

THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case Number: CCT320/21

In the matter between:

BLIND SA

Applicant

And

**MINISTER OF TRADE, INDUSTRY AND
COMPETITION**

First Respondent

**MINISTER OF INTERNATIONAL RELATIONS
AND COOPERATION**

Second Respondent

SPEAKER OF THE NATIONAL ASSEMBLY

Third Respondent

**CHAIRPERSON OF THE NATIONAL COUNCIL
OF PROVINCES**

Fourth Respondent

**PRESIDENT OF THE REPUBLIC OF SOUTH
AFRICA**

Fifth Respondent

and

OWEN DEAN

First Amicus Curiae

MEDIA MONITORING AFRICA GROUP

Second Amicus Curiae

INTERNATIONAL COMMISSION OF JURISTS

Third Amicus Curiae

**FIRST AMICUS CURIAE'S RESPONSE TO THE THIRD AMICUS
CURIAE'S SUBMISSIONS**

INTRODUCTION

- 1 On 30 March 2022, the third *amicus curiae*, International Commission of Jurists (“**ICJ**”), filed written submissions.
- 2 Among others, ICJ’s submissions trenchantly criticise the first *amicus curiae* (“**Professor Dean**”), and accuse him of appearing to “*pick and choose in applying the relevant international law regimes*”.¹ The criticism of Professor Dean is unwarranted and unfair.
- 3 In this response to ICJ, we make two related submissions.
 - 3.1 First, we show that Professor Dean has not undermined the framework of international human rights law. Rather, his proposed remedy proceeds from an acceptance of the importance of that framework. The remedy is predicated on the premise that the drafters of the Marrakesh Treaty were cognisant of international human rights law and gave full effect thereto in drafting the treaty.
 - 3.2 Second, we note that ICJ has not impugned any aspect of that remedy, or of Professor Dean’s critique of the reading-in of proposed section 19D.

¹ Third *Amicus Curiae*’s written submissions, page 4, para 9

THERE IS NO DEBATE ON INTERNATIONAL HUMAN RIGHTS LAW

4 ICJ notes that the applicant and various *amici* rely on international human rights law to impugn provisions of the Copyright Act,² and admonishes Professor Dean for “*entirely omitting reference to applicable international human rights law*”, while relying on copyright law and international trade law to oppose the remedy sought by the applicant.³

5 In this respect ICJ is incorrect, at both the level of fact and of principle.

5.1 First, as a matter of fact, Professor Dean does make reference to international human rights law. In particular, he makes extensive reference, in his founding affidavit and in the main heads of argument, to the Marrakesh Treaty – the primary international instrument on which this application is based, and through which the rights of print-disabled persons are balanced against copyright entitlements.

5.2 Second, as a matter of principle, it would be inappropriate for Professor Dean, as an *amicus curiae* admitted due to his expertise in intellectual property law, to engage in a comprehensive traversal of international human rights law –

² Third *Amicus Curiae*'s written submissions, page 4, para 6

³ Third *Amicus Curiae*'s written submissions, page 4, para 7

particularly where there is unanimity amongst all the parties as to the deficiencies in the current regime and the need to provide an appropriate exception in favour of print-disabled persons. The applicant, Professor Dean, and the remaining *amici* all propound that the current copyright regime is deficient in respect of access for print-disabled persons. No purpose is served by belabouring the point. On the contrary, Professor Dean would be failing in his duty as an *amicus curiae*, were he to re-state the accepted basis of the application. Instead, Professor Dean appropriately seeks to assist the Court, in identifying the source of, and crafting an appropriate remedy for, that deficiency.⁴

6 For that reason, we submit the criticism of Professor Dean's failure to traverse a range of international human rights instruments is unwarranted.

PROFESSOR DEAN'S PROPOSED REMEDY IS NOT IMPUGNED

7 ICJ also misconstrues Professor Dean's position. It says Professor Dean argues that it "*is incumbent upon States in terms of international law to mechanically replicate verbatim treaty provisions in domestic instruments*". But it later acknowledges that Professor Dean actually

⁴ In *In Re: Certain Amicus Curiae Applications; Minister of Health v Treatment Action Campaign 2002* (5) SA 713 (CC), this Court said an *amicus curiae's* duty is "*to provide cogent and helpful submissions to assist the court. The amicus must not repeat arguments already made but must raise new contentions...*"

says, in his founding affidavit, that as “*a general proposition, it is advisable and prudent that domestic laws seeking to give effect to obligations in terms of an international treaty should be worded as closely as possible to the corresponding wording of the treaty*”.⁵ His proposition relates to a practical rule of thumb for draftsmen seeking to incorporate treaty law in domestic legislation.

- 8 The import of that statement is not that States can never legislate beyond the minimum requirements of an international treaty. On the contrary, Professor Dean acknowledges and accepts that States have a wide scope to choose the basis on which they incorporate treaty obligations into domestic law.
- 9 But this case is not concerned with the breadth of the Legislature’s power to craft a broad copyright exception for disabled people. Here, a case has been made out only that the domestic copyright regime does not grant adequate access to blind, visually-impaired and print-disabled persons, and the Court is called upon to craft an appropriate remedy for that deficiency.
- 10 In this regard, Professor Dean submits that it is appropriate for the Court to procure the incorporation into the domestic regime of provisions that mirror those of the Marrakesh Treaty as closely as possible. That avoids

⁵ Third *Amicus Curiae*’s written submissions, page 45, para 94

the Court stepping into the shoes of Parliament to enact legislation, via reading-in, that is contentious, overly broad, fails to comply with the Marrakesh Treaty, and is in any event not self-executing.

- 11 Put differently, we submit that Professor Dean's proposed remedy is appropriate not because it mechanically replicates the Marrakesh Treaty, but because it entails the least legislative interference on the part of this Court, whilst complying with international law, and with the Constitution. By contrast, the remedy proposed by the applicant achieves none of these objectives.⁶
- 12 Were the Court to procure the adoption of Professor Dean's proposed regulation, or to read-in provisions in similar terms, that would in no way prevent or preclude the state from enacting future provisions (by regulation or legislation) to give effect to international or domestic obligations beyond the scope of this case.⁷
- 13 While ICJ dedicates a significant portion of its submissions to engaging with Professor Dean's submissions, it advances no basis for concluding that the remedy for which he contends is unconstitutional or contravenes international law. Similarly, it fails to deal with any of the comprehensive submissions, in the main heads of argument filed on

⁶ In this regard, see our submissions in our main heads of argument, page 30-33, para 71-76

⁷ In this regard, see our submissions in response to the Second *Amicus Curiae's* submissions, page 9-11, para 15-20

Professor Dean's behalf, as to why reading-in the proposed section 19D is inappropriate and ineffective, and would not give effect to the framework of the Marrakesh Treaty. While it suggests that Professor Dean's non-referral to international human rights instruments "*results in a misinterpretation of South Africa's international law obligations*", it does not say how.

- 14 Ultimately, ICJ's critique appears aimed only at Professor Dean's failure to "*refer to or consider*" certain instruments that it identifies. But, as we have shown, the import of international human rights law on the rights of blind, visually-impaired and otherwise print-disabled people is not contentious, and it is inappropriate then for an *amicus curiae* to deal with that matter.
- 15 We agree that international law instruments must be interpreted as a whole, and in light of international human rights law. We submit that Professor Dean's approach is fully cognisant of, and in line with, that requirement.

CONCLUSION

- 16 ICJ offers an excursus on international human rights law which Professor Dean does not dispute.
- 17 In this matter, however, an application has been brought to give effect to rights of blind, visually-impaired and print-disabled persons. The

applicant has asked the Court to read-in a controversial, overly broad and non-self-executing provision of draft legislation, which does not achieve the applicant's primary objective – conformity with the copyright exception in the Marrakesh Treaty, and which seeks a broad exception for which no substantiation has been advanced in the papers.

- 18 In the circumstances, we persist in the submission, in our main heads of argument and in our response to the second *amicus curiae*, that reading in section 19D would not be just and equitable, and that the Court ought to favour Professor Dean's approach.

ISABEL GOODMAN
DANIEL LINDE
Chambers, Sandton
13 April 2022

First Amicus Curiae's Additional Table of Authorities

In Re: Certain Amicus Curiae Applications; Minister of Health v Treatment Action Campaign 2002 (5) SA 713 (CC)