



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 300/24

In the matter between:

BLIND SA Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Respondent

SPEAKER OF THE NATIONAL ASSEMBLY Second Respondent

**CHAIRPERSON OF THE NATIONAL COUNCIL
OF PROVINCES** Third Respondent

**MINISTER OF TRADE, INDUSTRY AND
COMPETITION** Fourth Respondent

**MINISTER OF INTERNATIONAL RELATIONS
AND COOPERATION** Fifth Respondent

and

MEDIA MONITORING AFRICA TRUST Amicus Curiae

Neutral citation: *Blind SA v President of the Republic of South Africa and Others*
[2025] ZACC 9

Coram: Madlanga ADCJ, Kollapen J, Mathopo J, Mhlantla J, Rogers J,
Seegobin AJ, Theron J, Tolmay AJ and Tshiqi J

Judgment: Mhlantla J (unanimous)

Heard on: 28 November 2024

Interim order: 13 December 2024

Decided on: 7 May 2025

Summary: Copyright Act 98 of 1978 — direct access — urgent relief after lapse of section 13A reading-in order — interim order to protect rights of persons with visual and print disabilities — section 19D reading-in order

ORDER

On application for direct access:

1. Direct access is granted.
2. Pending the coming into force of legislation remedying the constitutional defects in the Copyright Act 98 of 1978 as identified by this Court's judgment and order of 21 September 2022, the Copyright Act 98 of 1978 shall be deemed to include a section 19D reading as follows:

“Section 19D.

- (1) An authorised entity, or any person as may be prescribed and who serves persons with disabilities may, without the authorisation of the copyright owner, make an accessible format copy for the benefit of a person with a disability, supply that accessible format copy to a person with a disability by any means, including by non-commercial lending or by digital communication by wire or wireless means, and undertake any intermediate steps to achieve these objectives, if the following conditions are met:

- (a) The person wishing to undertake any activity under this subsection must have lawful access to the copyright work or a copy of that work;
 - (b) in converting the copyright work to an accessible format copy, the integrity of the original work must be respected, taking due consideration of the changes needed to make the work accessible in that alternative format and of the accessibility needs of the persons with a disability; and
 - (c) the activity under this subsection must be undertaken on a non-profit basis.
- (2) (a) A person to whom the work is communicated by wire or wireless means as a result of an activity under subsection (1) may, without the authorisation of the owner of the copyright work, reproduce the work, where that person is a person—
- (i) with a disability, for their personal use; or
 - (ii) who serves persons with disabilities, including an authorised entity, for personal use by a person with a disability.
- (b) The provisions of paragraph (a) are without prejudice to any other limitations or exceptions that the person referred to in that paragraph may enjoy.
- (3) A person with a disability, or someone acting on their behalf, including an authorised entity, may make an accessible format copy of a work for the personal use of the person with a disability or otherwise may assist the person with a disability to make and use accessible format copies where the person with a disability has lawful access to that work or a copy of that work.
- (4) (a) A person with a disability or a person who serves persons with disabilities, including an authorised entity, may,

without the authorisation of the copyright owner export to, or import from, another country any legal copy of an accessible format copy of a work for distribution, or to make it available to persons with a disability, as long as such activity is undertaken on a non-profit basis by that person.

- (b) A person contemplated in paragraph (a) may not export or import an accessible format copy where such person knows, or has reason to know, that the accessible format copy will be used for purposes other than to aid persons with a disability.
- (5) The exception created by this section is subject to the obligation of indicating the source and the name of the author, if it appears on the work, on any accessible format copy.
- (6) For the purposes of this section 19D—
- (a) ‘accessible format copy’ means a copy of a work in an alternative manner or form, which gives a person with a disability access to the work, including to permit the person to have access as feasibly and comfortably as a person without a disability;
 - (b) ‘authorised entity’ means—
 - (i) an entity that is authorised or recognised by the government to provide education, instructional training, adaptive reading or information access to persons with a disability on a non-profit basis; or
 - (ii) an entity, including a government institution or non-profit organisation that provides education, instructional training, adaptive reading or information access to persons with a disability on a

non-profit basis as one of its primary activities or institutional obligations.

(c) ‘person with a disability’ means a person who has a physical, intellectual, neurological, or sensory impairment and who requires the work to be in a format that enables that person to access and use the work in the same manner as a person without a disability; and

(d) ‘commercial’ means the obtaining of economic advantage or financial gain in connection with a business or trade.”

3. The reading-in of section 19D shall remain in effect until the remedial legislation contemplated in paragraph 2 comes into force.
4. The President of the Republic of South Africa must pay the costs of this application including the costs of two counsel.

JUDGMENT

MHLANTLA J (Madlanga ADCJ, Kollapen J, Mathopo J, Rogers J, Seegobin AJ, Theron J, Tolmay AJ and Tshiqi J concurring):

Introduction

[1] On 13 December 2024, this Court issued an interim order pending the final determination of the matter. The terms of the order were as follows:

“1. The Copyright Act 98 of 1978 shall be deemed to include the following provisions:

‘Section 13A Exceptions applicable to beneficiary persons

- (1) For the purposes of section 13A—

- (a) ‘accessible format copy’ means a copy of a work in an 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. The accessible format copy must be used exclusively by beneficiary persons, and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons;
 - (b) ‘beneficiary person’ means a person who—
 - (i) is blind;
 - (ii) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or
 - (iii) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would normally be acceptable for reading regardless of any other disabilities;
 - (c) ‘literary works’ means literary works as defined in section 1 of this Act, and shall be taken to include artistic works forming part of a literary work;
 - (d) ‘permitted entity’ means an entity, including a government institution or non-profit organisation, that provides education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis, and has the provision of such services as one of its primary activities or institutional obligations.
- (2) A permitted entity may, without the authorisation of the owner of copyright in a literary work, make an accessible format copy of the literary work; obtain from another permitted entity, an accessible format copy, and supply those copies to beneficiary persons by any means, including non-commercial lending or by electronic communication by wire or wireless means, and undertake any intermediate steps to achieve those objectives, provided that all of the following conditions are met—

- (a) the permitted entity wishing to undertake said activity has lawful access to that work or a copy of that work;
 - (b) the work is converted to an accessible format copy, which may include any means needed to navigate information in the accessible format, but does not introduce changes other than those needed to make the work accessible to the beneficiary person;
 - (c) such accessible format copies are supplied exclusively to be used by beneficiary persons; and
 - (d) the activity is undertaken on a non-profit basis.
- (3) A beneficiary person, or someone acting on their behalf, including a primary caretaker or caregiver, may make an accessible format copy of a work for the personal use of the beneficiary person or otherwise may assist the beneficiary person to make and use accessible format copies where the beneficiary person has lawful access to that work or a copy of that work.’
- 2. Costs are reserved.
 - 3. Reasons for this order shall be given at a later date.”

This Court has now considered the matter and made a final determination in respect of the relief sought. Our reasons for the final order are set out below.

[2] On 8 October 2024, Blind SA, an organisation which advocates for the rights and empowerment of visually impaired persons in South Africa, filed an urgent application in this Court for direct access in terms of section 167(4)(e) of the Constitution read with rules 11 and 12 of this Court’s Rules. The application was against the President of the Republic of South Africa (President), the Speaker of the National Assembly (Speaker), the Chairperson of the National Council of Provinces (NCOP), the Minister of Trade, Industry and Competition (Minister) and the Minister of International Relations and Cooperation. The Speaker and Chairperson of the NCOP have filed notices to abide.

[3] Blind SA sought the following orders—

- (a) declaring the failure of the President to make a timeous decision on whether to sign the revised version of the Copyright Amendment Bill¹ (CAB) inconsistent with the President's obligations in terms of section 79(4) read with section 237 of the Constitution;²
- (b) directing the President to assent to and sign the CAB within 10 days of the order of this Court;
- (c) in the alternative, directing that from the date of the order, pending legislation coming into force that would cure the constitutional defect in the Copyright Act,³ the Act will be deemed to include a new provision, namely, section 13A; and
- (d) ordering the President to pay the costs of this application, including the costs of two counsel, on an attorney and own client scale, alternatively jointly by the President and all other respondents who oppose the relief sought.

[4] It is apposite at this stage to set out the circumstances that led to this application.

Background

[5] The legislative context began in 2015, when Parliament commenced the process to amend the Copyright Act. The CAB was originally introduced in the National Assembly on 10 May 2017. Parliament passed the CAB on 28 March 2019 and forwarded it to the President for his assent. On 16 June 2020, the President referred that version of the CAB and the Performers Protection Amendment Bill (PPAB)

¹ [B 13B—2017].

² Section 79(4) of the Constitution provides:

“If, after reconsideration, a Bill fully accommodates the President's reservations, the President must assent to and sign the Bill; if not, the President must either

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

Section 237 of the Constitution states that all constitutional obligations must be performed diligently and without delay.

³ 98 of 1978.

(originally introduced in the National Assembly on 27 November 2016) back to Parliament for reconsideration as he had reservations about certain provisions.

[6] As there was no legislative provision to assist persons with visual and print disabilities to legally access literary material in accessible formats, clause 19D of the CAB sought to facilitate such access by providing an exception to copyright for such persons and those assisting them on a non-profit basis.⁴ However, this was not possible as the Bill was not signed by the President. As there was a delay in finalising the legislative process of amending the Act, Blind SA launched an application in the High Court in 2021 and challenged the constitutionality of sections 6 and 7 of the Copyright Act. On 7 December 2021, the High Court⁵ granted the application in favour of Blind SA and made a declaration of invalidity.

[7] On 21 September 2022, the Constitutional Court in *Blind SA I*⁶ confirmed the declaration of invalidity granted by the High Court that sections 6 and 7, read with section 23 of the Copyright Act, were unconstitutional. This Court held that these provisions were inconsistent with constitutional rights enumerated in sections 9(3), 10, 16(1)(b), 29(1) and 30, specifically regarding access rights of persons with visual and print disabilities. The Court held that requiring copyright owners' permission to create accessible formats amounted to a discriminatory barrier that unfairly prevented people with visual and print disabilities from accessing copyrighted materials.

[8] The Court, when considering an appropriate remedy, declined to incorporate clause 19D⁷ of the CAB, stating that it was excessively broad and lacked the precision

⁴ This was a provision from an earlier version of the CAB. Clause 19D remains in the present version of the CAB although it is slightly revised.

⁵ *Blind SA v Minister of Trade, Industry and Competition* [2021 ZAGPPHC 871 (GP).

⁶ *Blind SA v Minister of Trade, Industry and Competition* [2022] ZACC 33; 2023 (2) BCLR 117 (CC).

⁷ Clause 19D is the National Assembly's attempt to allow authorised entities or prescribed persons to create, supply and distribute accessible format copies of copyright works to persons with disabilities without copyright owner permission, provided they have lawful access to the work, maintain its integrity, operate non-profit and properly attribute the source and author.

necessary for the specific case under consideration. As an interim measure, the Court read in “section 13A” into the Act, which was based on but not identical to clause 19D of the CAB,⁸ as well as definitions necessary for the operation of section 13A. The declaration of invalidity was suspended for a period of 24 months to afford Parliament an opportunity to cure the legislative defect.

[9] Section 13A established exceptions for persons with visual and print disabilities by introducing four definitions: “accessible format copy”, “beneficiary person”, “literary works” and “permitted entity”. These definitions formed the basis for conditions permitting the creation of accessible format copies without requiring copyright owners’ authorisation.

[10] On 29 February 2024, Parliament passed the revised versions of the CAB and PPAB and, on or about 2 March 2024, resubmitted the Bills to the President for his assent and signature.

[11] On 23 April 2024, Blind SA sent a letter to the President requesting him to sign the CAB. Between 10 May 2024 and 30 June 2024, the national elections were held, the incumbent President was re-elected and a new cabinet formed. On 7 August 2024, Blind SA sent another letter to the President imploring him to sign the CAB. In that letter, Blind SA indicated that it would launch an urgent application in the event the President failed to sign the CAB before the expiry of the suspension period. On 12 September 2024, Blind SA sent a letter to the Presidency to enquire about progress, adding that it would have to proceed with litigation if the President failed to act. Blind SA received a response to the effect that the President was attending to the matter. It was advised that the deadline for the expiry of the suspension of the declaration of invalidity did not apply to the President. Notwithstanding the requests from Blind SA for the President to sign the Bill, he did not do so.

⁸ It was also formulated through reference to the Marrakesh VIP Treaty, see n 10 below. See *Blind SA I* above n 6 at paras 105-8.

[12] On 21 September 2024, the suspension period expired without the promulgation of legislation curing the defect. This resulted in the lapse of the interim provisions that had permitted entities to create accessible format copies under conditions of lawful access and non-profit status. Therefore, the declaration of invalidity took effect and persons who previously had the benefit of the reading-in, no longer did.

Application for direct access

[13] On 8 October 2024, Blind SA, clearly troubled by this state of affairs, launched this application for direct access. The main reason for the application was that the lapse of the suspension period without any enabling legislation in place left a lacuna (gap) in the Copyright Act, resulting in the violation of the rights of persons with visual and print disabilities. Therefore, in the application Blind SA sought an order granting just and equitable relief and that section 13A should be kept in place until legislation is passed to cure the constitutional defect. It stated that if the Marrakesh VIP Treaty⁹ had been signed and ratified by South Africa, persons with blindness and other visual impairments in South Africa would be able to access hundreds of thousands of accessible format copies of literary works from international libraries. According to Blind SA, facilitating South Africa's accession to the Marrakesh VIP Treaty is one goal of this litigation.

[14] Blind SA recognised that this Court does not have the power to extend the period of suspension of the declaration of invalidity and the reading-in once that period has expired, but contended that this Court has the power to grant just and equitable relief in terms of section 172(1)(b) of the Constitution. It also sought an order directing that costs be paid by the President, or jointly by him and those respondents who elect to oppose the relief sought. It contended that the request for costs aligns with the urgency of bringing this application due to the President's failure to make a timeous decision on the CAB by the deadline.

⁹ Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (2013) 52 ILM 1309 administered by the World Intellectual Property Organisation (Marrakesh VIP Treaty).

[15] On 14 October 2024, the President referred the CAB and the PPAB to this Court in terms of sections 79(4)(b) and 84(2)(c) of the Constitution for a determination of constitutional validity. These reservations concerned provisions unrelated to the updated version of clause 19D of the CAB. The President's referral confirmed that Parliament had addressed some of his previous concerns but it stated that he still had reservations about certain provisions.

[16] On 22 October 2024, the Court issued directions consolidating both matters for an urgent hearing scheduled for 28 November 2024. The Court also directed the respondents to file their opposing papers and written submissions within prescribed timelines.

[17] In light of the referral matter, on 18 October 2024 Blind SA filed a supplementary affidavit stating that it no longer sought the relief in prayers 2 and 3. Blind SA stated that the matter was urgent; litigating the present application and the President's referral¹⁰ on a non-urgent basis would delay the finalisation of its case by more than a year.

[18] On 29 October 2024, the President filed his answering affidavit in which he submitted that the matter was not urgent, this Court's jurisdiction was not engaged and that the matter was moot. The President stated that he had given due attention to the CAB and the PPAB. He refuted the allegation that he had failed to act within a reasonable time. He explained that the referral of the CAB and PPAB to this Court after the expiry of the suspension period was due to the national elections and formation of a new government, which resulted in his team requiring time to prepare a memorandum on the Bills and parliamentary submissions and to obtain legal opinion from the state attorney. He submitted that he was not in a position to sign the Bill when the

¹⁰ Blind SA argues that this referral will likely take longer than the referral in *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* [1999] ZACC 15; 2000 (1) SA 732 (CC); 2000 (1) BCLR 1 (CC), which was a less complex matter and yet still took eight months and resulted in the Liquor Bill being found unconstitutional.

suspension period of the declaration of invalidity expired and that he was not reacting to Blind SA's application when he filed the referral application. The President did not oppose the relief sought in prayer 4 of Blind SA's notice of motion but sought a costs order against it.¹¹

[19] On 31 October 2024, Blind SA filed its amended notice of motion, in which it stated that the only relief that was sought related to prayers 1, 4 and 5 (these are now prayers 1, 2 and 3 of the amended notice of motion).¹² On the same day, Blind SA, in its replying affidavit, challenged the President's repeated assertions that this Court's order in *Blind SA I* is not relevant to him, even though he was the only person in a position to assent to the Bill following the passing of the CAB by Parliament. On 6 November 2024, Media Monitoring Africa Trust (MMA) filed an application for admission as amicus curiae.

[20] On 11 November 2024, the Minister filed a condonation application, a notice to abide and an explanatory affidavit regarding the stance of the Department of Trade, Industry and Competition (Department) on the reading-in of section 13A. The Minister provided an explanation for the delay and stated that this was due to communication, procedural and logistical factors. The explanatory affidavit provides the history of the CAB and documents some initial concerns raised in 2018 to 2019 by a technical team appointed by Parliament about clause 19D. These concerns did not relate to the constitutionality of clause 19D, but rather the alignment of clause 19D with the Marrakesh VIP Treaty and whether it would meet the three-step test. The Minister supported an order that would read in section 13A.

¹¹ Seeking interim amendment of the Copyright Act by the inclusion of section 13A, pending the coming into force of the CAB.

¹² In restating the relief sought, prayer 1 pertains to the applicant's request for an urgent hearing pursuant to rule 12 of the Constitutional Court Rules; prayer 2 (formerly prayer 4) is for interim relief in the form of an inclusion of section 13A in the Copyright Act, pending the enactment of appropriate legislation; and prayer 3 (formerly prayer 5) is for a costs order on an attorney and client scale, including costs of two counsel, against the President or, in the alternative, jointly against the President and all opposing respondents.

[21] On 18 November 2024, Blind SA filed its replying affidavit in response to the Minister. This was to dispute the Minister's contention that South Africa has signed the Marrakesh VIP Treaty. First, Blind SA stated that South Africa has not acceded to the Marrakesh VIP Treaty. It also highlighted that since this Court's order in 2022, South Africa has still not acceded to the Treaty and despite numerous requests for the Department to initiate the processes to do so, it is not clear whether it has taken any such steps. Blind SA pointed to the fact that nowhere in the Minister's papers does he confirm that the Department will regard section 13A as providing a sufficient basis for the country's accession to the Marrakesh VIP Treaty.

[22] On 20 November 2024, the Court separated this matter from the President's referral and admitted MMA as amicus curiae. The separation was on the basis that Blind SA's application would be adjudicated urgently while the President's referral would be decided in the ordinary course.

Submissions by the parties

[23] Blind SA submitted that this Court's jurisdiction is engaged because the relief sought is an order that would effectively vary or supplement this Court's order in *Blind SA I*. It relied on *Ex Parte Home Affairs*¹³ for the proposition that "the variation of orders is a constitutional matter, within this Court's jurisdiction"¹⁴ and that only this Court has the power to vary its own orders.¹⁵ Furthermore, if direct access is refused, persons with visual and print disabilities would have to wait for the enactment of the CAB and this could take years depending on the outcome of the referral case. During that time, the rights of persons with visual and print disabilities would be unrealised. Therefore, it is in the interests of justice for this Court to grant direct access.

¹³ *Ex parte Minister of Home Affairs: In re Lawyers for Human Rights v Minister of Home Affairs* [2023] ZACC 34; 2024 (1) BCLR 70 (CC); 2024 (2) SA 58 (CC).

¹⁴ *Id* at para 29.

¹⁵ *Id* at para 10.

[24] Initially, the President, in his answering affidavit, submitted that no case had been made out for direct access. However, in the written submissions, the President appears to accept that this Court's jurisdiction is engaged and that the matter is urgent. He has no objection to the updated relief sought by Blind SA save for the costs order against him, which he opposes.

[25] On urgency, Blind SA recognises that the majority of case law about urgency in relation to applications for extensions of declarations of invalidity concern applications made close to the expiry of the suspension period. It submits that appropriate relief is urgently required to clarify the position of persons with visual and print disabilities and those they rely on to make or obtain these accessible format copies. Another potentially indefinite delay to the amendment of the Copyright Act is not justified considering the length of time the rights of persons with visual and print disabilities have been violated. This was recognised by this Court in *Blind SA I*, in terms of which this Court held that persons with visual and print disabilities needed to be provided with immediate relief to address the continuing infringement of their rights.¹⁶ Despite Parliament having fulfilled its obligation to pass legislation to cure the constitutional defect, clause 19D has not been promulgated and the Court's reading-in of section 13A is no longer operative.

[26] Blind SA asks this Court to grant just and equitable relief and that section 13A should be kept in place until legislation is passed to cure the constitutional defect. This would remove the uncertainty that exists regarding the current position of persons with visual and print disabilities and would facilitate South Africa's accession to the Marrakesh VIP Treaty, which has been put on hold indefinitely.¹⁷

¹⁶ *Blind SA I* above n 6 at para 102.

¹⁷ South Africa had previously indicated that it would not sign the Marrakesh VIP Treaty until its laws were aligned with it. Despite this, even when this Court read section 13A into the Copyright Act, which supposedly aligned South Africa's copyright regime with the Marrakesh VIP Treaty, South Africa still did not sign or ratify the treaty.

[27] Blind SA argues that this Court is able to vary or supplement its order in the manner sought. It relies on *LAMOS*,¹⁸ in which this Court confirmed the principle that it has the power to vary its orders, although this power must be sparingly exercised.¹⁹

[28] Blind SA submits that the Court is not obliged to read in section 13A as an interim measure but could read in the current version of clause 19D of the CAB and the definitions it relies upon (the current version is slightly different from the previous version of clause 19D considered by the Court in *Blind SA I*) as Parliament has chosen this provision to cure the constitutional defect in the Copyright Act. Alternatively, this option is made possible by this Court's judgment in *EFF II*,²⁰ in which this Court held that the power to grant just and equitable relief is "so wide and flexible that it allows courts to formulate an order that does not follow prayers in the notice of motion or some other pleading".²¹ Blind SA argues that the current clause 19D is "more user friendly and better advances the rights of persons with visual and print disabilities". Therefore, it would be just and equitable for this Court to revive section 13A or to read in the current clause 19D in the CAB as the Legislature's chosen solution, which is also not a subject of the President's referral.

[29] On costs, Blind SA argues that if it is successful in relation to its substantive relief, the President should pay the costs of the application, including the costs of two counsel and that this should be on a punitive scale. This is due to the delay on the part of the President to make a decision on the CAB before the expiry of the suspension period and the declaration of invalidity taking effect. Secondly, the President failed to

¹⁸ *Speaker of the National Assembly v Land Access Movement of South Africa* [2019] ZACC 10; 2019 (5) BCLR 619 (CC); 2019 (6) SA 568 (CC).

¹⁹ *Id* at para 15. In its written submissions, Blind SA gives several examples of where this Court has exercised this discretion, see *Acting Speaker of the National Assembly v Teddy Bear Clinic for Abused Children* [2015] ZACC 16; 2015 (10) BCLR 1129 (CC) (*Teddy Bear Clinic*) at para 12; *Minister of Justice and Correctional Services v Ramuhovhi* [2019] ZACC 44; 2020 (3) BCLR 300 (CC) (*Ramuhovhi II*) at para 9; and *Electoral Commission of South Africa v Speaker of the National Assembly* [2018] ZACC 46; 2019 (3) BCLR 289 (CC) (*Electoral Commission of South Africa*) at paras 69-70.

²⁰ *Economic Freedom Fighters v Speaker of the National Assembly* [2017] ZACC 47; 2018 (2) SA 571 (CC); 2018 (3) BCLR 259 (CC).

²¹ *Id* at para 211.

inform the parties that he would not be able to make a decision in time, forcing Blind SA to approach the Court after the declaration of invalidity had expired and thus jeopardising the rights of persons with print and visual disabilities. The President did not make it clear to the parties that he would not be able to decide on time. If he had informed the parties, Parliament, the Minister or Blind SA could have approached this Court before the expiry of the suspension of invalidity. Blind SA contends that it was compelled to approach the Court on an urgent basis because those who should have ensured the implementation of the order were absent. The President, on his side, rushed his referral of the CAB to this Court, which strongly suggests he did so in response to the initiation of this case and indicates that without such pressure, the referral would have taken longer.

[30] The President has abandoned his initial stance that Blind SA should pay costs and submits that the *Biowatch*²² principle applies. Regarding the costs order sought against the President, the President submits that he was not a party to the order in *Blind SA I* and, thus, his failure to decide on the CAB before the end of the suspension of the declaration of invalidity did not contravene this Court's order or his constitutional obligations. He further argues that there is no assertion in Blind SA's founding affidavit that the CAB was not prioritised, nor any mention of facts that might support such a view. Blind SA had thus made out a new case in its replying affidavit – that the President ought to have prioritised the processing of the CAB, which was not foreshadowed in its founding affidavit. The President was not afforded an opportunity to respond to these averments.

[31] The President argues that there is no basis for a punitive costs order against him. He submits that the scale of attorney and client costs is extraordinary and should only be granted in cases where a litigant has acted in “a clear and indubitably vexatious and reprehensible manner” to indicate the extreme disapproval of the Court.

²² *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

[32] The Minister submits that while the Court has broad and flexible powers to grant just and equitable relief under section 172(1)(b) of the Constitution to address the current dispute and ensure constitutional compliance, any reading-in should respect the legislative process and concerns raised by the President. A just and equitable remedy would be one that maintains section 13A while respecting the separation of powers. In this regard, the Minister argues that this Court should be guided by *Ex Parte Home Affairs*.

[33] The Minister thus supports the temporary inclusion of section 13A into the Copyright Act pending legislation curing the defect. He argues that this is necessary to preserve the rights of persons with visual and print disabilities and align South Africa with the Marrakesh VIP Treaty, which the Minister believes has been ratified.

[34] Media Monitoring Africa provided submissions on remedy. It notes that all parties rely on *Ex Parte Home Affairs* to justify the view that this Court has the power to grant supplementary relief. However, it argues that this Court is in a somewhat unique position in this case: Parliament technically complied with this Court's order in *Blind SA I* but, due to the delay in signing the CAB, the intention of the order is unrealised and as a result the legislative defect is not cured. The Court did not anticipate that the President's process in deciding whether to sign the CAB would hinder or delay the enactment of the remedial legislation. This has effectively resulted in the rights of persons with visual and print disabilities being violated once again.

[35] The amicus refers to the *Firestone*²³ principle that a court has no power to change or supplement a final judgment, unless such change or supplementation relates to accessory or consequential matters that the court overlooked or accidentally omitted.²⁴ It submits that this Court has developed a "precautionary measures approach" in that, because of the repeated applications for extensions of declarations of invalidity, this

²³ *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A); [1977] 4 All SA 600 (A).

²⁴ *Id* at 306F-H.

Court provides an interim reading-in that becomes final if the suspension of the declaration of invalidity expires. The Court expressed this approach in *Levenstein*,²⁵ *Centre for Child Law*,²⁶ *Women's Legal Centre Trust*²⁷ and *Ramuhovhi II*.²⁸ The combination of the precautionary measures approach and the power of courts to supplement orders culminated in *Ex Parte Home Affairs*, which MMA submits allows this Court to remedy the lacuna in the current law through granting the just and equitable relief sought by Blind SA. This Court actually has a constitutional responsibility to grant supplementary relief because it is clear that, without such relief, the rights of persons with visual and print disabilities will be violated again. This Court should also infuse precautionary measures into its order.²⁹ MMA submits that this Court may grant the relief proposed by Blind SA or any other relief on an urgent basis and provide reasons for granting this relief later.

Issues

[36] The central issues for determination by this Court are as follows:

- (a) Firstly, whether this Court retains jurisdiction to hear the present application and whether the application satisfies the requisites of urgency.
- (b) Secondly, what form of remedy constitutes just and equitable relief, considering the lapsed suspension period of the prior declaration of constitutional invalidity in relation to the Copyright Act.
- (c) Thirdly, whether an order for costs against the President and/or the Minister is warranted in these circumstances.

²⁵ *Levenstein v Estate of the Late Sidney Lewis Frankel* [2018] ZACC 16; 2018 (2) SACR 283 (CC); 2018 (8) BCLR 921 (CC) at paras 76 and 89.

²⁶ *Centre for Child Law v Media 24 Limited* [2019] ZACC 46; 2020 (3) BCLR 245 (CC); 2020 (4) SA 319 (CC) at para 128(7).

²⁷ *Women's Legal Centre Trust v President of the Republic of South Africa* [2022] ZACC 23; 2022 (5) SA 323 (CC); 2023 (1) BCLR 80 (CC) at paras 86(1.7)-(1.9).

²⁸ *Ramuhovhi II* above n 20 at para 12.

²⁹ *Ramuhovhi v President of the Republic of South Africa* [2017] ZACC 41; 2018 (2) BCLR 217 (CC); 2018 (2) SA 1 (CC) at paras 50 and 71.

Analysis

[37] During the hearing of the matter, there was no dispute between the parties that this matter was urgent and that the Court's jurisdiction is engaged. I agree, this Court is the only court with the competency to supplement its orders. This matter is also about the protection of the constitutional rights of the visually and print-disabled persons pending the coming into force of remedial legislation. Therefore, this Court's jurisdiction is engaged.

[38] The matter is urgent as the persons represented by Blind SA find themselves in a precarious position because they no longer enjoy the protection of this Court's order and are now without an effective remedy. The urgency here stems from the lacuna created by the lapsed suspension period of the declaration of constitutional invalidity and the resultant lapsing of section 13A's reading-in provisions. This gap creates an immediate breach of the rights of persons with visual and print disabilities – rights that section 13A previously safeguarded. Similarly, Blind SA approached this Court approximately ten days after the expiry of the suspension period, notwithstanding the fact that it did not have any responsibility to cure the defects. In my view, questioning whether they could have acted sooner would misplace the constitutional burden. No party contests the pressing nature of this application and that the potential violation of rights demands immediate attention.

[39] The remaining issues that require the Court's attention relate to the determination of just, supplementary and equitable relief and whether the President and/or the Minister should pay the costs of the application.

[40] During the hearing, Blind SA submitted that, at a minimum, a just and equitable solution would be to effectively reinstate section 13A until it is no longer required. Alternatively, Parliament's chosen solution of clause 19D, which has been delayed only by the referral matter and which may provide a more comprehensive remedy, should be read in. Counsel for the President and the Minister supported Blind SA's position and

urged us to read in the current version of clause 19D until legislation to cure the defect in the Copyright Act comes into force.

[41] In *Hoërskool Ermelo*,³⁰ this Court held that in deciding on a remedy in a constitutional matter within this Court's power, the "litmus test will be whether considerations of justice and equity in a particular case dictate that the order be made".³¹ The Court further held that the power to order just and equitable relief is available even though the case is not one in which a court makes a declaration of invalidity nor one in which the outcome hinges on constitutional invalidity. To do this, the Court reasoned, places substance over form.³²

[42] In *LAMOS*, this Court confirmed "that courts do have the discretion to vary their orders, albeit that this discretion must be exercised sparingly".³³ This Court has exercised such discretion to extend suspension periods where Parliament failed to cure constitutional defects timeously.³⁴

[43] This Court in *Blind SA I* declared that the provisions of the Copyright Act were constitutionally invalid and provided interim relief it considered just and equitable at the time.³⁵ The circumstances have since evolved: after two years, the interim reading-in remedy has lapsed without the defect having been cured, creating uncertainty and postponing accession to the Marrakesh VIP Treaty. Indeed, the failure to promulgate the CAB within 24 months has created a legislative gap, reverting to the position before this Court's original order. This situation requires balancing the immediate need for protection against the necessity of ensuring constitutionally compliant legislation

³⁰ *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC).

³¹ *Id* at para 96.

³² *Id* at para 97.

³³ *LAMOS* above n 18 at para 25.

³⁴ *Teddy Bear Clinic* above n 20, considering factors in *Ramuhovhi II* above n 20 at para 9 and *Electoral Commission* above n 20 at paras 69-70.

³⁵ See *Blind SA I* above n 6.

satisfactory to both the President and Parliament. The retention of section 13A is proposed as an appropriate solution, as it would continue to protect visually and print-impaired persons' constitutional rights to equality, dignity and education under sections 9, 10, and 29 of the Constitution.

[44] As the suspension period has lapsed, no extension may be granted. However, this Court has the power to order just and equitable relief if justice so demands and as long as that does not revive statutory provisions that have been declared invalid and where such declaration has taken effect. Therefore, this Court has to determine a just and equitable remedy rather than an extension of a suspension of an order of constitutional invalidity. The parties are not arguing otherwise, correctly so.

[45] As to when such a just and equitable order may be sought, this Court in *Ex Parte Home Affairs* considered whether it could vary an order where the suspension period had expired, leaving an uncertain legal framework. It recognised its power under section 172(1)(b) of the Constitution “to order supplementary just and equitable relief to provide [legal] certainty”,³⁶ explaining:

“The legal question is what, under the circumstances, would qualify as a just and equitable order? To determine this, we must adopt the approach set out in *Ntuli, Zondi, Minister of Social Development and Cross-Border Roads Transport Agency*, where this Court considered:

- (a) the nature of the constitutional defects;
- (b) the harm caused by the failure to pass remedial legislation; and
- (c) the remedies proposed by the parties.

...

As stated, this Court cannot revive statutory provisions after . . . suspension. But there is nothing in our law that precludes us from ordering amplified just and equitable relief to supplement the [original] order. An amplification . . . by adding a modified version of the invalid [provisions] is not a reading-in . . . following upon a declaration of . . .

³⁶ *Ex Parte Home Affairs* above n 13 at para 40.

invalidity. Instead, it is a free-standing judicial remedy in terms of section 172(1)(b).³⁷

[46] In the above case, the Court granted the order three years after the expiry of the suspension period of a declaration of invalidity and six years since the original order of constitutional invalidity was made. In the present case, the applicant approached us around ten days after the suspension period ended.

[47] Importantly, in granting a supplementary just and equitable order, one must be mindful of the legal framework at play. Section 13A was read into the Copyright Act as a whole and functioned as a standalone provision. The constitutional defect that necessitated this Court's intervention did not lie in any specific provision of the Copyright Act that needed to be struck down, but rather in the absence of necessary provisions to protect the rights of persons with visual and print disabilities. Section 13A was designed to function as an interim measure to fill this gap. The President's current referral of the CAB raises distinct constitutional questions about that Bill's provisions, which cannot affect the existing Copyright Act as the CAB has not yet been enacted into law. Therefore, our task is to craft an appropriate interim remedy that addresses the lapsed suspension period while the legislative process takes its course.

[48] The factors outlined in this Court's judgments require a careful balancing to determine whether justice demands reading in section 13A or clause 19D along with necessary ancillary provisions. The traditional considerations from *Zondi II*³⁸ and *LAMOSI*, including explanations for failing to remedy the defects timeously, the adequacy of proposed extensions and comparative prejudice,³⁹ do not align precisely with the circumstances of the current matter. Unlike typical cases, there is no proposed timeline for a parliamentary remedy, as the CAB remains before this Court for

³⁷ Id at paras 30 and 40.

³⁸ *Zondi v Member of the Executive Council for Traditional and Local Government Affairs* [2005] ZACC 18; 2006 (3) SA 1 (CC); 2006 (3) BCLR 423 (CC).

³⁹ Id at para 46 and *LAMOSI* above n 18 at paras 32-6.

determination as to whether certain provisions pass constitutional muster. Therefore, any relief granted must operate pending the coming into force of the legislation.

[49] The potential violation of fundamental rights emerges as the decisive consideration, particularly given the absence of certainty regarding the Bill's eventual assent. The interests of justice therefore compel the provision of remedial relief. This approach is aligned with the approach in *Ex Parte Home Affairs* where this Court focused on three main factors, namely, the nature of the constitutional defect, the harm ensuing due to the lacuna and the suggested remedies for consideration in determining a supplementary just and equitable order.⁴⁰ I proceed to deal with that question.

Should this Court grant section 13A or clause 19D relief?

[50] As indicated in this judgment, after the hearing this Court issued an interim order in the form of section 13A to ensure that the persons with visual and print disabilities had some form of relief whilst we were considering the matter. The question whether this Court should grant an order reading in section 13A or the current version of clause 19D pending the coming into force of remedial legislation warrants detailed examination.

[51] There have been concerns raised about the proposal of reading-in clause 19D and these relate to piecemeal legislation through judicial intervention, with the provision's perceived ambiguity presenting significant obstacles. The view was that the reading-in of clause 19D risked undue intrusion into legislative domain, particularly given its status within a Bill that has not yet been assented to and signed. The uncertainty surrounding the provision's final legislative form amplified these concerns about encroaching on parliamentary prerogatives. Another factor was this Court's decision in *Blind SA I* when it declined to incorporate the previous version of clause 19D on the basis that it went beyond *Blind SA*'s constitutional challenge.⁴¹

⁴⁰ *Ex Parte Home Affairs* above n 13 at para 30.

⁴¹ See *Blind SA I* above n 6 at para 105.

[52] While the concerns about judicial overreach are valid, the changed circumstances, the intention of the Legislature, urgent rights protection and the temporary nature of the remedy, warrant the reading-in of clause 19D instead of section 13A. Furthermore, the convergence of all respondents' positions supporting clause 19D as the just and equitable remedy, coupled with their comprehensive legal arguments, provide compelling grounds that a reading-in of clause 19D is an appropriate order for the reasons set out below.

[53] First, unlike in *Blind SA I*, clause 19D has undergone substantial revision and notably is not one of the provisions in the President's referral matter where he has constitutional reservations. The previous barriers that prevented its incorporation have been resolved through proper constitutional tagging and parliamentary scrutiny. The provision previously fell short due to specific deficiencies: its narrow scope, critical dependence on subordinate legislation, procedural flaws in legislative tagging and incomplete drafting. These fundamental limitations necessitated this Court's crafting of section 13A as a temporary relief which, while embodying clause 19D's core principles, addressed immediate needs. Section 13A was explicitly designed as an interim measure and has since lapsed, requiring fresh consideration of relief mechanisms within the current constitutional framework.

[54] Second, clause 19D represents Parliament's chosen solution, having already passed through the legislative process. Reading it in as an interim measure respects rather than undermines legislative prerogatives, as it implements Parliament's considered remedy while technical processes are completed. The 2024 iteration of clause 19D demonstrates a marked evolution through proper constitutional tagging and rigorous parliamentary scrutiny. It has developed into a broader provision encompassing artistic works and multiple formats, reflecting both procedural improvements and substantive enhancement of its legal architecture.

[55] Third, the lapsing of section 13A has created an immediate rights vacuum affecting the constitutional rights of visually and print-impaired persons, therefore, it is imperative that these rights are protected. Clause 19D provides a more comprehensive framework aligned with both constitutional imperatives and international obligations, particularly the Marrakesh VIP Treaty. A detailed comparative analysis between section 13A and clause 19D reveals fundamental distinctions. Where section 13A provided restricted relief focused solely on visual or print disabilities, clause 19D establishes a comprehensive scheme aligned with contemporary disability rights jurisprudence. Clause 19D incorporates essential cross-border provisions mandated by the Marrakesh VIP Treaty, enabling international exchange of accessible-format copies – a vital element entirely absent from section 13A. The provision carefully balances accessibility requirements with copyright protections through specific attribution requirements and detailed safeguards against misuse, particularly in international transfers.

[56] These substantive improvements render clause 19D a more robust and legally sustainable framework. Its structure harmonises with both evolving disability rights' principles and South Africa's international obligations, providing essential flexibility, durability and clarity for meaningful relief. Reading in clause 19D as interim relief achieves an appropriate balance between constitutional imperatives, legislative intent and pressing accessibility needs in a manner that section 13A, with its inherent limitations, could not accomplish.

[57] The international dimension merits consideration, though requires careful articulation. While South Africa played a significant role in negotiating the Marrakesh VIP Treaty in 2013, it has not yet acceded to the treaty. Thus, South Africa does not currently bear binding international obligations under this instrument. Nevertheless, clause 19D's framework represents an advancement over section 13A's limited scope, particularly in its provision for cross-border exchange of accessible-format copies. This alignment with international best practices in disability rights protection, as embodied in the Marrakesh VIP Treaty, would place South Africa in an

advantageous position should it choose to accede to the treaty in future. Furthermore, clause 19D's comprehensive approach to accessibility rights better serves the constitutional imperatives of equality and dignity for persons with disabilities. The provision maintains its constitutional integrity and remains separate from the concerns raised in the President's referral.

[58] Lastly, the separation of powers concerns that initially weighed against clause 19D can now be resolved through established constitutional principles with minimal procedural complexity. Framing the relief as temporary and interim in nature – pending presidential assent – avoids judicial overreach into legislative or executive domains. The Court, which is not bound by the previous relief due to its expiry, possesses the constitutional authority to formulate the most appropriate solution. As counsel persuasively argued during the hearing, while nomenclature may vary, the substantive constitutional effect remains constant. The reading-in would be temporary in nature, serving as an interim bridge ensuring that the CAB's stated objectives persist despite procedural delays, particularly given the uncertain trajectory of the referral matter, and will remain until the formal legislative process is finalised. This approach balances the need to protect constitutional rights with respect for the separation of powers. This solution represents a pragmatic response to an urgent constitutional need while maintaining appropriate deference to legislative and executive functions.

[59] The reading-in of clause 19D as an interim measure would neither impede Parliament's ongoing legislative functions nor compromise its broader constitutional objectives. Parliament's permanent legislative remedy, though delayed by the referral process, would remain intact and preserved for implementation upon the CAB's eventual assent. The fact that the order will be an interim one should allay any fears regarding the legislative process that will follow, including the signing of the Marrakesh VIP Treaty. It must be borne in mind that the clause 19D relief is not merely a question of the parties agreeing to it, but Parliament has already passed this provision and the President did not raise any issue with it.

[60] In the result, it would be just and equitable for this Court to make an order that would essentially supplement its 2022 order, to ensure its effectiveness. It would be unacceptable for this Court to permit a delay of more than a year in the realisation of the rights of persons with visual and print disabilities in light of the President's referral. It follows that an order must be issued to protect their constitutional rights. For this purpose, clause 19D and the relevant definitions contained in the current version of the CAB as passed by Parliament will be in operation until the coming into force of the CAB.

Costs

[61] Initially, Blind SA sought a punitive costs order against the President. During the hearing, counsel for Blind SA indicated that it no longer seeks a punitive costs order.

[62] While many respondents participated in these proceedings, the President's unique constitutional position and responsibilities distinguish his role. The President alone possessed both the authority and knowledge to prevent this litigation. His failure to act timeously regarding the CAB, or at minimum alert other parties to potential delays, effectively necessitated these proceedings. The President failed to communicate with any of the parties that he would not be able to make a decision on the CAB before the expiry of the declaration of invalidity. In my view, his lack of communication resulted in the suspension period of the declaration of invalidity expiring without any party being able to launch proceedings in advance, to extend the suspension of invalidity. Blind SA's application cannot be characterised as frivolous or vexatious. It was caused by the President's delay in addressing the CAB some seven months after parliamentary passage. Blind SA demonstrated procedural diligence by its enquiries and prompt filing of supplementary documentation.

[63] The position of other respondents – including the Chairperson of the NCOP and the Minister – differs materially, as they had fulfilled their duties and lacked the knowledge that the relief would expire due to the President's decision not to sign the CAB. Had the President exercised appropriate diligence in either making a timely

decision or seeking an extension, rather than maintaining prolonged silence after parliamentary passage of the CAB, Blind SA's approach to this Court might have been avoided entirely. The dilatory approach to this matter is not acceptable and this Court cannot condone it. Therefore, the President must pay Blind SA's costs.

[64] During the hearing, Blind SA sought an order that the Minister should pay its costs for the filing of the replying affidavit. Blind SA submitted that it was compelled to file a reply due to the error in the Minister's affidavit. I am not persuaded by this argument as the Minister was an abiding party and merely filed an explanatory affidavit.

Order

[65] In the result, the following order is made:

1. Direct access is granted.
2. Pending the coming into force of legislation remedying the constitutional defects in the Copyright Act 98 of 1978 as identified by this Court's judgment and order of 21 September 2022, the Copyright Act 98 of 1978 shall be deemed to include a section 19D reading as follows:

“Section 19D.

(1) An authorised entity, or any person as may be prescribed and who serves persons with disabilities may, without the authorisation of the copyright owner, make an accessible format copy for the benefit of a person with a disability, supply that accessible format copy to a person with a disability by any means, including by non-commercial lending or by digital communication by wire or wireless means, and undertake any intermediate steps to achieve these objectives, if the following conditions are met:

- (a) The person wishing to undertake any activity under this subsection must have lawful access to the copyright work or a copy of that work;

- (b) in converting the copyright work to an accessible format copy, the integrity of the original work must be respected, taking due consideration of the changes needed to make the work accessible in that alternative format and of the accessibility needs of the persons with a disability; and
 - (c) the activity under this subsection must be undertaken on a non-profit basis.
- (2)
 - (a) A person to whom the work is communicated by wire or wireless means as a result of an activity under subsection (1) may, without the authorisation of the owner of the copyright work, reproduce the work, where that person is a person—
 - (i) with a disability, for their personal use; or
 - (ii) who serves persons with disabilities, including an authorised entity, for personal use by a person with a disability.
 - (b) The provisions of paragraph (a) are without prejudice to any other limitations or exceptions that the person referred to in that paragraph may enjoy.
- (3) A person with a disability, or someone acting on their behalf, including an authorised entity, may make an accessible format copy of a work for the personal use of the person with a disability or otherwise may assist the person with a disability to make and use accessible format copies where the person with a disability has lawful access to that work or a copy of that work.
- (4)
 - (a) A person with a disability or a person who serves persons with disabilities, including an authorised entity, may, without the authorisation of the copyright owner export to, or import from, another country any legal copy of an accessible format copy of a work for distribution, or to make

it available to persons with a disability, as long as such activity is undertaken on a non-profit basis by that person.

- (b) A person contemplated in paragraph (a) may not export or import an accessible format copy where such person knows, or has reason to know, that the accessible format copy will be used for purposes other than to aid persons with a disability.
- (5) The exception created by this section is subject to the obligation of indicating the source and the name of the author, if it appears on the work, on any accessible format copy.
- (6) For the purposes of this section 19D—
- (a) ‘accessible format copy’ means a copy of a work in an alternative manner or form, which gives a person with a disability access to the work, including to permit the person to have access as feasibly and comfortably as a person without a disability;
 - (b) ‘authorised entity’ means—
 - (i) an entity that is authorised or recognised by the government to provide education, instructional training, adaptive reading or information access to persons with a disability on a non-profit basis; or
 - (ii) an entity, including a government institution or non-profit organisation that provides education, instructional training, adaptive reading or information access to persons with a disability on a non-profit basis as one of its primary activities or institutional obligations.
 - (c) ‘person with a disability’ means a person who has a physical, intellectual, neurological, or sensory impairment

and who requires the work to be in a format that enables that person to access and use the work in the same manner as a person without a disability;

(d) ‘commercial’ means the obtaining of economic advantage or financial gain in connection with a business or trade.”

3. The reading-in of section 19D, shall remain in effect until the remedial legislation contemplated in paragraph 2 comes into force.
4. The President of the Republic of South Africa must pay the costs of this application including the costs of two counsel.

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