IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

BLOEMFONTEIN

SCA Case No: 1233/2022

High Court Case No: 2101/2021

In the matter between:

THE HAZE CLUB (PTY) LTD	*First Appellant*
NEIL TRISTAN LIDDELL	*Second Appellant*
BEN ADAM VAN HOUTEN	*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*
SOUTH AFRICAN HEALTH PRODUCTS REGULATORY AUTHORITY	*Fifth Respondent*
MINISTER OF HEALTH	*Sixth Respondent*
and	
FIELDS OF GREEN FOR ALL NPO	*Amicus Curiae*

WRITTEN SUBMISSIONS BY *AMICUS CURIAE*

INTRODUCTION

1. It is acknowledged that:

1.1 provided that it is in the public interest and not arbitrary or capricious, regulation of the use and possession of cannabis, for the benefit and protection both of the persons using it and of the community at large, is to be both expected and welcomed; and

1.2 there is a legitimate governmental interest in preventing harm caused by the abuse of harmful, dependence-producing drugs and the suppression of illicit trafficking in substances, the use of which the government has (legitimately) sought to criminalise by virtue of their status as harmful, dependence-producing drugs.

2. In **Minister of Justice & Constitutional Dev v Prince 2018 (6) SA 393 (CC) ("Prince 3")**, the Constitutional Court held that the statutory criminalisation of the cultivation, possession and use of cannabis was unconstitutional and struck down the relevant statutory prohibitions, to the extent that they made the use or possession of cannabis in private by an adult person for his or her own consumption in private, a criminal offence.

3. Importantly, the court in **Prince 3** confined its enquiry to the impact of the impugned provisions upon the right to privacy enshrined in section 14 of the Constitution.

4. The court *a quo*, *in casu*, directed most of its consideration to the impact which the presently impugned provisions may have upon the right to

privacy, notwithstanding having recognised that *"(T)he application is brought on various grounds which inter alia include… the limitations of the constitutional rights to equality, bodily and psychological integrity, freedom of trade and profession and human dignity"*.[1] It dealt with those other grounds only fleetingly.

5. The court *a quo* thus sought to use **Prince 3** as the yardstick against which to measure the constitutionality of the presently impugned provisions. It is respectfully submitted that, in so doing, the court *a quo* erred.

6. This error, with respect, was foundational to the court *a quo's* findings because it considered, as a matter of principle, that the commercial and transactional nature of the "*grow club*" model took it beyond the realms of privacy, thus justifying its prohibition because of the constitutional court's recognition that "(*D)ealing in cannabis is a serious problem in this country…*".[2]

7. However, the court *a quo,* having accepted that **Prince 3** was decided within the narrow context of the right to privacy, ought similarly to have recognised that the constitutional court's refusal to permit dealing in cannabis, was similarly premised upon the conclusion that the right to privacy was not unjustifiably limited by a prohibition on dealing. Considered

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[1] *Judgment para [3]*
[2] *Prince 3 at para [88]*

in context, the constitutional court did not find that dealing in cannabis was impermissible – it merely found that "*the prohibition of dealing in cannabis is a justifiable limitation of the right to privacy*" (Emphasis added).[3] The constitutional court in **Prince 3** *did not* consider whether a prohibition on dealing could survive a constitutional challenge based on other grounds, particularly the ground that a blanket prohibition in dealing causes the impugned provisions to fail the general rationality requirement, stemming from the Rule of Law in section 1 of the constitution.

8. Therefore, whilst the appellants approach the enquiry from the perspective of a rights violation and direct their submissions at an enquiry into the reasonableness requirement contained in section 36, the *amicus* approaches the enquiry from a different perspective that, although having been raised on the papers before the court *a quo*,[4] has not been meaningfully adverted to in written argument – the rationality requirement stemming from section 1 of the constitution.

9. The submissions of the *amicus* will accordingly be confined to this topic.

[3] *Prince 3 at para [88]*
[4] *See, for example, founding affidavit pCB57, line 1-10; Replying affidavit pCB217 line 14-16*

THE RULE OF LAW: THE PRINCIPLES OF LEGALITY, RATIONALITY AND THE PROHIBITION OF ARBITRARINESS

10. South Africa is a democratic state founded on *inter alia,* the supremacy of the constitution and the Rule of Law.

    See: Section 1(c) of the Constitution of the Republic of South Africa Act 108 of 1996

11. The exercise of all Public Power must comply with the Constitution and the doctrine of legality, which is part of the Rule of Law. This applies equally to legislation.

    See: Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC) at para 49; Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) at para 20; Albutt v Centre for the Study of Violence and Reconciliation and Others 2010 (3) SA 293 (CC)

12. According to this doctrine, all legislation and changes to existing law, even when they do not limit a right in the Bill of Rights, or do not otherwise conflict with the Constitution, must serve a legitimate government purpose and must be capable of contributing something towards promoting that purpose. A

rational relationship must therefore exist between the impugned provisions and a legitimate government purpose.

13. As the constitutional court has observed, the idea of the constitutional state presupposes a system whose operation can be rationally tested.

See S v Makwanyane and Another 1995 (3) SA 391 (CC) at para [156]

14. Rationality is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and is therefore unlawful.

15. It is submitted that the impugned provisions fail this basic rationality requirement.

16. Prior to the legalisation of cannabis for private use arising from **Prince 3**, it could fairly be assumed that the governmental purpose in prohibiting "*dealing*" in cannabis was to prevent the *use* and *possession* of cannabis.

17. This was confirmed in **Prince v President, Cape Law Society and Others 2002 (2) SA 794 (CC)** ("**Prince 2")**, where the following was stated:

"[52] … The government thus has a clear interest in prohibiting the abuse of harmful drugs. Our international obligations too require us to fight that war subject to our Constitution.

[53] The government objective in prohibiting the use and possession of cannabis arises from the belief that its abuse may cause psychological and physical harm. On the evidence of the experts on both sides, it is common cause that cannabis is a harmful drug. However, such harm is cumulative and dose-related. Uncontrolled use of cannabis may lead to the very harm that the legislation seeks to prevent..." [Emphasis added].[5]

18. The governmental purpose in preventing *dealing* was thus recognised as going hand-in-hand with the governmental purpose in preventing *use* and *possession.* It was considered acceptable to prohibit dealing because, in so doing, one would ultimately prevent use and possession and thus, ultimately, abuse.

19. But this recognition of the State's governmental purpose has become outdated as use and possession, at least in private, is no longer unlawful. If, as was stated in **Prince 2**, the governmental purpose is to prevent use and possession and thereby to prevent abuse, that purpose can no longer

[5] *In **Prince 2** the court was split 5:4. In the minority judgment it was said that the medical evidence in that case showed that there was a level of consumption of cannabis which was not harmful but it was not known what that level was.*

be legitimate because the constitutional court in **Prince 3** expressly permitted use and possession, at least in private.

20. One may therefore ask rhetorically: "*if use and possession of cannabis is a legitimate constitutional right, then what is the purpose in prohibiting any form of dealing in cannabis which would give effect to that right?*'. It is submitted that the irrationality of permitting use and possession but prohibiting the means by which someone may lawfully acquire cannabis in order to use or possess it, is self-evident.

21. If the governmental purpose identified in **Prince 2** can no longer serve as a legitimate governmental purpose in prohibiting dealing in cannabis, then what is the legitimate governmental purpose in prohibiting dealing?

22. It is submitted that the State has failed to identify any other governmental purpose, other than to prohibit use and possession. But if use and possession is lawful, then nothing is achieved by prohibiting dealing. Indeed, the mere fact that this court is confronted with a debate about whether cultivation of cannabis is rendered unlawful, merely by dint of the fact that someone is cultivating on someone else's behalf and not for their own purposes, demonstrates the arbitrariness of the distinction and, thus, the irrationality of the prohibition on dealing. The question should not be whether cultivation on behalf of someone else constitutes dealing. The question should be, "*if <u>that</u> constitutes dealing, then what is wrong with*

dealing?" The distinction between dealing and mere cultivation for private use in this sense, with respect, is inappropriately artificial.

23. Another factor to bear in mind is that the constitutional court in **Prince 3** emphasised, based on the position taken by the South African Central Drug Authority, that "*an assessment of available data in other countries indicates, inter alia, that, among alcohol, tobacco and cannabis 'alcohol causes the most individual and social harm . . .".*

24. Why then, should dealing in cannabis be prohibited when dealing in other substances such as cigarettes and tobacco (which are equally if not more harmful than cannabis), is permitted? It is submitted that the difference in treatment between cannabis and these other substances can no longer be justified with reference to a governmental purpose designed to prevent possession and use and, ultimately, abuse.

25. What is more, the distinction drawn by the court *a quo* between the permissible cultivation of cannabis for oneself and cultivation for someone else, is not explained. It is unhelpful to observe that cultivation for someone else is not "*private use*" and that it is suggestive of "*dealing*" when the very question to determine is whether dealing (in this fashion) ought to be prohibited at all. A prohibition cannot exist for its own sake. It must achieve a clearly defined governmental purpose. The governmental purpose previously identified can no longer be relied upon in light of the judgment in

Prince 3 and it is not clear what other governmental purpose is now relied upon by the State.

26. And yet, even if it may be said that a prohibition on dealing *does,* in some respects, give effect to a legitimate governmental purpose, then the prohibition would still fall to be struck out because the impugned provisions are overbroad and the professed purpose could be achieved through less restrictive means.

See: Prince 2 paras [35] and [36]

27. It can hardly be argued, with respect, that *regulation* of cannabis dealing is not less restrictive than a blanket prohibition and the respondents' submissions regarding the cost of regulation cannot, with respect, be sustained, not only in light of the common cause fact that the legislature is already in the process of considering legislation which seeks to regulate dealing in cannabis but also it is simply untenable to suggest that the State should be entitled to jail people for doing something, simply because it does not have the capacity to regulate how it should be done.

28. A less restrictive, but equally effective alternative method or methods exist to achieve the purpose of the impugned provisions. There are any number of alternative models of regulation which permit dealing in varying degrees

and which are employed in other jurisdictions such as Canada[6] and the United States[7][8], to name a few.

29. By way of illustration:

29.1 Canada has through legislation, legalised the possession, sale and use of cannabis albeit subject to some restrictions.

29.2 The national legislation dealing with the regulation of cannabis is the Cannabis Act S.C. 2018, c. 16, assented on 21 June 2018. However, the Cannabis Act does also provide for provincial legislation to be passed dealing with, *inter alia*, the selling of cannabis.

29.3 The Cannabis Act is extremely thorough in its regulation of the use, possession, selling and distribution of cannabis.

29.4 It highlights the point that a well fleshed out regulatory approach to the selling and distribution of cannabis is far better than a blanket prohibition that leads to people having to resort to black market sellers.

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[6] Cannabis Act S.C. 2018, c. 16, assented on 21 June 2018. See Division 1,2 and 3 of the Act.
[7] Medicinal and Adult-Use Cannabis Regulation and Safety Act which regulates cannabis in California. See chapters 1,2,3,5,6,7,8,9,10,11,12,13,14,15,16,18,19,20,22 and 23 of the Act.
[8] Marihuana Regulation and Taxation Act which regulates cannabis in New York. See Article 1,4,5 and 6 of the Act.

29.5 The advantages of providing comprehensive regulatory mechanisms for the possession and distribution of cannabis can be seen from the purpose behind the Cannabis Act:-

"***Purpose***

7 The purpose of this Act is to protect public health and public safety and, in particular, to

(a) protect the health of young persons by restricting their access to cannabis;

(b) protect young persons and others from inducements to use cannabis;

(c) provide for the licit production of cannabis to reduce illicit activities in relation to cannabis;

(d) deter illicit activities in relation to cannabis through appropriate sanctions and enforcement measures;

(e) reduce the burden on the criminal justice system in relation to cannabis;

(f) provide access to a quality-controlled supply of cannabis; and

(g) enhance public awareness of the health risks associated with cannabis use."

29.6 The parts in the Act dealing with the monitoring of cannabis[9] and the ability for the minister to order information relating to cannabis from sellers illustrates the advantages that can be achieved by

[9] Part 6.

having legal vendors. Moreover, the sections regulating what types of cannabis are permitted serve to prevent harmful substances from being mixed with cannabis[10] (something that is not possible without distribution being legalised as authorities have no control over the content of cannabis being produced and sold on the illicit market).

30. The State's professed intention to curb trafficking in illicit drugs, is also, with respect, unhelpful as it presupposes that the sale of cannabis ought to be "illicit", in the first place. It is submitted that, in fact, it is the continued classification of the sale of cannabis as "illicit" which causes the very harm which the legislation in question, is designed to prevent. The evidence on record is suggestive of a significant public harm reduction in permitting and monitoring lawful trade in cannabis, when compared to the consequences of large scale illicit cannabis markets.

CONCLUSION

31. Read in context, **Prince 3** did not find that dealing in cannabis was impermissible – it merely found that "*the prohibition of dealing in cannabis is a justifiable limitation of the right to privacy*" (Emphasis added).[11] The constitutional court in **Prince 3** *did not* consider whether a prohibition on dealing could survive a constitutional challenge based on other grounds.

[10] Section 33 and 34.
[11] *Prince 3 at para [88]*

32. Prior to **Prince 3**, the constitutional court accepted that there was a legitimate governmental purpose in prohibiting the use and possession of cannabis and a prohibition on dealing served the same purpose. That governmental purpose can no longer be relied upon because the law now permits possession and use, albeit in private.

33. The State has not identified any other legitimate governmental purpose which may be served by the continued ban on "dealing" in cannabis.

34. If the law permits possession, use and cultivation of cannabis, albeit in private, then there can be no rational purpose in continuing to ban dealing in cannabis, at least insofar as the "Grow Club" model is concerned.

35. The present manner of distinction between cultivation, use and possession for private use, which is lawful and "dealing" which is unlawful, is inappropriately arbitrary. This is illustrated by the fact that, 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.

36. The continued overbroad, blanket prohibition on dealing causes the impugned provisions to fail the general rationality requirement, stemming from the Rule of Law in section 1 of the constitution.

Dated at Sandton on 10 August 2023.

D MAHON

K RAMCHARETHAR

Counsel for *Amicus Curiae*
Chambers
Sandton

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA CASE NO: 1233/2022
wee CASE NO: 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

AMICUS CURIAE'S CHRONOLOGY

DATE	EVENT	REFERENCE
18 September 2018	• Judgment handed down in **Minister of Justice and Constitutional Development v Prince** 2018 (6) SA 393 (CC) ("**Prince 3**").	Core bundle, Volume 1: Answering affidavit, p CB92, par 15.
End of 2018	• Having considered the Prince 3 judgment, the Second Appellant started the Grow Club Model.	Core bundle, Volume 1: Founding affidavit, p CB23-CB24, par 44-48.
7 August 2020	• Cannabis for Private Purposes Bill as introduced in the National Assembly (proposed section 75); explanatory summary of Bill and prior notice of its introduction published in Government Gazette. 43595 of 7 August 2020.	Core bundle, Volume 2: Answering affidavit, Annexure AA12 p CB163-CB187.
13 October 2020	• Members of the South African Police Service ("**SAPS**) entered the premises of the First Appellant. • SAPS arrested the Second and Third Appellants. • The Second and Third Appellants were: o taken to the Grassy Park police station; and o charged with possessing and/or dealing in a dependence producing substance and/or a dangerous or undesirable dependence producing substance.	Core bundle, Volume 1: Founding affidavit, p CB18, par 31-33 read with Core Bundle Volume 1: Answering affidavit, p CB119, par 90 and Core bundle, Volume 2: Answering affidavit, p CB142- CB143, par 170-171 and Volume 2: Charge sheet, p 291-292.
15 October 2020	• The Second and Third Appellants appeared in the Wynberg Magistrates Court and bail was granted. • The case was postponed to 26 January 2021.	Core bundle, Volume 1: Founding affidavit, p CB19, par 35 read with Core bundle, Volume 2: Answering affidavit, p CB143, par 174.
26 January 2021	• The case was postponed to 22 April 2021.	Core bundle, Volume 1: Founding affidavit, p CB19, par 36 read with Core bundle, Volume 2: Answering affidavit, p CB143, par 174.

2 February 2021	• The Appellants instituted the application in the Western Cape High Court.	Core bundle, Volume 1: Notice of motion, p CB1-CB84 read with Core bundle, Volume 1: Answering affidavit, p CB103, par 41.
19 April 2021	• Order granted by the Western Cape High Court in respect of Part A of the application, staying the criminal proceedings in the Wynberg Magistrates' Court under case number 4/866/2020, pending the final determination of the relief set out in Part B of the application.	Volume 2: Order dated 19 April 2021, p 202-203.
10 May 2021	• Amended Notice of Motion filed.	Volume 2: Amended notice .of motion, p 208-214.
26 May 2021	• Johan Smit deposed to answering affidavit on behalf of the1Fitst to Third Respondents.	Core bundle. Volume 1: Answering Affidavit, p CB l62 read with Core Bundle Volume 2: Replying Affidavit, p CB 190, par 3.
6 June 2022	• Hearing of Part B of the application in the Western Cape High Court.	Volume 2:_Order dated 17 February 2022, p 355.
29 August 2022	• Judgment handed down by the Western Cape High Court dismissing the application with no order made in respect of costs.	Volume 2: Judgment, p 357-387.
19 September 2022	• Application for leave to appeal filed by the Appellants seeking leave only against the order dismissing the alternative relief.	Volume 3: Notice of application for leave to appeal, p 388-398.
4 November 2022	• Judgment handed down granting leave to appeal against the order dismissing the alternative relief to the Supreme Court of Appeal.	Volume 3: Judgment: leave to appeal, p 399- 404.
5 December 2022	Notice of appeal filed in the Supreme Court of Appeal.	Volume 3: Notice of appeal, p 405 -410.

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

BLOEMFONTEIN

SCA Case No: 1233/2022

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BEN ADAM VAN HOUTEN	*Third Appellant*
and	
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MINISTER OF TRADE, INDUSTRY AND COMPETITION	*Fourth Respondent*
SOUTH AFRICAN HEALTH PRODUCTS REGULATORY AUTHORITY	*Fifth Respondent*
MINISTER OF HEALTH	*Sixth Respondent*
and	
FIELDS OF GREEN FOR ALL NPO	*Amicus Curiae*

AMICUS CURIAE **LIST OF AUTHORITIES**

Authorities to which specific reference will be made in argument are indicated with an asterisk.

1. *Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC)

2. Albutt v Centre for the Study of Violence and Reconciliation and Others 2010 (3) SA 293 (CC)

3. *Minister of Justice & Constitutional Dev v Prince 2018 (6) SA 393 (CC)

4. *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC)

5. *Prince v President, Cape Law Society and Others 2002 (2) SA 794 (CC)

6. S v Makwanyane and Another 1995 (3) SA 391 (CC)

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(BLOEMFONTEIN)

SCA CASE NO: 1233/2022
WCHC CASE NO: 2101/2021

In the matter between:

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

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
SOUTH AFRICAN HEALTH PRODUCTS REGULATORY AUTHORITY	Fifth Respondent
MINISTER OF HEALTH	Sixth Respondent

AMICUS CURIAE'S COUNSEL CERTIFICATE

I hereby certify that as far as I am aware there has been compliance with the Rules 10 and 10A of the Rules of the Supreme Court of Appeal.

D MAHON

Chambers
Sandton
10 July 2023