IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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

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BLIND SA'S WRITTEN ARGUMENT

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INTRODUCTION

1 At its core, this case is about ensuring that an order of this Court is given full and proper effect. In that order, handed down on 21 September 2022 in *Blind SA v Minister of Trade, Industry and Competition and Others*,[1] this Court –

1.1 declared key sections of the Copyright Act 98 of 1978 *"unconstitutional, invalid and inconsistent with the rights of persons with visual and print disabilities … to the extent that these provisions … limit the access of such persons to published literary works, and artistic works as may be included in such literary works, in accessible format copies"*;

1.2 provided a comprehensive definition of what is meant by the term *"person with a visual and print disability"* for the purposes of the declarator;

1.3 suspended the declaration of unconstitutionality for a period of 24 months *"to enable Parliament to cure the defect in the Copyright Act giving rise to its invalidity"*;

1.4 read in, for the duration of the 24-month period of suspension, a new section 13A titled *"Exceptions applicable to beneficiary persons"*, which – among other things – effectively defines *"beneficiary person"* to mean a person with a visual and print disability; and

[1] [2022] ZACC 33; 2023 (2) BCLR 117 (CC)

1.5 directed the Minister of Trade, Industry and Competition to pay Blind SA's costs, notwithstanding his non-opposition to the application.[2]

2 At the time *Blind SA* was decided, the National Assembly was considering the Copyright Amendment Bill [B 13B—2017] ("the Bill"), which sought to introduce to the Copyright Act a new section 19D titled *"General exceptions regarding protection of copyright work for persons with disability"*.[3] Passed by Parliament on 28 March 2019, the Bill had been referred back to the National Assembly on 16 June 2020 in terms of section 79(1) of the Constitution. Had the Bill been assented to and sign instead, section 19D would have cured the defect.

3 On 29 February 2024, almost five years after the Bill had first been sent to the President for his consideration, Parliament finally passed a revised version – the Copyright Amendment Bill [B 13F—2017] ("the CAB") – which was sent to the President for a decision in terms of section 79(4) of the Constitution. At that point, almost seven months of the 24-month period of suspension still remained, giving Blind SA hope that the defect identified by this Court would be cured timeously.

4 But despite repeated calls on the President to assent to and sign the CAB, he simply allowed the 24-month period of suspension to expire, without the defect in the Copyright Act having been cured. Two things happened when that period expired at 00h00 on 21 September 2024: the declaration of unconstitutionality in

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[2] This Court left the High Court's costs order undisturbed, which directed the Minister to pay Blind SA's costs in that court.
[3] Clause 20 of the CAB

this Court's order in *Blind SA* came into effect; and the provisions of section 13A, which had been temporarily read in by this Court, fell away.

4.1 The declaration concerned sections 6 and 7 of the Copyright Act, which deal collectively with the nature of copyright in literary, musical, and artistic works, and section 23, which deals with copyright infringement. What exactly their partial invalidity now means for persons with visual and print disabilities, and those upon whom they to rely for the making and/or obtaining of accessible format copies, is not entirely clear.

4.2 The same cannot be said of section 13A. Because this Court ordered that its provisions be deemed to be included in the Copyright Act during the period of suspension, the expiry of that period can only mean one thing: that all of the provisions of section 13A are no longer deemed to be part of the Act. No-one may now rely on such provisions to satisfy themselves that their conduct in respect of the making and/or obtaining of accessible format copies of literary works under copyright is lawful.

5 Without the defect being cured, South Africa's accession to the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled ("the Marrakesh VIP Treaty") has been placed on hold indefinitely. Dating back to 27 June 2013, the Marrakesh VIP Treaty makes provision (among other things) for contracting parties – in their national copyright laws – to *"facilitate the availability of [literary and artistic] works in accessible format copies for beneficiary persons."*

6 The Marrakesh VIP Treaty also enables contracting parties to facilitate the cross-border exchange of accessible format copies. But for as long as South Africa does not accede to the treaty, which would result in it becoming a contracting party, everyone in the country is precluded from engaging in such cross-border exchanges. This severely limits which literary works under copyright persons with visual and print disabilities may actually access.

7 Faced with this reality, Blind SA had no option but to turn to this Court for urgent relief. At the time the application was served on the President, he had yet to make any decision on the CAB's fate. In Blind SA's view, his failure to make that decision timeously, as required by section 237 of the Constitution, meant that he had failed to fulfil the obligation imposed on him by section 79(4) of the Constitution. But shortly thereafter, the President referred the CAB to this Court for a decision on its constitutionality.

8 Blind SA was quick to recognise the impact of the President's decision on the relief it had asked this Court to grant. In supplementary papers filed just three days after the Presidency went public on the section 79(4)(b) referral, Blind SA abandoned two key prayers in its original notice of motion. What remains are the prayers dealing with urgency and costs, and the substantive relief originally sought in the alternative, which provides:

> *"Directing that as from the date of this order, and pending the enactment and commencement of legislation that cures the constitutional defect identified in paragraph 2 of this Court's order in Blind SA v Minister of Trade, Industry and Competition and Others [2022] ZACC 33; 2023 (2) BCLR 117 (CC), the*

Copyright Act 98 of 1978 shall be deemed to include a new section 13A, the provisions of which are set out in paragraph 6 of that order".

9 This application raises the following key questions for this Court's determination:

9.1 First, does this Court have jurisdiction to entertain this matter, and if so, should Blind SA be granted direct access on an urgent basis?

9.2 Second, would it be just and equitable in the circumstances for this Court to grant the supplementary relief sought by Blind SA in prayer 2 of its amended notice of motion?

9.3 Third, should the President be ordered to pay Blind SA's costs, including the costs of two counsel, and if so, on what scale?

10 In what follows below, we deal with each of these questions in turn.

JURISDICTION AND DIRECT ACCESS

11 In *Ex parte Minister of Home Affairs*,[4] this Court confirmed that *"the variation of orders is a constitutional matter, within this court's jurisdiction."* If granted, the substantive relief sought in prayer 2 of the notice of motion in this case – the grant of supplementary relief in respect of this Court's order of 21 September 2022 in

[4] *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) at para 29, citing *Zondi v MEC, Traditional and Local Government Affairs, and Others* 2006 (3) SA 1 (CC) at para 36 with approval

Blind SA – would effectively vary that order. Accordingly, this Court has the necessary jurisdiction to entertain this matter.

12 Blind SA approaches this Court in terms of section 167(6)(a) of the Constitution, which recognises that any person must be able to bring a matter directly to this Court, with the Court's leave, *"when it is in the interests of justice"* to do so. Blind SA also invokes rules 12 and 18 of this Court's rules. While rule 12 deals with urgency (which we address later), rule 18 – which gives effect to section 167(6)(a) of the Constitution – provides detail on what to address in any such application.[5]

13 In *Women's Legal Centre Trust v President of the Republic of South Africa*,[6] this Court held that *"the power to grant litigants direct access outside the Court's exclusive competence is one this Court rarely exercises, and with good reason."* The Court explained:

> *"It is loath to be a court of first and last instance, thereby depriving all parties to a dispute of a right of appeal. It is also loath to deprive itself of the benefit of other courts' insights."*

14 But only this Court has the power to vary its own orders.[7]

15 In the context of rescission, this Court has noted that *"it would be inappropriate for any other court to entertain a rescission application pertaining to an order made by this Court."* While *"direct access is only granted in rare and exceptional*

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[5] [We submit that Blind SA's application satisfies these requirements.
[6] *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2009 (6) SA 94 (CC) at para 27
[7] *Ex parte Minister of Home Affairs* at para 10

circumstances", this Court has nevertheless recognised that *"rule 42(1)(a) would never find operation in respect of an order of this Court without direct access being granted."*[8] Rule 42, which applies to proceedings in this Court by virtue of rule 29 of this Court's rules, also deals with the variation of court orders.

16 From the start, the substantive relief sought in this case has always been that which only this Court could grant: a declarator that the President has failed to fulfil a constitutional obligation; an order directing him to discharge that obligation in a particular way; and, in the alternative, an order granting supplementary relief in respect of this Court's order in *Blind SA*. With the relief that was sought by way of exclusive jurisdiction having been abandoned, following the President's referral of the CAB, what remains is still relief that only this Court can grant.

17 If such relief were not to be granted, persons with visual and print disabilities would have to wait for the CAB first to be enacted, and then to come into force, before being able to realise their rights in the manner contemplated by this Court in *Blind SA*. Absent this Court declaring the referral in CCT 306/24 unlawful, or dismissing every one of the President's reservations, the wait would be for an indeterminate – and possibly indefinite – period of time. We submit that in such circumstances, the interests of justice demand the grant of direct access.

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[8] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) at para 49

URGENCY

18 Much of this Court's case law on urgency concerns applications for the extension of periods of suspensions, ordinarily made close to their expiry.[9] On occasion, however, this Court has also entertained other types of urgent applications.

18.1 For example, in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma*,[10] characterised as an *"application for direct access to the Constitutional Court on an urgent basis"*, this Court ordered former President Zuma *"to obey all summonses and directives lawfully issued by the … Commission"* and *"to appear and give evidence before the Commission on dates determined by it."*

18.2 And in the follow up case under the same name,[11] contempt proceedings brought urgently against Mr Zuma following his failure to *"appear before the Commission on the dates determined by the Commission"* or to *"file any affidavits in accordance with the Commission's directives"*,[12] Khampepe ADCJ – writing on behalf of a majority of this Court – held that urgency was justified by *"the need to put an end to Mr Zuma's contempt and vindicate the authority of this Court."*[13]

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[9] See, for example, *Speaker of the National Assembly and Others v New Nation Movement NPC and Others* [2023] ZACC 12; 2023 (7) BCLR 897 (CC) at paras 18 – 19; and *Speaker of the National Assembly and Another v Women's Legal Centre Trust and Others* [2024] ZACC 18 at para 15
[10] 2021 (5) SA 1 (CC)
[11] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* 2021 (5) SA 327 (CC)
[12] At para 2
[13] At para 35

19 Rule 12(2) requires an applicant seeking to have a matter heard urgently, in its founding affidavit, explicitly to set out *"the circumstances that justify a departure from the ordinary procedures."* The founding affidavit in this case *"explained why a delay of about one year – which would be the result of having to bring an application in the ordinary course – would not assist Blind SA and the people on whose behalf it acts in obtaining the substantive relief they require."*[14] The same point was made in the supplementary affidavit, in respect of the amended relief.[15]

20 It was only after the supplementary affidavit was delivered that the President referred the CAB to this Court for a decision on its constitutionality. This was followed shortly thereafter by the Chief Justice issuing directions in which she consolidated the two applications, and set them down for hearing on the same day. The replying affidavit considers the impact of the consolidation on urgency:[16]

> *"The consolidation of the two cases changes only one thing: this Court may soon decide whether the President's referral is unlawful, and if not, whether there is merit to any of the President's reservations, raising the possibility – for the very first time – that the CAB may soon be returned to the President for his assent and signature. But unless and until that happens, which is by no means guaranteed, a decision on the relief sought in prayer 4 of the original notice of motion, dealing with the reading-in remedy sought, will still be urgently required."*

21 As we explain below, the relief sought in this urgent application is needed to remove the uncertainty that currently exists regarding what persons with visual

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[14] Replying affidavit, para 38
[15] Replying affidavit, para 39
[16] At para 40

and print disabilities, and those upon whom they rely for the making and/or obtaining of accessible format copies, may lawfully do; and second, to facilitate South Africa's accession to the Marrakesh VIP Treaty. Given how long persons with visual and print disabilities have already waited to vindicate their rights, both long before and after this Court handed down its judgment in *Blind SA*, another year's delay – at the very least – cannot be justified.

22 In his answering affidavit in this matter, the President opposes the application being heard urgently. That opposition, however, appears to have been based on a misunderstanding of the effect of Blind SA's abandonment of two prayers in its original notice of motion without – at that stage – filing an amended notice of motion. Given that the apparent confusion has been cleared up in the replying affidavit, which was delivered together with an amended notice of motion, we trust that the President's position on urgency will be clarified in his written submissions.

SUPPLEMENTARY JUST AND EQUITABLE RELIEF

23 In explaining the basis upon which this Court chose to provide interim relief in *Blind SA*, Unterhalter AJ explained:[17]

> *"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'. However, Parliament must be afforded*

[17] *Blind SA* at para 102 (our emphasis)

an opportunity to cure the constitutional defect we have found to exist. This is so because the remedy that is required fits into a larger legislative design as to how to domesticate the Marrakesh Treaty and harmonise the exceptions that are required with the project under consideration to revise the Copyright Act. This is a matter properly left to Parliament. A reading-in by this Court should not deter Parliament from its ultimate task to cure the constitutional defect we have found and integrate a remedy into the wider reformation of the Copyright Act."

24 The remedy that this Court granted (over two years ago) to provide *"immediate redress"* – the reading in of a new section 13A titled *"Exceptions applicable to beneficiary persons"* – is no longer in force.[18] And despite Parliament having used the opportunity afforded to it by this Court *"to cure the constitutional defect ... found to exist"*, the remedy chosen – the adoption of the new section 19D and the definitions on which it relies – remains on ice. These provisions (and none others) were to come into effect immediately upon the CAB being enacted, and thereafter published in the *Gazette*.

25 The substantive relief that Blind SA seeks in prayer 2 of the amended notice of motion is for this Court effectively to resuscitate section 13A, which – in terms of paragraph 6 of its order in *Blind SA* – was deemed to be part of the Copyright Act for the period 21 September 2022 to 20 September 2024, and to keep it in place for as long as it takes for legislation that cures the constitutional defect identified in paragraph 2 of that order to come into force. Were the CAB (in its current or any amended form) eventually to become law, section 19D and its related definitions would replace section 13A.[19]

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[18] Section 13A(1)(b) effectively defines a beneficiary person to be a person with a visual and print disability, a term which is similarly defined in paragraph 3 of the order in *Blind SA*.
[19] The order sought does not preclude the enactment of other legislation to achieve the same purpose.

26 The effect of such an order would be twofold: first, it would remove the uncertainty that currently exists regarding what persons with visual and print disabilities, and those upon whom they rely for the making and/or obtaining of accessible format copies, may lawfully do; and second, it would facilitate South Africa's accession to the Marrakesh VIP Treaty. Once that has been achieved, sooner rather than later, a whole new world of accessible format copies, such as those under the control of the *"American non-profit library service, Bookshare"*,[20] would open up to persons with visual and print disabilities in South Africa.

27 Unsurprisingly, none of the respondents in this case appears to have any principled problem with the grant of such relief.

27.1 Although the President opposes this Court hearing this application as a matter of urgency, submitting that *"the application under case number CCT300/64 should be dismissed [with costs]"*, he also recognises that in *Blind SA*, *"the pressing need for effective relief in the form of the section 13A deeming provision was accepted as necessary"*,[21] and that his *"stance toward section 13A has ... not changed since this Court's judgment in September 2022"*.[22] Importantly, he expressly states that he *"do[es] not oppose the grant of an order that section 13A continue to be of force and effect pending the enactment of the CAB."*[23]

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[20] *Blind SA* at para 53
[21] President's answering affidavit, para 22
[22] President's answering affidavit, para 23
[23] President's answering affidavit, para 21. The President adds that he *"would have no standing to oppose such an order"*, providing no legal authority for this proposition (at para 21).

27.2 None of the other respondents has filed any document or communicated in any way to suggest that they oppose the relief sought by Blind SA.

28 Of course, before granting any relief of the type sought, this Court must satisfy itself that it has the power to grant such an order, and that it would be just and equitable in the circumstances for such supplementary relief to be granted. In what follows immediately below, we deal with both issues in turn, submitting that this Court can and should grant the relief sought, invoking its powers in terms of sections 172(1)(b) and 173 of the Constitution.

This Court has the power to vary its own orders in the manner sought

29 In *Speaker of the National Assembly v Land Access Movement of South Africa*,[24] this Court confirmed the principle *"that courts do have the discretion to vary their orders, albeit that this discretion must be exercised sparingly."* In a number of cases, this Court has exercised such discretion to extend periods of suspension (of orders of invalidity) in circumstances where Parliament has failed timeously to cure constitutional defects.[25] This Court has also recognised that its power to extend a period of suspension may only be used before the expiry of the suspension period; an expired period of suspension may not be revived.[26]

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[24] *Speaker of the National Assembly and Another v Movement of South Africa and Others* 2019 (6) SA 568 (CC) at para 25

[25] See, for example, *Acting Speaker of the National Assembly v Teddy Bear Clinic for Abused Children and Another* [2015] ZACC 16; 2015 (10) BCLR 1129 (CC), and the cases that followed in its wake considering the various factors identified in para 12 of that judgment. These include, for example, *Minister of Justice and Correctional Services v Ramuhovhi and Others* [2019] ZACC 44; 2020 (3) BCLR 300 (CC) at para 9; and *Electoral Commission of South Africa v Speaker of the National Assembly and Others* [2018] ZACC 46; 2019 (3) BCLR 289 (CC) at paras 69 – 70.

[26] *Zondi 2* at para 43

30 In *Ex parte Minister of Home Affairs*, this Court had to determine whether it could vary an earlier order in circumstances where a period of suspension had long since expired, leaving behind a somewhat uncertain – and inadequate – legal framework. In that context, this Court recognised that it *"has the power, through s 172(1)(b) [of the Constitution], to order supplementary just and equitable relief to provide [legal] certainty"*.[27] The Court explained:[28]

> *"As stated, this court cannot revive statutory provisions after the lapsing of the period of suspension. But there is nothing in our law that precludes us from ordering amplified just and equitable relief to supplement the 2017 order. An amplification of para 4 by adding a modified version of the invalid paras (b) and (d) of s 34(1) is not a reading-in or severance of an existing statutory provision following upon a declaration of their invalidity. Instead, it is a free-standing judicial remedy in terms of s 172(1)(b)."*

31 Accordingly, this Court has the power to grant the type of order sought in prayer 2 of the notice of motion: the reading-in of section 13A, previously read in by this Court in *Blind SA* as an interim measure, but this time for as long as it takes for Parliament's chosen remedy – section 19D and the definitions on which it relies – to be enacted and come into force.

32 Alternatively, based on the recognition in *Economic Freedom Fighters II*[29] that *"[t]he power to grant a just and equitable order is so wide and flexible that it allows courts to formulate an order that does not follow prayers in the notice of motion*

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[27] At para 39
[28] At para 40
[29] *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC) at para 211

or some other pleading", this Court could read in the provisions of proposed new section 19D, and the definitions on which it relies.

The grant of the supplementary relief sought would be just and equitable

33 In *Hoërskool Ermelo*,[30] this Court dismissed an appeal against a decision of the Supreme Court of Appeal that had upheld an appeal against a decision of the full court that the language policy of the school in question had been lawfully altered. The effect of this Court's dismissal of the appeal meant that *"the language policy the interim committee [appointed by the Head of Department of Education of the province of Mpumalanga] devised is void and has no legal consequences."*[31]

34 This Court, however, also held that *"[t]he facts of the case … call for the making of further orders that are just and equitable"*:[32]

> *"In the present matter, it is just and equitable to all concerned that the school governing body be directed to reconsider the school language policy in the light of the considerations set out in this judgment. These considerations are underpinned by an understanding of the power to determine language policy in terms of section 6(2) of the Schools Act as informed by the peremptory provisions of section 29(2) of the Constitution."*[33]

35 Of particular relevance here is the basis upon which this relief was granted:[34]

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[30] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) at paras 96 and 97
[31] At para 94
[32] At para 95
[33] At para 98
[34] At paras 96 and 97 (footnotes omitted and emphasis added)

"The power to make such an order derives from section 172(1)(b) of the Constitution. First, section 172(1)(a) requires a court, when deciding a constitutional matter within its power, to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. Section 172(1)(b) of the Constitution provides that when this Court decides a constitutional matter within its power it 'may make any order that is just and equitable'. The litmus test will be whether considerations of justice and equity in a particular case dictate that the order be made. In other words the order must be fair and just within the context of a particular dispute."

"It is clear that section 172(1)(b) confers wide remedial powers on a competent court adjudicating a constitutional matter. The remedial power envisaged in section 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under section 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements."

36 In the context of this particular dispute, this Court has already found that certain provisions of the Copyright Act are constitutionally invalid. It provided relief that, in its view, was just and equitable at the time. But circumstances have changed. Two years after judgment was handed down in *Blind SA*, the interim reading-in remedy has fallen away, without the constitutional defect having been cured, leaving behind an unclear legal framework, and delaying accession to the Marrakesh VIP Treaty indefinitely.

37 In many ways, people with visual and print disabilities once again find themselves being held hostage by concerns relating to the constitutionality of provisions of

the CAB that deal with important but unrelated issues. The very reason for first approaching this Court – to secure relief outside of the seemingly never-ending legislative process – has now been thwarted. The order granted by this Court in Blind SA is no longer effective; people's rights have not been vindicated.[35]

38 The facts of this case, we submit, *"call for the making of further orders that are just and equitable".*

38.1 Due to no fault of their own, persons with visual and print disabilities are now worse off than they were when section 13A was in force. A remedy that has left them in this position is not just and equitable.

38.2 This Court has held that *"[c]ourt orders must not only grant effective relief, they must be clear and certain in their operation."*[36] The substantive order sought would provide the necessary clarity and certainty.

38.3 It would be unjust to make persons with visual and print disabilities wait an indeterminate period of time to see if Parliament's cure for the constitutional defect is indeed enacted and brought into force, or – as has happened – gets delayed once again.

38.4 There is no just basis upon which South Africa's accession to the Marrakesh VIP Treaty can be delayed any further, with over 11 years

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[35] See *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para 69
[36] *Ex parte Minister of Home Affairs* at para 38

having passed since the international agreement was adopted, and over eight since it came into force.

39 We submit that – at the very least – it would be just and equitable effectively to resuscitate section 13A, and keep it in place for as long as it is still required. Alternatively, this Court may find that what is truly just and equitable in the circumstances is to put Parliament's chosen legislative solution in place, which would have come into force immediately upon publication had the CAB not been referred for a determination of the constitutionality of unrelated sections.

COSTS

40 The general rule regarding costs in constitutional matters involving a private party and the state is that a successful private party *"should have its costs paid by the state, and if unsuccessful, each party should pay its own costs."*[37] However, an unsuccessful private party will not be protected against an adverse costs award in circumstances where the litigation *"is frivolous or vexatious, or in any other way manifestly inappropriate"*.[38]

41 There is nothing frivolous, vexatious, or in any other way manifestly inappropriate about Blind SA's application, having been brought after the organisation and its attorneys had sought – but ultimately failed – to get the President to act timeously. At the time this application was brought, some seven months after the CAB had

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[37] *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC) at para 43
[38] At para 24

been sent passed by Parliament, the President had yet to make any decision contemplated by section 79(4) of the Constitution.

42 Once the President had taken his decision, a while after the 24-month period of suspension had already expired, the need for the application remained, albeit that Blind SA could no longer pursue the relief sought in prayers 2 and 3 of the original notice of motion. Importantly, Blind SA wasted no time in dealing with the impact of the President's decision on the relief originally sought, filing a supplementary affidavit urgently to prevent any party from being prejudiced.

43 In such circumstances, there would be no basis for this Court to saddle Blind SA with a costs order should this application be dismissed for any reason. But should the relief sought in prayers 1 and 2 of the amended notice of motion (or similar) be granted, the President should be ordered to pay Blind SA's costs, including the costs of two counsel, just as the Minister of Trade, Industry and Competition was ordered to pay the applicant's costs in Blind SA.[39]

44 The only issue on costs left to consider is the question of the scale, should the President be ordered to pay Blind SA's costs, as we submit he should. In *Mkhatshwa v Mkhatshwa*,[40] this Court recognised that a punitive costs award may be granted not only to punish vexatious litigation:

> *"The primary underlying purpose of any costs award is to minimise the extent to which a successful litigant will be out of pocket as a result of litigation that*

[39] See para 111 of the judgment, which – we submit – applies to the President in this case.
[40] *Mkhatshwa and Others v Mkhatshwa and Others* 2021 (5) SA 447 (CC) at para 20 (footnotes omitted and emphasis added)

she or he should not have had to endure. Indeed, this Court has recognised that costs orders often do not even achieve this objective, and fall short of assisting the successful litigant in fully recovering her or his expenses. It follows that, at times, it may be just and equitable to award costs on a punitive scale, not just to punish vexatious litigation, but also to assist the successful litigant in recouping their often substantial expenses."

45 We accept, as we must, that *"punitive costs orders are not frequently made, and exceptional circumstances must exist before they are warranted."*[41] But we do so mindful that this Court has also held – in the context of ordering personal costs awards – that a *"higher duty is imposed on public litigants, as the Constitution's principal agents, to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights."* This *"emanates from the Constitution itself, since the Constitution regulates all public power, and public officials are required to act in accordance with the law and the Constitution."*[42]

46 There are troubling aspects to the manner in which the President made a decision in terms of section 79(4) of the Constitution, rushed his referral of the CAB, sought to explain (in answer) why he took so long to make a decision on the CAB's fate, and sought to mulct Blind SA in costs, including the costs of three counsel.

46.1 We submit that it should be of particular concern to this Court that the President did not feel constrained – in any manner or form – by the then looming expiry of the 24-month period of suspension, and the practical consequences and implications for the rights of persons with visual and

[41] See, for example, *Ex parte Minister of Home Affairs* at paras 55 – 92
[42] At para 95

print disabilities should that period expire without the constitutional defect in the Copyright Act being cured.

46.2 Moreover, at no point did the President make it clear, prior to expiry of the 24-month period of suspension, that he was in all likelihood not going to be in a position to make his decision in time. Had he advised the parties in *Blind SA* that this may well be the case, one or more of them could have approached this Court for appropriate relief prior to the expiry of the period of suspension.

46.3 On the President's own version, his referral of the CAB to this Court was rushed, strongly suggesting that – but for the initiation of these legal proceedings – the referral would have taken longer. The President's affidavit in CCT 306/24, of which only a small part responds to Blind SA's affidavit in that case, effectively serves to lay out the basis for his referral. In substance, the President appears to be making out his case in reply.

46.4 The reasons advanced by the President for not prioritising the CAB do not withstand scrutiny. It is not true that only Bills dealing with electoral matters were prioritised,[43] and it is not true that the President held off on making important decisions about Bills in the period between the 29 May 2024 elections on the one hand, and his election as President on 14 June 2024 and/or the finalisation of his Cabinet on 30 June 2024 on the other.[44]

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[43] Replying affidavit, paras 25 – 26
[44] Replying affidavit, paras 27 – 28

46.5 The President's basis for seeking a costs order against Blind SA appears to flow from a misunderstanding about the nature of the relief still pursued in this case, as well as a failure to appreciate that his referral of the CAB to this Court did not, and in fact could not, address Blind SA's concerns arising from the expiry of the period of suspension and the concurrent lapse of section 13A.

47 With all of these concerns in mind, we submit that it would be just and equitable in the circumstances for this Court to direct the President to pay Blind SA's costs on the attorney and own client scale.

CONCLUSION

48 In the result, Blind SA prays for an order in terms of the amended notice of motion.

JONATHAN BERGER

MPHO RASIVHETSHELE

Counsel for Blind SA

Chambers, Sandton

6 November 2024

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