IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA Case No.: 1233/22

Case No. *a quo*: 2101/21

In the matter between:

THE HAZE CLUB (PTY) LTD (Reg No: 2019/096535/07)	First Appellant
NEIL TRISTAN LIDDELL (ID No: 840113 5136 085)	Second Appellant
BEN ADAM VAN HOUTEN (ID No: 871119 5020 080)	Third Appellant

and

MINISTER OF POLICE	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Third Respondent
MINISTER OF TRADE, INDUSTRY AND COMPETITION	Fourth Respondent
THE REGIONAL MAGISTRATE, WYNBERG	Fifth Respondent
MINISTER OF HEALTH	Sixth Respondent

and

FIELDS OF GREEN FOR ALL NPO	*Amicus Curiae*

APPELLANTS' FILING SHEET

PLEASE TAKE NOTICE THAT: the Appellants hereby deliver their Heads of Argument in Response to Written Submissions by *Amicus Curiae*.

Dated at Howick on this the 8th day of September 2023.

CULLINAN & ASSOCIATES INC.
Per: **Paul-Michael Keichel**
Appellants' Attorneys

18A Ascot Rd
Kenilworth
Cape Town
Tel: (021) 671 7002
Email: paul-michael@greencounsel.co.za
& ricky@greencounsel.co.za
Ref: Keichel/Stone/T054-001
C/O: **HONEY ATTORNEYS**
Honey Chambers, Northridge Mall
Kenneth Kaunda Road
BLOEMFONNTEIN, 9301
Email: jessica@honeyinc.co.za
Tel: (051) 403 6679

TO: **THE REGISTRAR**
SUPREME COURT OF APPEAL
BLOEMFONTEIN

AND TO: **THE STATE ATTORNEY**
Per: **L. Golding**
Attorneys for the First to Third Respondents
4th Floor, 22 Long Street
CAPE TOWN
Ref: 328/21/P10
Email: LGolding@justice.gov.za
& CMallum@justiice.gov.za
C/O **NELISE CRONJE** (State Attorney Bloemfontein)
FEDSURE BUILDING - Charlotte Maxeke Street
Bloemfontein
CoCronje@justice.gov.za
051 4004312

AND TO: **SJF ATTORNEYS INC**
Attorneys for the *Amicus Curiae*
17 MacGillivray Road
Glenferness, Midrand, Johannesburg
Tel: (011) 448-9600
Ref: SB/LIT/FGA
Email: Stefan@attorney420.co.za
c/o **CALLIS ATTORNEYS INC**
12 Milner Road
Waverley
Bloemfontein
Tel: 051 447 1741
Email: litigation@callisattorneys.co.za
Ref: JA CALLIS/h1/B3AF001

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FIELDS OF GREEN FOR ALL NPO	*Amicus Curiae*

APPELLANTS' HEADS OF ARGUMENT IN RESPONSE TO WRITTEN SUBMISSIONS BY *AMICUS CURIAE*

I THE ARGUMENT ADVANCED BY THE *AMICUS CURIAE*

1. The argument advanced by the *amicus curiae* may be interpreted narrowly or broadly.

2. The **narrow** interpretation is that it is irrational to permit private use and possession of cannabis, but to criminalise Grow Clubs. This seems to be the argument advanced in the concluding section of their Heads of Argument. The *amicus curiae* does not seek wider relief than the Appellants, and therefore presumably accepts the constitutional infringement is confined to Grow Clubs.

3. To the extent the *amicus curiae* advances that narrow argument, the Appellants wholeheartedly support it. While it is framed as attacking the Drugs Act on the basis of irrationality, it aligns with the arguments the Appellants advance for why the Respondents have failed to justify the limitation. The argument, in essence, is that it is irrational to allow private use and possession, but then to make it practically impossible for people to obtain cannabis legally and safely.

4. However, at times the *amicus curiae* seems to advance a **broader** argument (Amicus Curiae's Heads of Argument at paras 18-22). That version of the argument appears to run like this:

   4.1. Following *Prince III*, preventing private use is not a legitimate purpose to underscore prohibiting possession or cultivation of cannabis;

   4.2. Preventing private use is also not a legitimate purpose to justify the continued criminalisation of dealing;

   4.3. There is no other legitimate purpose served by criminalising dealing;

   4.4. Therefore, criminalising any dealing in cannabis – including commercial dealing – is irrational.

5. It is not for the Appellants to support or oppose that argument, because it is not the Appellants' argument.

6. This case is not about the legalisation of commercial dealing in cannabis.

7. It is about whether the state respondents have justified the admitted (and unadmitted) limitations of rights arising from prosecuting the Second and Third Appellants for running a Grow Club. The orders the Appellants seek would not decriminalise all dealing in cannabis. They would only decriminalise use, possession, cultivation and consequently a narrow interpretation of what is *'dealing'*, if it occurs in the strict confines of the Grow Club model. They would not require decriminalisation of commercial dealing.

8. It is for this reason that the Appellants support the narrow interpretation of the argument advanced by the *amicus*, rather than the broad one. The remainder of these submissions expand on the Appellant's response to the broader argument (in the event that that is what the *amicus* advances).

II THE BROAD ARGUMENT IS UNNECESSARY

9. To repeat, the Appellants contend only that criminalising possession, use, cultivation and dealing in the Grow Club model unjustifiably limits constitutional rights. Permitting Grow Clubs does not require the state to permit commercial dealing. Just as decriminalising private use and possession does not require full decriminalisation, decriminalising Grow Clubs does not require decriminalising commercial dealing.

10. This is true both as a matter of constitutional law, and of policy.

11. As a matter of constitutional law:

    11.1. If Grow Clubs are available, that does not mean that the State may not criminalise commercial dealing, because those who wish to access cannabis through a Grow Club or to cultivate cannabis otherwise personally and privately can do so legally. It will be a question of fact whether any regulatory regime that permits Grow Clubs still limits

constitutional rights for outlawing commercial dealing.

11.2. The Constitutional Court recognised in *Prince III* that there remain reasons that justify the criminalisation of commercial dealing,[1] *albeit* that the *amicus* may be correct that those reasons have been eroded as a matter of logic. It is the Appellants' view that the justification advanced for criminalising Grow Clubs may be unpersuasive, while the justifications for criminalising commercial dealing – if that case is ever brought – may be reasonable and justifiable. This Court does not need to decide whether other constitutional attacks could be made on commercial dealing because that issue is not before this Court.

12. As a matter of <u>policy</u>:

12.1. A country can permit regulated grow clubs, but not commercial dealing. That is the position in, for example, Uruguay[2] and Malta.[3] Other countries – like Spain – tacitly permit Grow Clubs by allowing personal possession and shared consumption, without formally regulating them.[4] As the *amicus* points out, other countries – such as the USA and Canada – have opted for full decriminalisation and/or legalisation as well as

[1] *Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton* [2018] ZACC 30; 2018 (10) BCLR 1220 (CC); 2018 (6) SA 393 (CC); 2019 (1) SACR 14 (CC) at para 88 ("*Dealing in cannabis is a serious problem in this country and the prohibition of dealing in cannabis is a justifiable limitation of the right to privacy.*")

[2] In Uruguay, following the adoption of a legal framework in December 2013 for cannabis social clubs (**CSC**), Grow Clubs are legal and completely regulated by government in terms of Decree 120/014 (Regulation of Law 19.172). The Institute for the Regulation and Control of Cannabis (IRCCA) is the government organisation that oversees the cannabis operations in Uruguay and the CSCs need to go through a series of steps to be granted authorisation to operate. CSCs are non-profit organisations and they are not constituted as business entities. Membership of CSCs is open to adult Uruguayan nationals, who must be registered with IRCCA in order to legally obtain cannabis. There are only three ways of acquiring cannabis in Uruguay: it can be home grown; obtained through a cannabis social club; or purchased in a pharmacy. The three ways of access are mutually exclusive in that individuals registered as self-growers cannot become members of CSCs nor become registered to purchase cannabis at pharmacies. Individuals cannot belong to more than one CSC at a time. The law establishes: (i) a maximum amount of cannabis per club member; (ii) a minimum and maximum number of club members; and (iii) a maximum number of flowered plants permitted in the club premises at any given time. See T Decorte *et al*, *Regulating Cannabis Social Clubs: A comparative analysis of legal and self-regulatory practices in Spain, Belgium and Uruguay*, International Journal of Drug Policy 43, 2017

[3] Malta legalised CSCs in 2021 as the only means of access to cannabis other than home growing. See V Belackova et al 'Cannabis Social Clubs in Contemporary Legalization Reforms: Talking Consumption Sites and Social Justice' (2023) 45(6) *Clinical Therapeutics* 551 at 553.

[4] Decorte (n 2) at 46.

regulation. But countries can draw the regulatory line in different places depending on their own unique constitutional requirements and socio-economic circumstances.

12.2. There may be policy reasons to permit full decriminalisation – including reducing underground markets and increased tax revenue. But there are also policy reasons to decriminalise only Grow Clubs – easier and tighter regulation and limiting access. In short, decriminalising Grow Clubs does not necessitate decriminalising commercial dealing.

13. It is not for this Court to determine South Africa's drug policy. Its task in this appeal is far more modest – to determine whether the Appellants have demonstrated that criminalising Grow Clubs limits fundamental rights, and then to assess whether the state has justified those limitations. The Appellants have discharged their burden, whereas the state has not – this being supported by both the narrow and broader arguments of the *amicus*.

III CONCLUSION

14. The Appellants agree with the *amicus curiae*'s narrow argument that the current criminalisation of Grow Clubs is irrational. As the *amicus* puts it: "*what you can do for yourself lawfully (grow cannabis) is rendered unlawful, merely by dint of the fact that someone else does it for you*."[5] That is precisely right. The link between Grow Clubs and private use, possession and cultivation is so strong that it cannot be constitutional to permit the one but not the other.

15. But, to the extent that the broad argument is advanced, it is a novel case for the decriminalisation of commercial dealing and one that varies from the Appellants' case. As principle and comparative practice show, it is possible to permit Grow Clubs without allowing commercial dealing and, so, it is the Appellants' submission that this Court should grant them their relief, even if it rejects the

[5] *Amicus* Heads of Argument at para 35.

broader argument of the *amicus*.

KARRISHA PILLAY SC

MICHAEL BISHOP

RENEÉ GRAHAM

Counsel for the Appellants

Chambers, Cape Town

8 September 2023