

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN**

Case No.: 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

AMICUS CURIAE'S WRITTEN SUBMISSIONS

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INTRODUCTION

1. On 31 October 2024, Geoff Budlender SC — in his acceptance speech for the fourth George Bizos Human Rights Award presented by the Legal Resources Centre — remarked, with reference to section 172(1)(b) of the Constitution,¹ that “where there is a right, there must be a remedy — and . . . for a remedy to be just and equitable, it should be effective.”²
2. These remarks in relation to the effectiveness of court orders, which devolve from this Court’s jurisprudence,³ are both timely and at the heart of the two questions before this Court: is this Court empowered to grant the relief that the Applicant seeks, and will the relief *continue* to effectively remedy the rights violations identified by this Court in *Blind SA I*?⁴
3. On 20 November 2024, the Media Monitoring Africa Trust (“**MMA**”) was admitted as an *amicus curiae* in this matter and directed to file written submissions on or before 22 November 2024. This followed an application for admission as *amicus*

¹ Section 172(1)(b) provides that [w]hen deciding a constitutional matter within its power, a court may make any order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and
(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

² Speech by Geoff Budlender on accepting the fourth George Bizos Human Rights Award (4 November 2024) published by *GroundUp* (accessible at <https://groundup.org.za/article/how-legal-resources-centre-has-fought-for-human-rights/>).

³ *Steenkamp NO v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) at para 29; *Masemola v Special Pensions Appeal Board and Another* [2019] ZACC 39; 2019 (12) BCLR 1520 (CC); 2020 (2) SA 1 (CC) at para 51; *SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation Limited* [2018] ZACC 37; 2019 (1) SA 370 (CC); 2018 (12) BCLR 1553 (CC) at para 52.

⁴ *Blind SA v Minister of Trade, Industry and Competition and Others* [2022] ZACC 33 (*Blind SA I*).

curiae made by MMA on 6 November 2024,⁵ when this matter and the matter of *Ex parte President of the Republic of South Africa*⁶ were consolidated.

4. As these matters are now no longer consolidated following an order of this Court dated 20 November 2024, and to ensure that MMA's written submissions remain useful, relevant, and different from those of the other parties in this matter,⁷ these submissions pertain only to the narrow question of remedy — and the importance of the continued reading-in of section 13A — detailed in MMA's application for admission.⁸ In doing so, these submissions:
 - 4.1. Detail the factors which empower this Court to grant supplementary just and equitable relief;
 - 4.2. Submit that, on the facts of this matter, there is a “constitutional responsibility” to grant supplementary relief; and
 - 4.3. Address a practical consideration for the implementation of the supplementary relief, should it be granted.
5. Each submission is dealt with in turn.

⁵ MMA's application for admission as an *amicus curiae* (6 November 2024).

⁶ CCT 306/24.

⁷ Rule 10(7), read with Rule 10(6), of the Constitutional Court Rules.

⁸ Above n 5 at para 16.

THE IMPORTANCE OF THE CONTINUED READING-IN OF SECTION 13A

Factors which empower this Court to grant supplementary relief

6. This Court is faced with a unique question on remedy. On the facts of this matter, Parliament complied with this Court's order in *Blind SA I* and cured the legislative defect that was found to violate the constitutional rights of persons with visual and print disabilities. However, the remedial intention of the order is now unrealised as the "cured" legislation was not signed into law by the President before the order lapsed. The effect is that persons with visual and print disabilities no longer enjoy the protection of this Court's order *or* the protection and promotion of their rights in cured legislation. Simply, their rights have not been effectively remedied or vindicated. They have been re-violated.
7. As a result, this Court is now asked to grant supplementary just and equitable relief which should include a continued reading-in of a "resuscitated"⁹ section 13A into the Copyright Act¹⁰ until the enactment and commencement of legislation that cures the legislative defects identified in *Blind SA I*.
8. The Applicant argues that this Court is empowered to do so.¹¹ The First and Fourth Respondents¹² and MMA agree.¹³

⁹ Applicant's Written Submissions (6 November 2024) at para 45.

¹⁰ 98 of 1978.

¹¹ First Respondent's Written Submissions (13 November 2024) at para 39.

¹² Fourth Respondent's Written Submissions (13 November 2024) at para 28.

¹³ Above n 5 at para 16.

9. While all of the parties rely on *Ex parte Minister of Home Affairs* which empowers this Court to grant “amplified just and equitable relief” to supplement a previous order,¹⁴ this Court may benefit from a brief overview of the jurisprudential development of supplementary just and equitable relief, including the factors which this Court may consider in granting such relief, given the unique question on remedy before it.

“Consequential matters” and the need to prevent “chaos”

10. The point of departure in this Court’s present inquiry is *Firestone*, often cited in matters pertaining to varying or extending an order.¹⁵ In *Firestone*, the Appellate Division held that “once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it”, save for a few exceptions to that rule, one of which is the supplementing of an order in respect of “accessory or consequential matters which were overlooked or inadvertently omitted”.¹⁶

¹⁴ *Ex Parte Minister of Home Affairs and Others; In re Lawyers for Human Rights v Minister of Home Affairs and Others* [2023] ZACC 34; 2024 (1) BCLR 70 (CC); 2024 (2) SA 58 (CC) at para 40.

¹⁵ *Firestone South Africa (Pty) Ltd v Genticuro AG* [1977] 4 All SA 600 (A); 1977 (4) SA 298 (A) at 606 (*Firestone*). *Firestone* has been approved by this Court and relied on in several cases including: *Minister of Justice v Ntuli* [1997] ZACC 7; 1997 (3) SA 772; 1997 (6) BCLR 677 (*Ntuli II*) at paras 22-23 and 30; *Ex Parte Womens’ Legal Centre: In re Moise v Greater Germiston Transitional Local Council* [2001] ZACC 2; 2001 (4) SA 1288; 2001 (8) BCLR 765 (CC) (*Ex Parte Womens’ Legal Centre*) at para 4; *Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others* [2005] ZACC 18; 2006 (3) SA 1 (CC); 2006 (3) BCLR 423 (CC) (*Zondi II*) at para 28; *Minister of Social Development and Others, Ex Parte* [2006] ZACC 3; 2006 (4) SA 309 (CC); 2006 (5) BCLR 604 (CC) at paras 30-31; *MEC for Local Government, Environmental Affairs and Development Planning, Western Cape Province In re: Minister for Mineral Resources and Swartland Municipality and Others and Maccsand (Pty) Ltd and The City of Cape Town and Others* [2012] ZACC 10; 2012 (9) BCLR 947 (CC) at para 5; and *Speaker of the National Assembly and Another v Land Access Movement of South Africa and Others* [2019] ZACC 10; 2019 (6) SA 568 (CC); 2019 (5) BCLR 619 (CC) (*LAMOSIA II*) at para 24.

¹⁶ *Firestone* id.

11. In *Ntuli II*, Chaskalson P, as he was then, introduced the *Firestone* principle of exceptions into the constitutional era, finding that in an “appropriate case an order for the suspension of the invalidity of the provisions of a statute may subsequently be varied by a court for good cause.”¹⁷ He however cautions that, similarly to *Firestone*, this discretionary power “should be very sparingly exercised”.¹⁸
12. The *Firestone* exceptions are further developed in *Zondi II* where Ncgobo J, as he was then, finds that the list of exceptions is not exhaustive and “may be extended to meet the exigencies of modern times”. Ncgobo J provides several relevant factors, including “the need to promote the constitutional project and prevent chaos”, that must be balanced to achieve the “ultimate goal” of a “just and equitable” order.¹⁹
13. In his reasoning, Ncgobo J relies on section 172(1) of the Constitution and holds that this Court “not only has the power but also has the obligation under its just and equitable jurisdiction to vary that period of suspension and the conditions attached to the suspension, if necessary, to reflect the justice and equity required by the facts of the case.”²⁰

¹⁷ *Ntuli II* above n 15 at para 30.

¹⁸ *Id.*

¹⁹ *Zondi II* above n 15 at para 46. At para 46, Ncgobo J holds that the “[f]actors that may be relevant in a particular case include the sufficiency of the explanation for failure to comply with the original period of suspension; the potentiality of prejudice being sustained if the period of suspension were extended or not extended; the prospects of complying with the deadline; the need to bring litigation to finality; and the need to promote the constitutional project and prevent chaos. What is involved is the balancing of all relevant factors bearing in mind that the ultimate goal is to make an order that is ‘just and equitable’.” (Own emphasis.) This affirmed the position in *Sibiya II*, where this Court held that applications for extensions of time “must be granted if that course is considered by this Court to be in the interests of justice.” See *Sibiya and Others v Director of Public Prosecutions: Johannesburg High Court and Others* [2005] ZACC 16; 2006 (2) BCLR 293 (CC); [2005] JOL 15699 (CC) (*Sibiya II*) at para 7.

²⁰ *Zondi II* *id.* at para 38.

14. This Court has continued to apply, among others, *Firestone*, *Ntuli II*, and *Zondi II* when grappling with the bounds of varying, supplementing, and extending its orders.²¹

The “precautionary measures” approach

15. In addition to the development of the *Firestone* principle, there is a notable parallel jurisprudential development process relating to the continued application of court orders. This development appears to stem from the tensions identified in, among others, *Ntuli II* and *Zondi II*, where Courts were repeatedly faced with extensions due to the lapsing of time-periods. This “precautionary measures” approach has gained traction and is increasingly used as an important safeguard to ensure the effectiveness of court orders:

- 15.1. In *Levenstein*, this Court ordered a final reading-in remedy. It granted an order in terms of which the interim reading-in would become final should Parliament fail to enact remedial legislation within the period of suspension.²²

²¹ For example, in *MEC for Local Government*, this Court relied on *Firestone* and *Ntuli II* to amend an order in relation to costs (*MEC for Local Government* above n 15). In *LAMOSIA II*, this Court found that it would not be in the interests of justice to grant an extension but rather granted alternative relief that was just and equitable in the circumstances (*LAMOSIA II* above n 15). In *Minister of Social Development and Others, Ex Parte* above n 15 where this Court develops *Firestone*, *Ntuli II*, and *Zondi II* in reaching the conclusion that an invalid proclamation cannot be revived, in other words, the court is “not empowered to resuscitate legislation that has been declared invalid” at paras 27 and 31-40 It bears mentioning that this differs from the Blind SA’s proposed “resuscitation”, as that is directed at reviving a part of the original order that keeps 13A alive, it not to revive the original Copyright Act.

²² *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others* [2018] ZACC 16; 2018 (2) SACR 283 (CC); 2018 (8) BCLR 921 (CC) at paras 76 and 89(4).

- 15.2. In *Ramuhovhi II*, this Court explained that the order in *Ramuhovhi I* included a “precautionary measure” and made provision for an interim regime for polygamous customary marriages that would continue to apply after the period of suspension if Parliament failed to address the defect during that period.²³
- 15.3. In *Centre for Child Law*, this Court adopted a similar approach and ordered an interim reading-in in the Criminal Procedure Act and expressly ordered that the interim reading-in shall continue to apply in the event that Parliament does not remedy the identified constitutional defects within 24 months of the order.²⁴
- 15.4. Most recently, in *Women’s Legal Centre Trust*, this Court ordered that “pending the coming into force of legislation or amendments to existing legislation”, certain marital regime recognitions will be in effect.²⁵ Similar wording, which borrows from that of Chaskalson P in *Bruce v Fleecytex*,²⁶ was relied on *Ex parte Minister of Home Affairs* and, most recently, in the Bloemfontein High Court in *J.J v Minister of Home Affairs*.²⁷

²³ *Minister of Justice and Correctional Services v Ramuhovhi and Others* [2019] ZACC 44; 2020 (3) BCLR 300 (CC) at para 12.

²⁴ *Centre for Child Law and Others v Media 24 Limited and Others* [2019] ZACC 46; 2020 (4) SA 319 (CC); 2020 (3) BCLR 245 (CC); 2020 (1) SACR 469 (CC) at para 7.

²⁵ *Women’s Legal Centre Trust v President of the Republic of South Africa and Others* [2022] ZACC 23; 2022 (5) SA 323 (CC); 2023 (1) BCLR 80 (CC) at paras 1.7-1.9.

²⁶ *Bruce and Another v Fleecytex Johannesburg CC and Others* [1998] ZACC 3; 1998 (2) SA 1143; 1998 (4) BCLR 415 (CC) at para 3. In this case, Chaskalson P used this wording to affirm that “[P]ending the coming into force of the relevant legislation and the adoption of rules in terms of its provisions, the rules adopted under the interim Constitution remain in force subject to their being consistent with the 1996 Constitution”.

²⁷ *J.J v Minister of Home Affairs and Another* [2024] ZAFSHC 286 at para 1(6)-(7).

16. These remedies have been developed to ensure that where a constitutional defect is not cured through remedial legislation, the interim remedy fashioned by the Court does not automatically fall away and, in turn, the impugned rights are not re-violated.
17. The ability to supplement court orders as developed in *Firestone*, *Ntuli II*, and *Zondi II*, and this Court's precautionary measures approach, culminates in the recent unanimous judgment by Madjiet J in *Ex Parte Minister of Home Affairs*.²⁸ By infusing these parallel strands of jurisprudence, *Ex Parte Minister of Home Affairs* has become the high-water mark for supplementing an order and ensuring its continued application.

The high watermark: Ex parte Minister of Home Affairs

18. In *Ex parte Minister of Home Affairs* this Court was asked to “revive” a lapsed order. The Court accepted that it cannot revive a provision after it lapses, but that it is capable of amplifying just and equitable relief to supplement an original order.²⁹ In crafting “a free-standing judicial remedy”, the Court took steps to guard against the risk of any further delays in enacting corrective legislation. The Court ordered that if remedial legislation is not enacted and brought into force within 12 months the relevant provisions in its order shall continue to apply until such remedial legislation is enacted and brought into force.³⁰

²⁸ *Ex parte Minister of Home Affairs* above n 14.

²⁹ *Id* at para 40.

³⁰ *Id* at para 2 of the order.

19. Unlike the above cases, the novelty of the present case is this: Parliament has complied with this Court's order. However, the order did not anticipate that the post-Parliament process may hinder the enactment and commencement of the remedial legislation. The *Ex parte Minister of Home Affairs* approach resolves the “undesirable consequences” of this lacuna³¹ and, alongside the cases that came before it, empowers this Court to grant the supplementary just and equitable relief sought by the Applicant.

The “constitutional responsibility” to grant supplementary relief

20. When the approach adopted in *Ex parte Minister of Home Affairs* is considered alongside the “justice and equity required by the facts of [this] case” and the importance of advancing the constitutional project,³² it becomes clear that the supplementary relief is necessary to ensure that the rights of persons with visual and print disabilities do not continue to be re-violated, particularly as this Court considers the referral application in *Ex parte President of the Republic of South Africa*.³³
21. An amplified and modified order — as proposed by the Applicant — which meets the interests of justice threshold and infuses a precautionary measure that enables the continued application of a rights-persevering response is an order that this Court can and should make.

³¹ Id at para 11.

³² See above paras 12-3.

³³ See above n 6.

22. As this Court found in *LAMOSA II* and which is apposite to this matter, “[a]ny further delays in this process will hinder the realisation of constitutional rights.”³⁴ In the absence of an effective remedy, the continued delay in enabling access to copyright works for persons with visual and print disabilities adversely impacts both the constitutional rights identified in *Blind SA I* and South Africa’s commitment to “[i]mprove the quality of life of all citizens and free the potential of each person”.³⁵ This Court should not countenance a continued rights violation that jeopardises this commitment, especially where a remedy has already been considered and offered.
23. In addition, and as in *Dawood*, there is a pressing need to “avoid further unjustifiable limitations of constitutional rights”,³⁶ pending the enactment of legislation that cures the constitutional defect found in *Blind SA I*. The most effective route to achieving this is to grant the relief in prayer 2 of the amended Notice of Motion. This strikes an appropriate balance and “avoids usurping the function of the other [branches of government] on the one hand without shirking the [Court’s] constitutional responsibility to protect constitutional rights on the other.”³⁷
24. Similarly to *Ex parte Minister of Home Affairs*, “[w]e cannot wait” for the legislation to eventually be enacted, particularly in the light of the ongoing rights violations

³⁴ *LAMOSA II* above n 17 at para 65.

³⁵ Preamble of the Constitution.

³⁶ *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (CC) para 68.

³⁷ *Id.*

and the time-periods which may be necessary to properly engage with the referral application.³⁸ This Court should exercise its responsibility to grant the supplementary relief to ensure both legal certainty for persons with visual and print disabilities and to ensure that the Judiciary remains responsive,³⁹ even in instances where persistent delays in enacting remedial legislation occur.

A practical consideration for the implementation of the supplementary relief

25. In the event that this Court grants the supplementary relief proposed by the Applicant, or any other form of supplementary relief that is just and equitable, this Court may consider giving an order on an urgent basis and furnishing its reasons for the order at a later stage.⁴⁰ In this matter, and as detailed above, there are “compelling reasons for an expedited resolution”.⁴¹

CONCLUSION

26. This Court is empowered to grant supplementary just and equitable relief and, on the facts of this matter, it has a constitutional responsibility to do so. Persons with visual and print disabilities presently have no other recourse. The

³⁸ *Ex parte Minister Home Affairs* above n 14 at para 51.

³⁹ See section 1(d) of the Constitution.

⁴⁰ See for example, *South African Informal Traders Forum and Others v City of Johannesburg and Others*; *South African National Traders Retail Association v City of Johannesburg and Others* [2014] ZACC 8; 2014 (4) SA 371 (CC); 2014 (6) BCLR 726 (CC); *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2019] ZACC 27; 2019 (9) BCLR 1104 (CC); *Speaker of the National Assembly and Others v New Nation Movement NPC and Others* [2023] ZACC 12; 2023 (7) BCLR 897 (CC) (*New Nation*); *Tuta v The State* [2022] ZACC 19; 2023 (2) BCLR 179 (CC); 2024 (1) SACR 242 (CC); *African Congress for Transformation v Electoral Commission of South Africa*; *Labour Party of South Africa v Electoral Commission of South Africa and Others*; *Afrikan Alliance of Social Democrats v Electoral Commission of South Africa* [2024] ZACC 7; 2024 (8) BCLR 987 (CC).

⁴¹ *New Nation* Id.

supplementary relief proposed by the Applicant is effective and, if granted, will be indicative of this Court's continued responsiveness to those whose rights have, again, been violated.

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22 November 2024

LIST OF AUTHORITIES

Blind SA v Minister of Trade, Industry and Competition and Others [2022] ZACC 33

Centre for Child Law and Others v Media 24 Limited and Others [2019] ZACC 46; 2020 (3) BCLR 245 (CC); 2020 (1) SACR 469 (CC); 2020 (4) SA 319 (CC)

Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (CC)

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Minister of Justice v Ntuli [1997] ZACC 7; 1997 (3) SA 772; 1997 (6) BCLR 677

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

Speaker of the National Assembly and Others v New Nation Movement NPC and Others [2023] ZACC 12; 2023 (7) BCLR 897 (CC)

Women's Legal Centre Trust v President of the Republic of South Africa and Others
[2022] ZACC 23; 2022 (5) SA 323 (CC); 2023 (1) BCLR 80 (CC)

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