

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT:300/24

In the matter between:

BLIND SA **Applicant**

And

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA **First Respondent**

SPEAKER OF THE NATIONAL ASSEMBLY **Second Respondent**

CHAIRPERSON OF THE NATIONAL COUNCIL **Third Respondent**

**MINISTER OF TRADE, INDUSTRY & COMPETITION
OF PROVINCES** **Fourth Respondent**

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

FILING NOTICE

DOCUMENT: **FIRST RESPONDENT'S PRACTICE NOTE AND HEADS OF ARGUMENT**

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PROVINCES** Third Respondent

MINISTER OF TRADE, INDUSTRY AND COMPETITION Fourth Respondent

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

FIRST RESPONDENT'S PRACTICE NOTE

1. NATURE OF THE PROCEEDINGS

- 1.1. This is a direct access application brought on an urgent basis in which Blind SA seeks relief following the coming into effect of the constitutional invalidity of sections 6 and 7 of the Copyright Act, 1978 on 21 September 2024.

- 1.2. On 21 September 2022, this Court declared sections 6 and 7 of the Copyright Act unconstitutional, suspended the declaration of invalidity for 24 months and read-in a new section 13A into the Copyright Act for the duration of the period of suspension. Blind SA prays that the Court grant just and equitable relief by reading-in section 13A into the Copyright Act pending the promulgation of a new Act that cures the constitutional defect.

2. **ISSUES THAT WILL BE ARGUED**

- 2.1. The First Respondent does not oppose the relief sought in the amended notice of motion.
- 2.2. The First Respondent will oppose and argue against the punitive costs order sought against the First Respondent.

3. **SUMMARY OF THE FIRST RESPONDENT'S ARGUMENT**

- 3.1. The First Respondent accepts that the reading in section 13A of the Copyright Act gives effect to the Marrakesh Treaty and to South Africa's constitutional obligations toward people who are visually and print impaired.
- 3.2. Parliament has proposed section 19D of the Copyright Amendment Bill, B13F-2017 (**CAB**) as the legislative cure to the constitutional invalidity of sections 6 and 7 of the Copyright Act. The CAB has not been assented to nor signed by the President and is subject to the Referral proceedings before this Court under case number CCT 306/24.
- 3.3. The First Respondent accepts that the lacuna in the law since 21 September 2024 cannot continue indefinitely and that an interim remedy is required to enable visual and print-impaired people to access copyrighted works.

- 3.4. The First Respondent will argue that the Applicant has introduced a new case in reply, in alleging that the President did not prioritise the CAB and the PPB. This case was not pleaded or foreshadowed in the founding affidavit, and the averments ought to be struck from the replying affidavit.

4. **PORTIONS OF THE RECORD NECESSARY TO DETERMINE THE MATTER**

- 4.1. The complete record is necessary to determine the two issues before the court.

5. **ESTIMATED DURATION OF ARGUMENT**

- 5.1. The applicant will need about 40 minutes to make its submissions in this case.

6. **LIST OF AUTHORITIES ON WHICH PARTICULAR RELIANCE WILL BE PLACED**

- 6.1. *Acting Speaker of the National Assembly v Teddy Bear Clinic for Abused Children and Another* 2015 (10) BCLR 1129 (CC)
- 6.2. *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC)
- 6.3. *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC)
- 6.4. *Ex Parte Minister of Home Affairs and Others; In re Lawyers for Human Rights v Minister of Home Affairs and Others* 2024 (1) BCLR 70 (CC)
- 6.5. *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC)

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FIRST RESPONDENT'S HEADS OF ARGUMENT

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A. INTRODUCTION

1. Blind SA brought a direct access application to the Constitutional Court on an urgent basis.
2. Blind SA abandoned the relief sought prayers 2 and 3 of its original notice of motion,¹ and filed an amended notice of motion dated 31 October 2024,² seeking the following, instead:

“2...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.”

3. The President abides the relief sought in prayers 1 and 2 relating to urgency and as set out above but opposes the costs order sought in prayer 3.
4. In the light of the amended relief sought by the Applicant, there are two issues before this Court. First, the only substantive issue this Court is seized with is whether

¹ Blind SA originally sought orders that the President contravened section 79(4) of the Constitution, and an order directing the President to and sign the CAB within 10 days of the date of any order granted by this Court.

² See amended notice of motion at “**RA2**” to the replying affidavit.

pending the enactment of legislation that will cure the unconstitutionality of section sections 6 and 7 of the Copyright Act, read with section 23, the Copyright Act shall be deemed to include a new section 13A, as was crafted by this Court in paragraph 6 of its order of September 2022. Section 19D of the Copyright Amendment Bill, B13F-2017 (**CAB**) is the section in the draft legislation aimed to cure this constitutional defect central to Blind SA's complaint.

5. Second, this Court must also in the exercise of its discretion determine what an appropriate costs order is.

B THESE HEADS

6. Since the President abides the substantive relief sought, these heads are brief. They address the material facts and why the costs order sought is not appropriate.

C THE RELEVANT FACTS

7. During 2021, Blind SA instituted litigation in the High Court seeking *inter alia* a declaration that the Copyright Act was unconstitutional to the extent that it failed to make provision for exceptions that would enable access to literary works to people with visual and print disabilities.
8. On 21 September 2022, in confirmation proceedings, this Court declared provisions of the Copyright Act unconstitutional and suspended the declaration of invalidity for

24 months to allow Parliament to correct the defect as described above (**2022 Court Order**).³ In relevant part, paragraphs 2 and 5 of the order read as follows:

“2. It is declared that sections 6 and 7, read with section 23 of the Copyright Act 98 of 1978, are unconstitutional, invalid and inconsistent with the rights of persons with visual and print disabilities, as set out in sections 9(3), 10, 16(1)(b), 29(1) and 30 of the Constitution, to the extent that these provisions of the Copyright Act 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.

5. The declaration of unconstitutionality in paragraphs 1 and 2 takes effect from the date of this judgment and is suspended for a period of 24 months to enable Parliament to cure the defect in the Copyright Act giving rise to its invalidity.”

9. In paragraph 6 of the 2022 Court Order, the Court read in a new section 13A to the Copyright Act to provide effective relief pending the enactment and commencement of legislation that cures the constitutional defect.
10. The President is not a party to the 2022 Court Order.
11. On 20 September 2024, the 24 month-period set out in the 2022 Court Order lapsed and the remedy in paragraph 6 of the order, reading in section 13A to the Copyright Act, lapsed. As of 21 September 2024, the suspension of the declaration of

³ The suspension of the order of constitutional invalidity is specifically provided for in section 172(1)(b)(ii) of the Constitution.

constitutional invalidity is lifted and section 13A is not deemed to be incorporated into the Copyright Act.

12. The lacuna resulting in the lapsing of the 2022 Court Order has resulted in an omission in the Copyright Act that must be addressed.
13. The CAB and Performers' Protection Bill, B24F-2016 (**PBB**) were first published for public comment on 27 July 2015. Thereafter the Bills were introduced in the National Assembly, and tagged as section 75 Bills not affecting the provinces on 16 May 2017. Parliament passed the CAB and PPB on 29 March 2019 and the Bills were referred to the President for assent.
14. After considering the Bills, on 16 June 2020, the President referred the Bills back to Parliament in terms of section 79(1) of the Constitution under cover of a letter raising both procedural and substantive reservations on the CAB.⁴
15. In reconsidering the Bills, Parliament addressed the two procedural reservations on the Bills (correct tagging of the Bills and the public participation process) raised by the President and also dealt with one of the President's substantive reservations (the extent of the Minister's delegated powers).⁵

⁴ Annexure A to the Referral.

⁵ Referral, President's Affidavit at paras 17 and 29 – 31.

16. On 29 February 2024, Parliament completed its process and assented to the Bill. On or about 2 March 2024, the CAB and the PPB were presented to the Office of the President for assent.
17. As is apparent from the Ex Parte Referral, the President is not satisfied that all the reservations on the CAB and the PPB were adequately addressed. For this reason, on 14 October 2024, the reservations that remained were referred to the Constitutional Court under sections 79(4)(b) and 84(2)(c) of the Constitution and are subject to the Ex Parte Referral application under case CCT 306/24 (the Referral).
18. No substantive orders are sought against the President. He was joined to this application because he referred the Bills to this Court for a decision on their constitutionality in October 2024, after this Court's declaration of invalidity lapsed.
19. Since no relief is sought against the President these heads address only why the new case made by Blind SA in reply must be struck and why an appropriate costs order is one in terms of the *Biowatch* principle.

D THE APPLICANT'S NEW CASE

20. While the Applicant has abandoned its relief in terms of section 79(4) and its pursuit of an order directing that the President assent to the CAB and PPB, it makes a new

case in reply that the President did not prioritise the processing of the Bills and ought to have done so.⁶

21. The Applicant's case was vastly different in its founding affidavit. It alleged only that the President failed to make a timeous decision on whether to assent to the Bills, and that a timeous decision is one that, in its view, would have predated the lapsing of the suspended declaration of invalidity.⁷ There was no assertion that the Bills were not prioritised, coupled with the extensive factual allegations in reply as to why in the Applicant's view this was not the case. Given *litis contestatio*, the President cannot at this stage join issue with the new case made in reply.
22. It is trite that a litigant must make out its case in the Founding Affidavit and cannot confront the other party to the litigation with a new case not canvassed and not foreshadowed.⁸ In *My Vote Counts NPC v Speaker of the National Assembly and Others*⁹ this Court held that:

"[177] Some of the contentions made by the applicant rather belatedly – in written and oral argument – also illustrate the inherent problem with the procedure adopted by it. Two examples are the "challenge" on PAIA's limitation as to the definition of "record" and its exemptions on confidentiality. Parliament was never called upon to meet a case of that nature. We have no idea what it might have said on the constitutional

⁶ Blind SA Replying Affidavit at para 15.2

⁷ Blind SA Founding Affidavit at paras 30,32,45 and 47

⁸ *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635F-636A

⁹ 2016 (1) SA 132 (CC)

validity of these issues. It is, in any event, imperative that a litigant should make out its case in its founding affidavit, and certainly not belatedly in argument. The exception, of course, is that a point that has not been raised in the affidavits may only be argued or determined by a court if it is legal in nature, foreshadowed in the pleaded case and does not cause prejudice to the other party.

23. It was because Blind SA alleged that the President did not act timeously, that the answering affidavit went into great detail on the timeline underpinning the decision to refer the Bills to this Court in terms of section 79(4)(b)¹⁰ – the history to the section 79(4) referral,¹¹ the circumstances that underpinned the consideration of these Bills,¹² the preparation of the Critical Memorandum,¹³ the instructions to the State Attorney and the national elections,¹⁴ legal advice taken, and the referral itself.¹⁵
24. In explaining why he had not delayed in referring the Bills to this Court the President explained, which Bills were prioritised in the period immediately before the 2024 national elections.¹⁶ However, his office set out fully the attention it gave the CAB and the PPB. There was no allegation in the Applicant’s founding papers that the President failed to prioritise the Bills. This was only raised in reply, with the Applicant

¹⁰ President’s Answering Affidavit at paras 28 – 35

¹¹ Id at paras 36 – 38

¹² Id at paras 39 – 42

¹³ Id at paras 43 – 48

¹⁴ Id at paras 49 – 53

¹⁵ Id at paras 54 – 58

¹⁶ Id at para 42

going into great factual detail and belatedly so on why the Bills ought to have been prioritised.

25. In essence the averment that the Bills were not prioritised is an attempt to introduce a new case because it was not pleaded or foreshadowed in the founding affidavit, and it is not supported by the evidence.
26. Further, the President has had no opportunity to respond to these averments and thus Blind SA must stand and fall by the averments in its Founding Affidavit. While it is permissible for Blind SA to address why the Bills ought to have been considered with other Bills during the period leading up to the election, it could not raise the new case that the Bills were not prioritised.
27. The foundation of its case, and the case the President was called upon to answer was that he delayed in referring the matter to this Court, not that he failed to prioritise the consideration of the Bills. The latter case is not before this Court and these averments ought to be struck from the replying affidavit.
28. Nevertheless, and for the sake of completion, a schedule of the Bills considered by the President during the relevant period is attached as “**A**” to these heads of argument.

E COSTS

29. The President opposes the punitive costs order sought by Blind SA.

30. The President also does not persist in seeking costs from Blind SA and, following the amended notice of motion, is of the view that the *Biowatch* principle applies.¹⁷

31. In *Mkhatshwa and Others v Mkhatshwa and Others*¹⁸ this Court said the following on the circumstances in which a punitive costs order would be granted:

[21] Generally speaking, punitive costs orders are not frequently made, and exceptional circumstances must exist before they are warranted. In SARB, this Court affirmed the following guiding principles in relation to punitive costs, elucidated by the Labour Appeal Court in Plastic Converters Association of SA:

“The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium.”

32. An applicant for punitive costs is thus required to demonstrate and plead with certainty the vexatious and reprehensible conduct it is alleged forms the basis of the order sought. No such facts exist and no case has been made here for such punitive costs order.

33. In addition there is simply no basis for the order sought. This is so because:

¹⁷ *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC) at para 43.

¹⁸ 2021 (5) SA 447 (CC).

- 33.1. In terms of the amended relief no order is sought that the President failed to fulfil a constitutional obligation. This relief has been expressly abandoned.
 - 33.2. The President's abides by this Court's decision on the continued application of section 13A pending the promulgation of the required legislative amendments to the Copyright Act.
 - 33.3. The President properly applied his mind to the provisions of the Bills and did so within a reasonable period of time. There is no case before this Court that he did not. Once again, the relief on this score has been abandoned.
 - 33.4. The President reasonably opposed the relief sought in prayer 2 of the original, unamended notice of motion and was compelled to oppose these proceedings – prior to the amendment – because of the allegations that his office contravened the Constitution.
 - 33.5. The President only opposes the costs order sought.
34. Taken in totality, the appropriate costs order in the circumstances is that each party pay its own costs, taking into account the *Biowatch* principle.

F THE APPROPRIATE RELIEF

35. Blind SA is correct that the President does not oppose the relief sought in prayer 2 of the amended notice of motion.¹⁹
36. The Court has reiterated the importance of just and equitable relief²⁰ and, in the case of suspensions of constitutional invalidity, the balancing exercise needed to ensure that orders handed down by the Court offer appropriate relief to the litigants in the case and those similarly situated, while at the same time exercising deference to the legislature who are best suited to cure the constitutional defect in an Act.²¹
37. Taken together the Court takes into account guiding tenets of justice and equity that include factors such as the need to ensure both a degree of certainty and a degree of flexibility when carving an appropriate remedy, balancing the need to ensure fulfilling its role to vindicate rights that were violated, while at the same time remaining conscious of the need not to overstep the constitutional domain of the legislature and the executive.

¹⁹ Blind SA HOA at para 27

²⁰ Section 172(1)(b) and 173 of the Constitution; *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC) at para 211; and *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) at para 96:

“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.”

²¹ *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 (3) SA 936 par 8; *Zondi v MEC for Traditional and Local Government Affairs & Others* 2005 (3) SA 589 (CC)

38. The 24-month period of suspension lapsed on 21 September 2024 and the period of suspension is now incapable of extension.²² People with visual and print impairments obtained effective relief as a result of section 13A of the Copyright Act for 24 months – this benefit and vindication of their rights has fallen away. This Court confirmed in *Minister of Social Development* that despite the Court’s general remedial powers under sections 172(1)(b)(ii) and 173 of the Constitution:²³

“The applicants can no longer seek an extension of an existing suspension period. Instead, they apply for a revival of an expired suspension order and a temporary reversal of the declaration of invalidity. A court does not have the power to grant such an application.”

39. In the present case, unlike the circumstances in *Minister of Social Development*, the Applicants have proposed an alternative just and equitable remedy. The breadth of the Court’s constitutional authority under section 172(1)(b) is explained in *Ex Parte Minister of Home Affairs*.²⁴ This Court, therefore, may justifiably decide to grant the remedy sought in prayer 2 of the Blind SA amended notice of motion.

40. Under the broad ambit of just and equitable relief, the Court is not confined to the relief set out in the amended notice of motion but may, in this case, have regard to section 19D of the CAB, which is not subject to this Court’s scrutiny in the Referral.

²² *Acting Speaker of the National Assembly v Teddy Bear Clinic for Abused Children and Another* 2015 (10) BCLR 1129 (CC) at para 12.

²³ *Minister of Social Development and Others, Ex Parte* 2006 (4) SA 309 (CC) at para 27; On the finality of court orders, see *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A).

²⁴ *Ex Parte Minister of Home Affairs and Others; In re Lawyers for Human Rights v Minister of Home Affairs and Others* 2024 (1) BCLR 70 (CC) at para 40, “... *But there is nothing in our law that precludes us from ordering amplified just and equitable relief to supplement the 2017 order ... it is a free-standing judicial remedy in terms of s 172(1)(b)*”.

Section 19D is the product of the legislature's incorporation of the Marrakesh Treaty into the new copyright regime provided for in the CAB.

41. It is for this reason that the President does not oppose the Blind SA application and, given the need for just and equitable relief, this Court is empowered grant the relief sought. Given that the President does not contest the relief, it will abide by the order framed by the Court.

G CONCLUSION

42. In the light of the above, the President abides the order sought by the Applicant regarding the relief sought in respect of section 13A.
43. The President contends that no case has been made for a punitive costs order and that there should be no order as to costs.

N Bawa SC

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13 November 2024

FRST RESPONDENT'S LIST OF AUTHORITIES

1. *Acting Speaker of the National Assembly v Teddy Bear Clinic for Abused Children and Another* 2015 (10) BCLR 1129 (CC)
2. *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC)
3. *Chief Lesapo v North West Agricultural Bank* 1999 12 BCLR 1420 (CC)
4. *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 (3) SA 936
5. *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A)
6. *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC)
7. *Ex Parte Minister of Home Affairs and Others; In re Lawyers for Human Rights v Minister of Home Affairs and Others* 2024 (1) BCLR 70 (CC)
8. *Ex Parte Minister of Social Development and Others* 2006 (4) SA 309 (CC)
9. *Executive Council, Western Cape Legislature & Others v President, Republic of South Africa & Others* 1995 (4) SA 877 (CC)
10. *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC)
11. *Jayiya v Member of the Executive Council for Welfare, Eastern Cape* 2004 2 SA 611 (SCA)
12. *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2007 (1) BCLR 47 (CC)

13. *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC)
14. *Mkhatshwa and Others v Mkhatshwa and Others* 2021 (5) SA 447 (CC)
15. *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC)
16. *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC)
17. *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)
18. *Zondi v MEC for Traditional and Local Government Affairs & Others* 2005 (3) SA 589 (CC)