

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA Case No. **1233/2022**

In the matter between:

THE HAZE CLUB (PTY) LTD <i>(Registration No. 2019/096535/07)</i>	First Appellant
NEIL TRISTAN LIDDELL <i>(ID No. 840113 5136 085)</i>	Second Appellant
BEN ADAM VAN HOUTEN <i>(ID No. 871119 5020 080)</i>	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
FIELDS OF GREEN FOR ALL NPO	<i>Amicus Curiae</i>

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SIGNED AND DATED AT CAPE TOWN THIS 4th DAY OF JANUARY 2024.

OFFICE OF THE STATE ATTORNEY

Per: Louis Golding

First to third respondents' attorneys

22 Long Street

CAPE TOWN

Ref.: Mr L Golding (2388/21/P10)

Email: LGolding@justice.gov.za

CMallum@justice.gov.za

Tel.: 021 441 9200

084 294 3366

Care of:

OFFICE OF THE STATE ATTORNEY

Fedsure Building

Charlotte Maxeke Street

BLOEMFONTEIN

Email: CoCronje@justice.gov.za

Tel. 051 4004312

082 412 4412

TO: **THE REGISTRAR**
Supreme Court of Appeal
BLOEMFONTEIN

AND TO: **CULLINAN & ASSOCIATES INC**
Appellants' attorneys
18A Ascot Road
Kenilworth
CAPE TOWN
Ref.: Keichel/Stone/T054-001
Email: Paul-Michael@greencounsel.co.za
Ricky@greencounsel.co.za
Tel.: 021 671 7002
076 273 8019

Care of:
Honey Attorneys
Honey Chambers
Kenneth Kaunda Road
BLOEMFONTEIN
Email: Jessica@honeyinc.co.za
Tel.: 051 403 6679

AND TO: **SJF ATTORNEYS**
Amicus curiae's attorneys
17 MacGillivray Road
Glenferness
MIDRAND
Ref.: SB/LIT/FGA
Email: Stefan@attorney420.co.za
Tel.: 011 448 9600

Care of:
Callis Attorneys Inc
12 Milner Road
Waverley
BLOEMFONTEIN
Ref.: JA CALLIS/h1/B3AF001
Email: liti@callisattorneys.co.za
Tel.: 051 447 1741

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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
FIELDS OF GREEN FOR ALL NPO	<i>Amicus Curiae</i>

**FIRST TO THIRD RESPONDENTS' SUBMISSIONS IN RESPONSE TO THE
AMICUS CURIAE'S HEADS OF ARGUMENT**

A. INTRODUCTION

1. The main argument advanced by the *amicus curiae* ('the *amicus*') proceeds as follows:
 - 1.1. Prior to the decision of the Constitutional Court in *Prince (III)*¹ decriminalising the use of cannabis by adult persons in private and their cultivation and possession of cannabis for such use, the governmental purpose of criminalising dealing in cannabis was to prevent the use and possession of cannabis.²
 - 1.2. Upon such decriminalisation, preventing the use and possession of cannabis could no longer serve as the governmental purpose of criminalising dealing in cannabis.³
 - 1.3. As the Government has not identified any other purpose of criminalising dealing in cannabis, the continued criminalisation of dealing in cannabis is irrational and hence unconstitutional because it is not rationally related to a legitimate governmental purpose.⁴
2. A second argument by the *amicus* related to the first is that the post *Prince (III)* legal dispensation draws an unjustified distinction between dealing in harmful substances, the possession and use of all of which are lawful, namely dealing in alcohol and tobacco, which is lawful, and dealing in cannabis, which is unlawful.⁵
3. A third argument by the *amicus* is that the post *Prince (III)* legal dispensation draws an arbitrary, unjustifiable and hence unconstitutional distinction between the cultivation and possession of cannabis by adult persons for use by them in private, which is lawful, and

¹ *Minister of Justice and Constitutional Development and Others v Prince* 2018 (6) SA 393 (CC) ('*Prince (III)*').

² *Amicus*' Heads of Argument ('HoA') paras 16 and 32.

³ *Amicus*' HoA paras 21 and 33.

⁴ *Amicus*' HoA paras 22, 34 and 34, read with para 12.

⁵ *Amicus*' HoA paras 23 and 24.

the cultivation and possession of cannabis by persons for use by others in private, which is unlawful.⁶

4. A fourth argument by the *amicus* is that even if the prohibition on dealing in cannabis in the post *Prince (III)* legal dispensation gives effect to a legitimate governmental purpose, the prohibition is nevertheless unconstitutional because it is overbroad in that such purpose could be given effect to by the less restrictive means of regulating dealing in cannabis such as is done in Canada.⁷
5. In what follows, we raise an *in limine* objection to widening of the case at this juncture. Thereafter, in the alternative, we deal with each of the *amicus*' arguments in turn.

B. *IN LIMINE: WIDENING THE CASE AT THIS JUNCTURE WOULD NOT BE IN THE INTERESTS OF JUSTICE*

6. As explained in paras 1 to 3 of our main heads of argument:

6.1. in this Court, as in the High Court, the appellants seek, in effect, declarations in terms of s 172(1)(a) of the Constitution of the Republic of South Africa, 1996 ('the Constitution') that s 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 ('the Drugs Act') read with Part III of Schedule 2 and s 5(b) of the Drugs Act read with the definition of '*deal in*' in s 1(1) and with Part III of Schedule 2, as amended by the Constitutional Court in *Prince (III)*, which criminalise, respectively, (a) the possession of cannabis for their own consumption by an adult person, through the '*grow club model*' referred to in para 1 of Part B and (b) the cultivation of cannabis for personal consumption by an adult person,

⁶ *Amicus*' HoA paras 22, 25 and 35.

⁷ *Amicus*' HoA paras 26 and 29.

through the '*grow club model*', are inconsistent with the Constitution and invalid; and

- 6.2. more specifically and consequently, this Court is called upon to determine whether ss 4(b) and 5(b) of the Drugs Act, insofar as they criminalise the possession and cultivation of cannabis for their own consumption by an adult person, in terms of the '*grow club model*', limit any of the rights in the Bill of Rights in the Constitution on which the appellants rely – and, if they do, whether the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including those listed in ss 36(1)(a) to (e) of the Constitution.
7. As appears from the summary in paras 1 to 4 above of the *amicus*' arguments, all of them challenge the rationality and hence the constitutionality (legality) of the prohibition on dealing in cannabis in the post *Prince (III)* legal dispensation.
8. Given the case made out by the appellants in their notice of motion and the fact that the *amicus* did not seek let alone gain admission as such in the High Court, what the *amicus* is now seeking to do is to expand the case beyond that dealt with in the High Court.
9. In the proceedings in the Constitutional Court in *Prince (III)*, three individuals which that court had permitted to intervene in those proceedings because they were persons accused of cannabis-related offences in other proceedings, supported by the present *amicus*, which that court had refused admission as such, similarly '*sought to rely on rationality and legality to challenge the constitutional validity of the whole criminalisation of cannabis by various statutory provisions*'. The Court however held that '*[i]t would not be in the interests of justice to widen the scope of this matter beyond the right of privacy*

as decided by the High Court' and consequently declined to do so. Among the Court's reasons was the intervening parties could pursue their challenge in their criminal trial.⁸

10. As the papers on both sides in the present appeal and the judgment of the High Court are confined to the appellants' different and far narrower Bill of Rights challenge, permitting the *amicus*' challenge would be inimical to the interests of justice for the following reasons:

10.1. The state respondents will be denied the opportunity to file affidavits dealing with the *amicus*' challenge.

10.2. This Court and the Constitutional Court (if the matter proceeds there) will be denied the benefit of those papers and a judgment by the High Court on the *amicus*' challenge.

10.3. The *amicus*' submissions, if permitted and upheld, will necessitate this Court granting an order in terms of s 172(1)(a) of the Constitution materially different to that sought by the appellants. This shows that, contrary to the binding authority of this Court,⁹ the *amicus* has gone far beyond making submissions regarding the dispute between the parties.

10.4. The *amicus* may institute fresh proceedings of its own challenging the rationality of the prohibition on dealing in cannabis in the post *Prince (III)* legal dispensation on the grounds it has sought to raise in this court.

11. In the alternative to the *in limine* objection, we now address each of the *amicus*' arguments in turn.

⁸ *Prince (III)* paras 6 to 13. See especially para 13.

⁹ *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* 2016 (3) SA 317 (SCA) para 30.

C. THE *AMICUS*' MAIN ARGUMENT: IRRATIONALITY BECAUSE OF THE ABSENCE OF A LEGITIMATE GOVERNMENTAL PURPOSE

12. The *amicus*' main argument is summarised in para 1 above.
13. There are two fundamental difficulties with this argument.
14. The first difficulty arises from the finding of the Constitutional Court in *Prince (III)* that the prohibition of dealing in cannabis is a reasonable and justifiable limitation of the right to privacy because dealing in cannabis is a serious problem in South Africa.¹⁰ The difficulty presented by this finding is that, by necessary implication, the Constitutional Court has found the prohibition is rationally related to combatting the serious problem of dealing in cannabis in South Africa.
15. This implication is a necessary one because, for the following reasons, a legislative provision which the Constitutional Court has found constitutes a reasonable and justifiable limitation on a right in the Bill of Rights, is consistent with the Constitution,¹¹ and both consistency with the Constitution and a positive finding in terms of s 36(1) mean that the provision is rational:
 - 15.1. In *Prince (III)* the Constitutional Court considered whether the prohibition on dealing in s 5(b) of the Drugs Act read with the definition of 'deal in' in s 1(1) constitutes a reasonable and justifiable limitation on the right to privacy.
 - 15.2. In so doing the Constitutional Court engaged in the enquiry mandated by s 36 of the Constitution, which requires that a non-exhaustive¹² list of factors be taken into account in determining whether the limitation of a right entrenched

¹⁰ *Prince (III)* para 88.

¹¹ *Prince (III)* para 40.

¹² *Prince (III)* para 60.

in the Bill of Rights is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. These are (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

- 15.3. As is clear from s 36 itself that part of the enquiry into whether a particular provision constitutes a reasonable and justifiable limitation on a right in the Bill of Rights is whether that provision serves a legitimate government purpose and is rationally related to that purpose.
- 15.4. That encompasses the enquiry mandated by the rationality test for all exercises of public power required by the principle of legality in the Constitution: In *Law Society*¹³ the Constitutional Court affirmed that when making laws, the legislature is constrained to act rationally. It may not act capriciously or arbitrarily. It must only act to achieve a legitimate government purpose. Thus, there must be a rational nexus between the legislative scheme and the pursuit of a legitimate government purpose. The requirement is meant '*to promote the need for governmental action to relate to a defensible vision of the public good*' and '*to enhance the coherence and integrity*' of legislative measures.¹⁴
- 15.5. Importantly for present purposes, in *Law Society* the Constitutional Court also made the point that the factors to be considered in a rights-limitation analysis under s 36(1) of the Constitution include the '*relation between the limitation and its purpose*' (s 36(1)(d) of the Constitution); and explained that '*[t]his is so*

¹³ *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) ('*Law Society*').

¹⁴ *Law Society* para 32.

*because the requirement of rationality is indeed a logical part of the proportionality test. It is self-evident that a measure which is irrational could hardly pass muster as reasonable and justifiable for purposes of restricting a fundamental right.*¹⁵

16. It is therefore not open to the *amicus* to argue that the prohibition on dealing in the Drugs Act, which the Constitutional Court has declared to be a justifiable limitation of the right of privacy, is nevertheless irrational.
17. The second difficulty with the *amicus*' main argument is that it is premised on a mischaracterisation of the purpose of the prohibition on dealing in cannabis. Contrary to what the *amicus asserts*, the governmental purpose of criminalising dealing in cannabis was not solely to prevent the use and possession of cannabis.
18. As the Constitutional Court acknowledged in *Prince(III)*,¹⁶ in *Prince (II)*¹⁷ both the minority and the majority judgments accepted that '*the provisions serve an important governmental purpose in the war against drugs*';¹⁸ the majority added that '*the prohibition against the possession and use of cannabis was part of a worldwide attempt to curb its distribution of which the present government is fully supportive*';¹⁹ and the minority accepted the legitimacy of the broad goals of preventing the abuse of dependence-producing drugs and trafficking in those drugs.²⁰
19. In *Prince (III)* the Constitutional Court made it clear that its decriminalisation of the use of cannabis by adult persons in private and their possession and cultivation of cannabis

¹⁵ *Law Society* para 37.

¹⁶ *Prince (III)* paras 63 and 64.

¹⁷ *Prince v President, Cape Law Society and Others* 2002 (2) SA 794 (CC) ('*Prince (II)*').

¹⁸ *Prince (II)* para 114 (this quotation in *Prince (III)* is from the judgment of the majority).

¹⁹ *Prince (II)* para 118.

²⁰ *Prince (II)* paras 47, 52, 81 and 86.

for such use, did not entail its sanctioning dealing in cannabis. Hence its refusal to confirm the part of the order made by the High Court²¹ which, in effect, would permit the purchase of cannabis by adult persons for use by adult persons in private. As the Constitutional Court explained, ‘[a] *A purchaser of cannabis would be purchasing it from a dealer in cannabis. Therefore, if this court were to confirm the order declaring invalid provisions that prohibit the purchase of cannabis, it would, in effect, be sanctioning dealing in cannabis. This the court cannot do*’.²²

20. When the parts of *Prince (III)* described in paras 18 and 19 above are read together, it is clear that the purpose of Constitutional Court’s confirmation of the prohibition of dealing in cannabis is the legitimate governmental purpose of preventing trafficking in cannabis. We submit the prohibition is rationally related to that purpose.

D. THE *AMICUS*’ SECOND ARGUMENT: AN UNJUSTIFIED DISTINCTION BETWEEN DEALING IN CANNABIS AND DEALING IN ALCOHOL AND TOBACCO

21. As explained in para 2 above, the *amicus*’ second argument is the post *Prince (III)* legal dispensation draws an unjustified distinction between dealing in harmful substances, the possession and use of all of which are lawful, namely dealing in alcohol and tobacco, which is lawful, and dealing in cannabis, which is unlawful.
22. The *amicus*’ contention that prohibition of dealing in cannabis is unjustified, is irreconcilable with the Constitutional Court’s affirmation in *Prince (III)* of the earlier findings of the majority and the minority in *Prince (II)* that preventing trafficking of cannabis is a legitimate governmental purpose.

²¹ As to which, see *Prince (III)* paras 17 and 83.

²² *Prince (III)* para 88.

E. THE *AMICUS*' THIRD ARGUMENT: AN ARBITRARY DISTINCTION BETWEEN CULTIVATING CANNABIS FOR OWN USE AND CULTIVATING CANNABIS FOR USE BY OTHERS

23. As explained in para 3 above, the *amicus*' third argument is the post *Prince (III)* legal dispensation draws an arbitrary, unjustifiable and hence unconstitutional distinction between the cultivation and possession of cannabis by adult persons for use by them in private, which is lawful, and the cultivation and possession of cannabis by persons for use by others in private, which is unlawful.
24. What this argument overlooks is that *Prince (III)* was decided on the basis of the right to privacy in s 14 of the Constitution, more specifically, that '*the right to privacy entitles an adult person to use or cultivate or possess cannabis in private for his or her personal consumption*'.²³ The Constitutional Court's partial invalidation of and readings into the provisions of the Drugs Act and the Medicines Act impugned in that case, were therefore aimed at safeguarding these cannabis-related aspects of the right to privacy. For this reason, to be constitutionally protected, the cultivation of cannabis by an adult person must be done in private for their own use in private. By contrast, the cultivation and possession of cannabis by persons for use by others, whether or not such cultivation occurs in private, is not something done in the '*truly personal realm*' of those involved, but rather in the sphere of '*communal relations and activities*' outside the '*personal space*' of the participants.²⁴

²³ *Prince (III)* para 58.

²⁴ *Prince (III)* para 58, quoting *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) para 31.

F. THE *AMICUS*' FOURTH ARGUMENT: THE PROHIBITION ON DEALING IN CANNABIS IS OVERBROAD

25. As explained in para 4 above, the *amicus*' fourth argument is that even if the prohibition on dealing in cannabis in the post *Prince (III)* legal dispensation gives effect to a legitimate governmental purpose, the prohibition is nevertheless unconstitutional because it is overbroad in that such purpose could be given effect to by the less restrictive means of regulating dealing in cannabis such as is done in Canada.
26. We refer to our dealing with the 'less restrictive means' element of the s 36(1) justification enquiry in paras 94-96 and 104-105 read with para 101 of our main heads of argument and, in particular, to:
- 26.1. the principle that in cases like the present, which concern legal provisions that have been amended by the Constitutional Court to avoid their unconstitutional infringement of a fundamental right, the State must be given a margin of appreciation in relation to whether there are less restrictive means available to achieve the stated purpose; and
- 26.2. the principle of the separation of powers which, in our submission, requires that the Executive and Parliament, and not the courts, should determine whether dealing in cannabis is to be decriminalised, and if so, how it should be regulated.

G. CONCLUSION

27. For the reasons set out above and in our main heads of argument the first to third respondents respectfully persist in asking that this appeal be dismissed.

A M BREITENBACH SC

M ADHIKARI

Counsel for the First to Third Respondents
3 January 2024
Chambers, Cape Town

FIRST TO THIRD RESPONDENTS' SUPPLEMENTARY AUTHORITIES

1. *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC)
2. *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* 2016 (3) SA 317 (SCA)
3. *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC)
4. *Prince v President, Cape Law Society and Others* 2002 (2) SA 794 (CC)

