and are further discussed:

- Interpretation through the prism of the fundamental rights as granted by the Bill of Rights in the Constitution
- Special but not especial
- Fair balance of different rights and interests
- Interpretation in light of the wording and context of provisions
- Teleological interpretation of IP statutes
- Consideration of international instruments
- Just and equitable; interests of justice; considerations etc. (pragmatic considerations)

4.2 Interpretation Through the Prism of the Fundamental Rights as Granted by the Bill of Rights in the Constitution

§ 2 of the Constitution states that the Constitution is the “supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”. § 8(1) stipulates that “the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state”. In the light of these ... and also given that the CCSA has jurisdiction over constitutional matters including any issue involving the interpretation, protection or enforcement of the Constitution,⁵³ it is not surprising that the CCSA has referred to the need to

⁵⁰ Roux (2016), p. 11.

⁵¹ *Ibid.*

⁵² *Ibid.*, p. 10.

⁵³ See § 167(7) of the Constitution.

interpret IP provisions through the prism of the Constitution especially the fundamental rights as protected in the Bill of Rights.

The result has been a process of a somewhat constitutionalizing of IPRs and exceptions to IPRs, though some have argued that this should not be so, given what it is in their view the constitutional superiority of IPRs over their statutory exceptions.⁵⁴ The constitutional rights that have been considered in the IP quartet are copyright and trade mark protection within the right to property (§ 25); freedom of expression/information (§ 16); right of access to courts (§ 34); and right of participation in cultural life (§ 31).

Laugh it off was the first case before the CCSA to require reference to a fundamental rights-based interpretation of South African trade mark law. In a unanimous decision the CCSA held that to succeed in a claim for trade mark infringement under § 34(1)(c) of the Trade Mark Act, a likelihood of substantial economic detriment to the mark must be established in order to oust expression protected under the right to freedom of expression.⁵⁵ While § 34(1)(c) of the Trade Mark Act does not explicitly require likelihood of substantial economic detriment to the mark. Instead, it indicates that an offending use may be one that is “detrimental to the distinctive character or the repute of the registered trade mark”, the CCSA was of the view that a high degree of detriment is needed to oust “valuable expressive acts in public”.⁵⁶

Ascendis and *Villa Crop* both raised issues of fundamental rights-based interpretation of South African patent law. However, in both cases, the court did not (and was not necessarily called upon to) undertake a balancing of different fundamental rights. In *Ascendis*, the CCSA was split equally in its decision (there was no majority or minority judgment) but both judgments held that the issue of *res judicata* as it relates to whether the grounds for patent revocation listed under § 61 of the Patents Act constitute a sole or separate causes of action affected the applicant’s right of access to court to have the merits of its case heard.⁵⁷ In *Villa Crop*, the majority judgment held that the refusal of the lower court to allow the applicant to amend its pleading to add a special plea *in limine* of abuse of process by the patentee adversely affected the applicant’s right of access to court.⁵⁸ There, the Court applied some of the principles expressed in *Ascendis* to the scenarios at issue (defences to patent infringement), holding that it is not for courts, when considering defences raised in patent infringement proceedings, to limit the defendant/alleged infringer to the grounds mentioned in the Patent Act. More specifically to the case in hand, a plea of abuse of court process affects the alleged infringer’s right of access to court and the evidence of such abuse of process must (first) be taken and then

⁵⁴ Karjiker (2021); Dean (2021); Dean (2015).

⁵⁵ See para. 56.

⁵⁶ *Ibid.*

⁵⁷ See para. 31 (Khampepe, J and 4 Justices concurring) and para. 139 (Cameron, J and 4 Justices concurring).

⁵⁸ See para. 66.

weighed to decipher if the abuse is indeed enough to warrant a restriction/limitation of that right (i.e. right of access to court).⁵⁹

The most recent concrete consideration of fundamental rights with specific weighing and balancing of various fundamental rights vis-à-vis copyright protection under the Copyright Act was undertaken in *Blind SA*. There, the CCSA had to consider the interplay between copyright protection, the right to not be unfairly discriminated against under § 9(3) of the Constitution, freedom of expression and in particular the freedom to receive and impart information in terms of § 16(1)(b); the right to human dignity in terms of § 10; the right to basic education as set out in § 29(1)(a) of the Constitution; the right to further education protected in terms of § 29(1)(b) of the Constitution; and the right to use of language and participation in cultural life under § 30 of the Constitution. In the Court's view, the rights of copyright owners when considered in the light of these fundamental rights must be interpreted and applied in a manner that considers and addresses the impact of copyright owners' rights on all persons of different classes and situations, including the difference in people's life situations and circumstances.⁶⁰ By failing to have due regard to the impact of the authorisation requirement upon different classes of persons, the authorisation requirement necessitated by the exclusive nature of copyright protection was held to be invalid and unconstitutional.⁶¹ The court considered that the peculiar circumstances of persons with visual and print disabilities meant that their access to copyright-protected materials as required to enjoy the fundamental rights was "radically compromised".⁶² This was because the authorisation requirement applied to them as though "all persons who need access to literary works are similarly situated, when they are not".⁶³

In many ways, this interpretation in *Blind SA* aligns with the Court's interpretation of the well-known trade mark protection in the light of the right to freedom of expression in *Laugh it off*. The CCSA in *Laugh it off* considered itself obliged to "delineate the bounds of the constitutional guarantee of free expression generously"⁶⁴ but "weigh carefully the competing interests of the owner of the mark against the claim of free expression of a user without permission".⁶⁵ According to the CCSA, "the exercise calls for an evaluation of the *importance of the purpose, nature, extent and impact of the limitation of free expression* invoked against claims of unfair advantage or of likelihood of material detriment to a registered mark" (emphasis added).⁶⁶ The fact that the right to freedom of expression was exercised in the course of trade should not, ipso facto, result in infringement liability.⁶⁷ Specifically, the interpretation of the requirement of unfair

⁵⁹ Paras. 66–69.

⁶⁰ Paras. 67–69.

⁶¹ Para. 70.

⁶² Para. 71.

⁶³ Para. 67.

⁶⁴ Para. 47.

⁶⁵ Para. 49.

⁶⁶ Para. 50.

⁶⁷ See paras. 83 and 84.

or detrimental use of a well-known mark involves, as a first step, the consideration of whether or not the offending expression is protected under § 16(1) of the Constitution.⁶⁸ Where the expression is found to be constitutionally protected the next step would be to determine if it is unfair or detrimental vis-à-vis the claim of freedom of expression.⁶⁹ The lower court's "two-stage approach" of first determining if the expression amounted to trade mark infringement because it was unfair to the reputation of the mark, and then enquiring whether freedom of expression justified the infringement, was considered "flawed" and a failure to promote the rights entrenched by the Constitution.⁷⁰

For now, the decision in *Blind SA* is the only IP case in which the CCSA has undertaken the most meaningful consideration of different fundamental rights. In other decisions, the CCSA has referred to one fundamental right and how that right interacts with specific IPR. For example, the freedom of expression in § 16 of the Constitution in relation to *Laugh it off*; and right of access to court in § 34 of the Constitution in relation to *Ascendis* and *Villa Crop*.

4.3 Special but not Especial

The CCSA in *Laugh it off* agreed with the Supreme Court of Appeal that IP "does not enjoy special status under the Constitution" and "is not immune from challenge and ... its enforcement must be constitutionally tenable".⁷¹ It held that "section 34(1)(c) must be construed in the light of the Constitution and applied in a manner that does not unduly trample upon freedom of expression".⁷² This is a principle that has appeared across the IP quartet.

In all the IP cases the Court appears to be willing to interpret the right of access to court broadly. In the two cases where the right of access to court was directly in issue – *Ascendis* and *Villa Crop* – it would appear that the CCSA was influenced by the fact that the crux of the amendments sought would have been permissible if the revisions had been contained in the pleadings in the first place. In *Ascendis*, both judgments appear to suggest that there would have been no issues if the applicant (*Ascendis Animal Health (Pty) Ltd*) had insisted on its intention to argue each element of novelty, non-obviousness and utility piecemeal. Indeed, in resolving the question of "whether all of the subsections in section 61 constitute a single cause of action or whether each subsection constitutes a separate and independent cause of action",⁷³ it appears that both judgments agreed that if *Ascendis* had raised all three grounds in the first place, the court of first instance would have been obliged to consider each of them or indicate its reasons for not doing so. This was a major aspect of the purpose of the doctrine of *res judicata* – to ensure that there is an end to litigation on the same issue. According to Khampepe J (writing for one side), the

⁶⁸ Para. 44.

⁶⁹ Para. 44.

⁷⁰ Paras. 43 and 44.

⁷¹ Para. 17.

⁷² Para. 18.

⁷³ Para. 27.

High Court’s decision refusing the amendment application denied “the applicant an opportunity to raise a defence”⁷⁴ and raises the question of “whether it is permissible that an alleged procedural misstep ...should deprive the applicant from relying on the undecided ground of invalidity as a defence in separate, but concurrent proceedings ...”⁷⁵ Cameron J, writing for the other one side, noted that “... Ascendis offered no reason as to why it did not raise the inutility ground in the earlier validity challenge”.⁷⁶ He went on to find that:⁷⁷

Louw J found that although only the anticipation (novelty) point had been argued before the Commissioner and the Supreme Court of Appeal, Ascendis had been obliged to advance all its validity challenges when it applied to revoke Merck’s patent. *Had it wanted to preserve the obviousness (non-inventiveness) point, Ascendis should have applied to separate the issues.* Since it didn’t do so, the patent’s validity was *res judicata*. Just or unjust? In my respectful view justice points to treating the Supreme Court of Appeal judgment refusing Ascendis’ revocation argument as conclusive of the patent’s validity. There can be no reason why *res judicata* cannot apply, *appropriately expanded.* (emphasis added)

In *Villa Crop*, the Court expressed doubt on the success of the applicant’s proposed plea given the timing of its filing.⁷⁸ The Court relied on a broad interpretation of the right of access to court vis-à-vis the rights and interests of the IP owners as a platform that allows it latitude to signal what it considers the appropriate direction of patent litigation, especially in the absence of substantive examination of patents in South Africa. More importantly, the CCSA indicated that patent litigation/enforcement proceeding may be affected by procedural rules of court and general principles of access to court just like any other matter. Per Unterhalter, AJ writing for the majority:

It suffices to observe that the power of the courts to prevent abuse of process is well recognised. The unclean hands doctrine marks out a species of such abuse. In egregious cases that power may be exercised to non-suit a litigant. *The law of patents is not exempted from the application of the doctrine because abuse of process may occur just as surely among litigants who claim rights in the law of patents, as it does among those who would make claims in the law of contract or delict.*⁷⁹(emphasis added)

⁷⁴ Para. 32.

⁷⁵ Para. 33. *See also* paras. 34–36, 80.

⁷⁶ Para. 137.

⁷⁷ Para. 138–139.

⁷⁸ *See* para. 79 where the court stated, “... entirely different questions arise as to whether the misrepresentations relied upon by Villa Crop, even if proven, would amount to an abuse of process, and whether such an abuse would warrant a court taking the drastic step of non-suiting Bayer, given the rights it comes to Court to vindicate”.

⁷⁹ *Ibid.*

As suggested above, the assumption of jurisdiction in matters where it has neither original nor appellate jurisdiction, whether on grounds of “interests of justice”, “right of access to court”, or “arguable case”, etc. is the Court’s one way of addressing pertinent IP issues.⁸⁰

Likewise, in *Blind SA*, the CCSA read into the Copyright Act specific provisions that would cure its constitutional invalidity pending the completion of the legislative reform process. Despite the fact that the specific provisions to be read in were already part of a wider ongoing legislative reform, the CCSA did not hesitate to curtail the scope of the authorisation requirement necessitated by the wording of the exclusive rights under the copyright statute. It stated that:

The starting point is this: 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. Section 237 of the Constitution places a duty on organs of state that “constitutional obligations must be performed diligently and without delay”... During the period of suspension, interim relief must be afforded to persons with print and visual disabilities. A reading-in is thus warranted. The question is what should this reading-in contain?⁸¹

4.4 Fair Balance of Different Rights and Interests

Another principle that the CCSA has employed in its case law, and which is expressed in the IP quartet, is that of striking a fair balance between different, conflicting rights of IP owners and users/members of the public.

In *Laugh it off*, the CCSA noted the imperative to balance the rights and interests of the proprietor of a well-known mark in securing their economic investments in such a well-known mark with those of the public in deploying such marks even, in the course of trade, to express themselves. Noting that the well-known mark protection is afforded to the mark itself as opposed to its proprietor, the CCSA stipulated that the appropriate starting point is to consider the expression that used the mark vis-à-vis the proprietor’s use of the mark as opposed to starting with questioning whether the expression is infringing and then determining whether such infringement as found is excused by the freedom of expression. Doing the former helps to ensure a fair and appropriate balance between the rights and interests of the trade mark proprietor and those of the general public. But doing the latter meant unduly elevating the rights of the trade mark proprietor. Based on the Constitution, the likelihood of material detriment must “be restricted to material harm in the commercial sense”.⁸² Given this, it is argued that the CCSA sought to pitch the personal rights, or the rights of persons to free expression, against the commercial interests inherent in a mark, as opposed to the owner of a mark. To hold otherwise

⁸⁰ See Part 2, above.

⁸¹ Para. 102.

⁸² Para. 51.

would push trade mark protection into the realms of defamation which protects the person.⁸³

This fair balancing approach is also found in the CCSA's consideration in *Blind SA*, of the constitutional invalidity of the authorisation requirement of copyright law in its protection of published literary works and artistic works found in literary works. In directing a remedy to cure the constitutional invalidity found to exist with the authorisation requirement under the Copyright Act the Court stated:

That must be done in such a way so as to respect the rights of copyright owners that are not implicated in constitutional infringement, whilst providing an effective remedy to cure the identified infringement of rights.⁸⁴

A similar fair balancing approach is evident in *Villa Crop* where the CCSA, even when allowing the appeal and the amendment sought by the applicant, noted the possibility that even if the respondent were found to have abused process, it may not be enough to result in its not being heard on its patent infringement claim.⁸⁵

4.5 Interpretation in Light of the Wording and Context of Provisions [“Scheme of the Act”]

In line with the rule of statutory interpretation in South Africa, courts will consider both the wording and context of statutory provisions in interpreting them.⁸⁶ Across the cases that make up the IP quartet, it is evident that the CCSA has referred to the need to interpret IP statutes in light of their wording and context. In this regard, the Court used what it refers to as the “scheme” of a given statute⁸⁷ along with the context in which a given provision appears, to decipher the appropriate interpretation of specific provisions.⁸⁸

In *Laugh it off*, the CCSA noted that the essential elements of trade mark infringement under § 34(1)(c) were that (a) there should be unauthorised use by the defendant of a mark identical or similar to the registered mark (b) in the course of trade in relation to goods or services; (c) the registered trade mark must be well-known in the Republic; and (d) the use of the trade mark would be likely to take unfair advantage of, or be detrimental to the distinctive character or repute of the registered trade mark”.⁸⁹ The CCSA held that the requirement that “the use of the trade mark would be likely to take unfair advantage of, or be detrimental to the distinctive character or repute of the registered trade mark” had two disjunctive

⁸³ See paras. 56, 106

⁸⁴ *Blind SA*, para. 105.

⁸⁵ See para. 79.

⁸⁶ Du Plessis (2005); Van Staden (2015); Perumalsamy (2019).

⁸⁷ See *Ascendis*, para. 43. A “scheme” means: a large-scale systematic plan or arrangement for attaining a particular object or putting a particular idea into effect. synonyms are plan, project, plan of action. “Scheme of the Act” would therefore consist in a plan of action under the Act to attain a particular purpose.

⁸⁸ For example, *Villa Crop*, para. 23.

⁸⁹ See para. 34.

elements, namely taking unfair advantage of the distinctive character or repute of the registered trade mark *and* being detrimental to the distinctive character or repute of the registered trade mark.⁹⁰ While taking unfair advantage of the distinctive character or repute of the registered trade mark applied to blurring, the element of being detrimental to the distinctive character or repute of the registered trade mark applied to tarnishment, of which the object of protection is the “repute, the good selling name of the mark”.⁹¹ The CCSA indicated that the Supreme Court of Appeal wrong when it failed to make a finding on the element relating to “taking unfair advantage of the distinctive character of the marks”. In the CCSA’s opinion this element was an issue because the basis of the respondent’s case was tarnishment. This was the crux of the appeal: whether the respondent established the likelihood of detriment to the repute of the marks.⁹²

This approach continued in *Ascendis* where the CCSA elaborated on the scheme and context of the Patent Act in order to interpret whether the grounds for revocation under § 61 of the Patent Act amounted to different or single causes of action.⁹³ Also, in *Blind SA*, the CCSA looked to the wording and context of the Copyright Act to decipher the respective meaning of and the distinction between the exclusive rights of reproduction and adaptation. Further, in interpreting the scope of the power conferred on the Minister for Trade, Industry and Competition to make regulations regarding the right of reproduction, the Court held that the power must be understood “within the scheme of the Copyright Act”.⁹⁴ The Court interpreted the scope of the Minister’s power by considering the definition of literary works; the nature of copyright in literary works; and the definition of adaptation and also reproduction under § 1 of the Copyright Act.⁹⁵ According to the Court:

The exact boundary between the reproduction and adaptation of a literary work is hard to draw. We know that the translation of a literary work, by definition, is an adaptation. *That assists us to understand what makes an adaptation distinctive.* Language is not simply made up of words that signify identifiable and distinctive things in the world. We well know this as lawyers. The very exercise upon which I am engaged is an effort to arrive at the meaning of a concept. Within a language community, there are shades of meaning, and differences that arise as to what a text means ...⁹⁶ (emphasis added)

In *Villa Crop*, the Court also interpreted the wording of § 61 of the Patents Act as one focused on the patentee as distinguished from the plea of abuse of process which is focused on the patent itself.⁹⁷ In the court’s view, this distinction was

⁹⁰ Para. 35.

⁹¹ Para. 41.

⁹² Para. 35.

⁹³ *Ascendis*, paras. 43–46.

⁹⁴ *Blind SA*, para. 78.

⁹⁵ Para. 78.

⁹⁶ Para. 83.

⁹⁷ *Villa Crop*, paras. 82–83.

important and it did not matter that the outcome of success on either § 61 of the Patents Act or the abuse plea was similar.

4.6 Teleological Interpretation of IP Statutes

Interpreting a statutory provision in terms of the purpose it was established to serve is another legal interpretation method employed by the CCSA in the IP quartet. Across the cases that make up the IP quartet, the CCSA has approached the interpretation of a number of IP statutes using a purposive approach in close connection with a combination of literal/textual and systematic/contextual approach to statutory interpretation. In *Laugh it off*, in order to discern the purpose and scope of trade mark protection under § 34(1)(c) of the Trade Marks Act the CCSA not only considered the wording of that section, it also considered external documents such as the explanatory memorandum to the Draft Trade Marks Bill.⁹⁸

Likewise, the interpretation of the provisions of § 61 of the Patents Act in *Ascendis* led the Court to employ the “scheme” of the Patent Act, the common law principle of *res judicata* and patent examination systems to discern the purpose of invalidity provisions.⁹⁹ Again, while there were two judgments in *Ascendis*, there is consensus on both sides that the “stability of the (South African) patent litigation system”¹⁰⁰ and the role of the court in the absence of a substantive patent examination system in South Africa should contribute to determining the appropriate approach in revocation proceedings and in considering invalidity defences in infringement proceedings.¹⁰¹ According to Khampepe, J:

More importantly, these foreign jurisdictions are all examination states. This means that by the time the first revocation proceeding between the two parties begins the State has already tested and at least initially verified the validity of the patent on all of the statutory grounds creating causes of action against validity. We must not lose sight of the fact that testing the validity of patents is in the public interest because patents create artificial monopolies. Currently, South Africa completely relies on private parties to regulate this artificial monopoly system because the government does not examine a patent’s validity upon registration. Instead of deterring litigants, who are working both in a private capacity and for the public interest, there should be an inclination to encourage them to bring more revocation challenges, not to create extensions in common law that increase the costs and risks of doing so.¹⁰²

Common law principles – be it *res judicata* or abuse of process – if properly brought before the Court are called in aid in the interpretation of what the Court

⁹⁸ This is published in GN 808 in GG13482 of 30 August 1991. See *Laugh it off*, para. 37.

⁹⁹ *Ascendis*, para. 139.

¹⁰⁰ *Ibid.*

¹⁰¹ See paras. 99 and 100; 129 and 130.

¹⁰² See para. 100.

finds to be the purpose of the extant/relevant IP legal framework.¹⁰³ Khampepe J in *Ascendis* admitted of the possibility that the application of the doctrine of abuse of court process could have applied to disallow Ascendis' proposal to amend its pleadings but did not make a definite ruling because the issue was not properly before the court.¹⁰⁴ While he found similarities between the policy considerations inherent in both *res judicata* and abuse of process, he properly distinguished both. The primary concern in *res judicata* was "judicial certainty" while for abuse of process, the primary concern was to protect the "integrity of the adjudicative functions of courts".¹⁰⁵ Cameron J found that the circumstances of the case warranted a relaxation or an extension of the principle of *res judicata* so that it applies.¹⁰⁶ In the end, both sides agreed on the possibility of common law doctrines (be it *res judicata* or abuse) applying to patents and changing the status quo. This distinction and explanation was helpful in the case of *Villa Crop* where the CCSA explained the purpose of § 61 to be focused on the validity of a patent as opposed to the patentee which is the focus of abuse of process pleas.¹⁰⁷

To explain the purpose and scope of the powers given to the Minister of Trade, Industry and Competition to make regulations under § 13 of the Copyright Act, the CCSA in *Blind SA* considered both the wording of that section and the activities involved in producing copyright-protected materials in accessible formats for print and visually disabled persons.¹⁰⁸

4.7 Consideration of International Instruments

Blind SA is the only case within the IP quartet that the CCSA relied on international instruments in undertaking the proper interpretation of South African IP law. Even then, the Court was categorical that international instruments are not the standard to which the propriety/appropriateness of IP statutes are held. The Court rejected the lower court's declaration that the omissions of the Copyright Act fail to measure up to what the Marrakesh Treaty requires to enable persons with visual and print disabilities to have access to published works on grounds, inter alia, that the "*Marrakesh Treaty is not the standard against which inconsistency for the purposes of section 172(1)(a) is measured*".¹⁰⁹ However, the CCSA relied on international instruments, namely certain provisions of the Marrakesh Treaty which passed constitutional muster to cure specific defects in the South African Copyright Act. According to the Court:

¹⁰³ Thambisetty (2019) argues that "It would be far better to uncouple human rights from patent law, so that we may systematically retool the latter to be a purposive and reflexive system of law that understands and participates in its own consequences".

¹⁰⁴ Para. 40. Also, para. 92.

¹⁰⁵ Para. 40. See Cameron J at para. 111, "In differing from the first judgment, I borrow with appreciation from its thorough overview of the principles of *res judicata*".

¹⁰⁶ See paras. 93, 110.

¹⁰⁷ Para. 78.

¹⁰⁸ See paras. 21–23.

¹⁰⁹ Para. 94.

There is good reason to adopt the definition of beneficiary persons in the Marrakesh Treaty, as *Blind SA* has done ... the Marrakesh Treaty provides a definition of “accessible format copy” that is sufficiently broad to take account of the variety of content and technologies that may be used to give beneficiary persons access that is feasible and comfortable. The definition also recognises the rights of the copyright owner to have the integrity of the original work respected.¹¹⁰

4.8 Pragmatic Considerations (“Just and Equitable”, “Interests of Justice”, etc.)

To make the case for a pragmatic reading of the CCSA’s IP jurisprudence would require a lot more decisions than are currently available with the IP quartet. However, the analysis here and the explanation proffered offers at least a preliminary foray into explaining the CCSA’s IP jurisprudence and opens a way in which lower courts and other arms of government may proceed. This is even more powerful – at least in the assessment of this author – when, as earlier highlighted, the status and unique position of the CCSA is considered.¹¹¹

Laugh it off was decided in 2005 and it was not until more than a decade later that *Ascendis* was decided. At the time, COVID-19 was not yet the crisis it turned out to be (at least in South Africa, or in the manner in which it was between 2020 and 2021). But, at least one-half of the Court accepted in the judgments that the absence of an examination system was problematic given the monopoly of patent rights and that this upped the ante for courts when presented with an opportunity, any opportunity, to scrutinize patents.

By the time *Blind SA* was coming before the CCSA, COVID-19 was in full swing and the challenges that the authorization requirement of copyright law posed for people with disabilities were more readily apparent. What was not as readily apparent was the nature of the remedy that the CCSA would conceive. Unanimously, the CCSA reasoned that a reading-in was warranted but “must be carefully tailored to address the constitutional defect that has been established” and “to do more is to trespass upon the constitutional powers of Parliament”.¹¹²

For context, in *Fourie* the CCSA had, after noting the constitutional invalidity of the marriage laws, left its redress to Parliament, arguing that in adherence to the principle of separation of powers which situates legislative amendments with Parliament, it could not amend a statutory provision. In *Blind SA*, however, the fact that there was a current, ongoing legislative reform that would achieve the same or similar results as those sought by *Blind SA* did not deter the CCSA from directing a reading-in. This remedy is significant as it was more concerned with the appropriate institutional role of the CCSA in effecting this amendment (pragmatism) than on a matter of substantive law (principle). The court went on to couch this reading-in in a manner that still gave room for Parliament to amend the copyright statute according to its own sense of the constitutional rights at issue. In making pronouncements on,

¹¹⁰ Para. 106.

¹¹¹ Issacharof (2010).

¹¹² See para. 103.

and even adopting certain provisions of, the Marrakesh Treaty, the CCSA provided the legislature with the appropriate constitutional principles (i.e. those laid down in *Blind SA*) to inform and guide its/the amendment. The court's remedy cleverly combined the interest of justice and equity with respect for the separation of powers and allowing Parliament the opportunity to deal appropriately with the matter in the broader copyright reform.¹¹³

When the *Blind SA* judgment, and its full institutional and socioeconomic context is considered alongside the CCSA's mandate, it offers an explanation of not just this decision, but also how it fits into the court's IP rights jurisprudence as a whole. On this view of things, the "just and equitable" interpretation in the *Blind SA* was driven by the fact that the outcome of the case affected the very text and structure of the copyright statute and thus the legal materials available to the courts in future cases to prevent any overreaching effects of operation of IP rights. It is not the case today that the point has been made and evidence provided of how the operation of copyright law particularly its authorization requirements affected access to copyright-protected material.¹¹⁴ But the circumstances of the case and the crisis of the COVID-19 pandemic were perhaps propitious to highlight the access problem created by copyright law.

Likewise, the court's approach in *Villa Crop* could be explained as its way of asserting that courts must or should seize every opportunity to allow challenges to patents. In a way, even though this was not mentioned in its judgment,¹¹⁵ the court's adjudicative strategy may suggest that formal examination of patents does not have to be a rubber stamp process. A good example of this point is the recent Registrar of Patent's draft Practice Note discussed briefly below. Such a response suggests that beyond constitutionalizing per se, the IP standards at issue are being retooled to be purposive.

Ascendis offers a good illustration of the agency and pragmatism of the CCSA even when dealing with matters of principles of law. As much as it depended on the skill of the senior counsel in question, the litigation strategy pursued by *Villa Crop* in *Villa Crop* was facilitated by the Court's decision in *Ascendis*. In particular, the focus on the need to promote some form of substantive examination of patents in South Africa in the absence of the substantive examination system adopted in that case was the very strategy that *Villa Crop* was able to exploit. By directly theorizing the dangers associated with the lack of a substantive examination system, the court in *Ascendis* shaped the law in a way that allowed a litigant to bring common law and procedural law arguments to bear on the policy issue that has been focused for too long on the monopolist right of patentees.¹¹⁶ The emphasis in *Ascendis* on the need for courts to play a role in realizing some form of substantive examination of the patents in view of its (patent's) monopolist nature allowed *Villa Crop* to contest the

¹¹³ Unlike previously in *Minister of Home Affairs v. Fourie* 2006 (1) SALR 524. See Roux (2009), pp. 121–122.

¹¹⁴ Nicholson and Kawooya (2008); Armstrong and De Beer (2010); Nicholson (2006).

¹¹⁵ Counsel for *Villa Crop* did argue this. See *Villa Crop's* heads of argument in *Villa Crop* available at <http://www.safii.org/za/cases/ZACC/2022/42hoa.pdf>.

¹¹⁶ South Africa Department of Trade and Industry 2018; Ncube (2014), dos Santos et al. (2022).

visceral focus on the rights of the patentees. *Ascendis* and *Villa Crop* therefore are powerful examples of the way that the court has been able to exploit aspects of its platform to address pertinent issues in IP law (patent law).¹¹⁷

Viewed in this manner the CCSA's IP rights jurisprudence offers guidance and impetus to lower courts, executive bodies, and parliament in addressing issues of intellectual property, and its exercise or enforcement.

5 Implications and Practical Significance

The analysis in Part 4, above, focused on the meaning and content of the adjudicative strategies that the CCSA has most significantly employed in its IP case law as represented in/by the IP quartet. This Part explores the significance and implications of the IP quartet for IPRs generally, for future decisions of High Courts and the Supreme Court of Appeal, for decisions of executive bodies, and for future and ongoing legislative reforms in the field of IP. The fact that the CCSA overturned some or all aspects of the decision of the lower court in all the cases that make up the IP quartet (even in *Ascendis* where there was no majority decision), offers some indication that lower courts need guidance on constitutional interpretation of IP statutes. In all the cases, it was not the IPRs owner who approached the court, but users for whom the scope of the IP right was in issue. The IP quartet offers guidance to courts on the scope of IP rights and the appropriate approach to their interpretation. Beyond IP law specifically, the IP quartet, in particular, *Ascendis* and *Villa Crop* provide guidance on constitutional dimensions of procedural law.¹¹⁸

Apart from *Laugh it off* whose facts did not necessarily implicate any/a specific executive body, the decision of the CCSA in the other three cases touched on the activities of executive bodies working in the IP field – patent registries and patent examiners/examination in *Ascendis* and *Villa Crop* and the Minister for Trade, Industry and Competition in *Blind SA*. For the legislative reforms, the CCSA in *Blind SA* was mindful of the fact that the legislative process underway to amend the Copyright Act would address the concerns and grounds of the reliefs sought by *Blind SA* in the proceedings. It was also an inordinate delay in the legislative process that had prompted *Blind SA*'s action.¹¹⁹ While it rightly left the task of how to domesticate the Marakesh Treaty into law in South Africa to Parliament,¹²⁰ its endorsement of certain provisions of the treaty,¹²¹ and also its declaration as to the supremacy of the Constitution in the manner in which the Treaty's provisions are to be domesticated,¹²² offers some guidelines to the legislature.¹²³

¹¹⁷ Basheer et al. (2014).

¹¹⁸ See Part 1, above.

¹¹⁹ See paras. 4–8.

¹²⁰ See para. 103.

¹²¹ Para. 106.

¹²² Para. 94.

¹²³ § 79(4) Constitution provides that “If, after reconsideration, a Bill fully accommodates the President's reservations, the President must assent to and sign the Bill; if not, the President's must either –

The IP quartet indicate that the purpose and scope of IP provisions should be interpreted and applied through the prism of the Constitution, especially the Bill of Rights. Indeed, § 8(1) of the Constitution stipulates that the “Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state”. For IP specifically, using a constitutional interpretation or application usually allows the consideration of the situation of all citizens and the impact of IP provisions to their circumstances. The lessons from the IP quartet are increasingly finding its way into decisions from lower courts and in actions of IP regulatory and public administrative agencies that have followed the IP quartet. For instance, in *PCCW Vuclip (Singapore) PTE Ltd v. E.tv (Pty) Ltd*, where a High Court was invited by one of the parties to read into a licensing contract an implied term that required the licensee to secure the content of their respective platforms against unauthorised access, the High Court declined to do so raising *suo motu* the fact that imposing such standards would unduly upset the balance between the copyright owner’s right to property and the public’s right to freedom of expression.¹²⁴ In the court’s view, in securing licensed material from piracy, the scope of responsibility that a copyright licensor can expect from a licensee has to be weighed against constitutional considerations.¹²⁵

On the executive side, the recent (2023) draft Practice Note from the South African Registrar of Patents essentially tightening the requirements for expedited patent applications is arguably an indication that the Patent Office is taking seriously the need for ensure that there is some substantive examination of patents or challenge to patents in South Africa, as noted explicitly in *Ascendis* and by implication in *Villa Crop*. The draft Practice Note is alleged to have indicated that, as from 1 March 2023, the Patent Office only intends to permit requests for accelerated acceptance where a positive examination report has been issued in respect of a corresponding patent.¹²⁶ Patents procured through such an expedited process stand to be invalidated based on a material misrepresentation in the applicant’s declaration, where the applicant knew or ought to have known that the claims would have been invalid at the time of the grant.¹²⁷

6 Conclusion

This contribution identified the key adjudicative strategy relied on by the CCSA in developing its approach to the interpretation of relevant South African IP statutes. It has also provided a discussion of the meaning of these standards. It is hoped that the

Footnote 123 continued

(a) assent to and sign the Bill; or (b) refer it to the Constitutional Court for a decision on its constitutionality”.

¹²⁴ [2021] ZAGPJHC 143, paras. 30–36. Also, Okorie et al. (2022), pp. 497–498.

¹²⁵ Okorie et al. (2022), p. 497.

¹²⁶ Ideanav “Proposed changes to patent accelerated acceptance in South Africa” (Ideanav) available at <https://ideanav.co.za/proposed-changes-to-patent-accelerated-acceptance-in-south-africa/>.

¹²⁷ See also § 61(g) Patents Act (South Africa) 57 of 1978.

contribution will be useful to appreciate the impact of the CCSA's activity in the area of IP in South Africa, and understand the implications. Section 39(1)(b) of the Constitution of South Africa requires courts to consider international law when interpreting the Bill of Rights, while Sec. 39(1)(c) enjoins courts to consider foreign case law in interpreting the Bill of Rights. The CCSA's IP quartet involves a consideration of both international law and foreign case law. However, whether or not the CCSA's approach in the IP quartet indicates sufficient reliance on international IP and international human rights law and foreign case law depends on how sufficiency is construed. Such a consideration may also require empirical and statistical analysis. More generally, even though the four cases in the IP quartet is too few to permit an effective and worthy statistical analysis, their analysis here serves to detect trends and patterns in IP case law in South Africa. As the analysis in this paper has shown, one trend that may be detected from the CCSA's activity in the area of IP in South Africa is its sustained stance (based on the Constitution that emerged from its Certification decision) that while IPRs have constitutional implications under the Constitution, it is not considered a universal human right in South Africa.

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