IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 36/00

In the matter between:

GARRETH ANVER PRINCE **Appellant**

versus

THE PRESIDENT OF THE LAW SOCIETY OF THE CAPE OF GOOD HOPE **First Respondent**

THE LAW SOCIETY OF THE CAPE OF GOOD HOPE **Second Respondent**

THE SECRETARY OF THE LAW SOCIETY OF THE CAPE OF GOOD HOPE **Third Respondent**

THE MINISTER OF JUSTICE **Fourth Respondent**

THE ATTORNEY-GENERAL OF THE CAPE OF GOOD HOPE Fifth Respondent

ADDITIONAL SUPPLEMENTARY WRITTEN SUBMISSIONS

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INTRODUCTION

1. A*The past was pervaded by inequality, authoritarianism and repression. The aspiration of the future is based on what is* A*justifiable in an open and democratic society based on freedom and equality*@*... The relevant provisions of the Constitution must therefore be interpreted so as to give effect to the purpose sought to be advanced by their enactment.*@

Shabalala and others v Attorney General of Transvaal and another 1996 (1) SA 725 (CC) at [26] per Mahomed DP referring to the interim Constitution (as cited in **Appellant=s written submissions** of 16 October 2000 at **para 30.3 thereof**).

2. I have already shown in **Appellant=s written submissions** that the relevant provisions of the Constitution that are required to be interpreted to promote the core values of our Constitution (described as >*human dignity*, *freedom and equality*= in **Government of RSA and others v Grootboom and others 2001 (1) SA 46 (CC)** at [**23**]) are:

2.1 the right to religious freedom and observance (ss 15(1) and 31(1)(a) referred to in **paragraphs 31 в 77** of **Appellant=s written submissions**);

2.2 the right to human dignity (s 10 at **paragraphs 78 в 83 thereof**);

2.3 the right to equality (ss 9(1) and (3) at **paragraphs 84 в 92 thereof**);

2.4 the right to personal autonomy (s 12(2)(b) at **paragraphs 93 в 112 thereof**);

2.5 the right to privacy (s 14 at **paragraphs 93 в 112 thereof**).

3. Appellant seeks the right for himself and other bona fide adult Rastafari to use, possess, cultivate and transport (under such regulation that is considered necessary) cannabis for their religious worship and observances in private.

4. I have already referred the above Honourable Court to the >nature and scope of fundamental rights in general= in **Appellant=s written submissions** (**para 30 thereof),** and the duty incumbent on the above Honourable Court at all stages of the enquiry (including during the limitation analysis) to be guided by the core values of our Constitution as reflected *inter alia* in the following sections: 1(a), 2, 7(1) and (2), 36 and 39(2) of our Constitution. In s 165(2), the courts are specifically enjoined to apply the Constitution >*impartially and without fear, favour or prejudice*=.

5. In **Hoffman v SAA 2001 (1) SA 1 (CC)** above Honourable Court again re-affirmed the supremacy of our Constitution notwithstanding emotive and ill-informed public perceptions that could be present as to what should be permissible in our society. (Examples of such emotive responses can be seen in **Fifth Respondent=s** (A**Respondent=s) Supplementary Answering Affidavit** at inter alia **paragraphs 5, 6.2, 7, 13, 14 and 15.1** and in the **Supporting Affidavit of the Director-General of Health** at **paragraphs 7.8.1 thereof)**. As was held in **Hoffman v SAA** (supra):

>*The constitutional right of the appellant not to be unfairly discriminated against cannot be determined by ill-informed public perceptions of persons with HIV. Nor can it be dictated to by other airlines not subject to our Constitution*= [**36**].

6. Religious rights are amongst the most important of the human rights. Heyns and Brand A**The Constitutional Protection of religious Human Rights in Southern Africa**@ Volume XXXIII, CILSA 2000 emphasise the importance of religious rights and state (at **page 55 thereof**) that religious rights were the first human rights, and were later followed by civil and political rights (the first generation of rights), the socio-political rights (the second generation of rights) and >others= (the third generation of rights).

7. I have already referred to in **Appellant=s written submissions** (**para 30.4 thereof)** that the right to religious freedom and observance cannot be viewed in isolation and must be viewed together with the fundamental rights set out in paragraph 2 above.

In reality, the right to religious freedom and observance and the right to human dignity are intimately entwined, as the right of dignity to which all human beings are entitled, does not exist fully for those individuals or groups whose rights of religious freedom and observance are grossly violated or truncated. For such a group of persons, most other fundamental rights are

often illusory, including the right of human dignity. It is therefor not surprising that the above Honourable Court has described human dignity as one of the two most important human rights B the other being the right to life (See the section on Human Dignity in **Appellant=s written submissions** and the cases referred to therein at **paragraphs79 and 80 thereof).**

8. I submit that until Rastafari, who are a small religious minority in South Africa, are permitted **lawfully** to practice and observe their religion **in private**, they will be unable to live their >*lives with dignity and respect.*= (See Appellant=s submissions in this regard in **Appellant=s Supplementary Affidavit** at **paragraphs 8.1; 8.3 and 8.10;** and in **Appellant=s Supplementary Replying Affidavit** at **paragraphs 3.5, 5.5, 5.32 and 10).**

9. Accordingly, the importance of freedom of religion and observance in our new Constitutional dispensation cannot be over-emphasised.

As was held in **Hoffman v SAA** (supra)

>***The greater interests of society require the recognition of the inherent dignity of every human being*** *and the elimination of all forms of discrimination. Our society protects the weak, the marginalized, the socially outcast and the victims of prejudice and stereotyping.* ***It is only when these groups are protected that we can secure that our own rights are***

protected=. **[34 and footnote 29 thereof**]. **(**My emphasis**).**

(See also similar sentiments in **Corbiere v Canada (Minister of Indian and Northern Affairs) [1999] 2 S.C.R. 203** where the Court held: > *Groups or individuals who are generally subject to unfair treatment in society because of their characteristics or circumstances are already demeaned in dignity, and further differential treatment of them is more likely to have a discriminatory impact, since it often perpetuates or increases that disadvantage: Law, supra, at para. 63. Pre-existing disadvantage, stereotyping, and vulnerability are important to the analysis in this case*Y= [**70**]).

And similarly:

>Y*This country has recently emerged from institutionalised prejudice*Y*Our Constitutional democracy has ushered in a new era* B *it is characterised by respect for human dignity for all human beings. In this era, prejudice and stereotyping have no place*Y= [**37**]

(See also the cases referred to in **paragraph 79.1** and **80** of **Appellant=s written submissions**).

10. It is evident from certain of the statements and submissions made in **Respondent=s Answering Affidavit**, as well as in the **Supporting Affidavit**

by the Director General of Health (as referred above in paragraph 5 supra and by Appellant in his **Supplementary Replying Affidavit** at **paragraphs 3.5, 3.13, 3.14, 6.5** and **6.7)** that Appellant and adherents of the Rastafari religion in South Africa are the victims of marginalisation, stereotyping and prejudice.

PERMISSABILITY OF CONSTITUTIONAL EXEMPTIONS

Constitutional Remedies

11. The above Honourable Court has a wide-range of constitutional remedies at its disposal in order to >*promote the spirit, purport and objects of the Bill of Rights*= as required in terms of s 39(2) of our Constitution.

12. The powers of the courts are found in **s 38** and **s 172** (**1**)(**a**) and (**b**) and permit the courts a wide discretion in fashioning an appropriate remedy. S 38, which requires a purposive interpretation, provides that the courts may grant >*appropriate relief*= and s172 (1) (b) provides inter alia for >*any order that is just and equitable*=.

The above Honourable Court has interpreted >appropriate relief= to >*be relief that is required to* ***protect*** *and* ***enforce*** *the Constitution*Y=. (**Fose v Minister**

of Safety and Security 1997 (3) SA 786 (CC) at [19] (My emphasis). In doing so, the courts try to synchronise the real world with the constructs of our Constitution (**Fose (**supra) **at [94]**), and to give relief >*that must be fair and just in the circumstances of the particular case*= (**Hoffman v SAA** (supra) at [**42**]).

13. The above Honourable Court has interpreted the above provisions as permitting it to fashion remedies to meet the exigencies of a matter in hand. Thus despite an initial >reluctance= to allow >reading in=, it has adopted this approach when the exigencies required. (See the cases referred to in **Appellant=s written submissions** in **paragraph 20. 4.4**)

14. If the above Honourable Court felt it was not permissible or that it did not have the power to grant or permit a constitutional exemption in an appropriate matter, such as in this appeal, even where it was found that the impugned Acts grossly violated fundamental rights and that such violations could not be justifiably limited in terms of **s 36**, the consequences would entail inter alia the following:

14.1 Our Constitution would not and could not be the supreme law of the land (despite its provisions);

14.2 there would be no reason for the existence of the above Honourable Court;

14.3 the wishes of the Constitutional Assembly, representing all the people of South Africa, which lead to the creation of our new constitutional dispensation with our Constitution as the supreme law of the land, and the above Honourable Court as vindicator and custodian of our Constitution, would be stymied;

14.4 abuses of human dignity, stereotyping, marginalisation of persons and groups not falling within the mainstream of society, and prejudice would prevail and flourish. (Examples of prejudice and stereotyping in the **Supplementary Affidavit of Respondent** and in the **Supporting Affidavit** by the **Director-General of Welfare** have already already been referred to).

15. The gross violation of the fundamental rights of Appellant and other adult Rastafari imposes a duty and obligation on the above Honourable Court and makes it necessary to exempt adult Rastafari from certain of the provisions of the impugned Acts. A finding not to do so, would also be interpreted as meaning that individuals and groups, notwithstanding their position in society, would no longer have to be treated with equal dignity and respect;

The grant of a constitutional exemption would in addition, be advantageous to society as a whole as it would allow for regulation of the use of cannabis by adult Rastafari in South Africa, where no regulation presently exists, and thus

synchronise the real world with provisions of our Constitution.

We have shown in **Appellant=s Supplementary Affidavit** that the use of cannabis by adherents of the Rastafari religion in South Africa is a central and integral part of their religion and observances, and will continue to be such, irrespective of the judgment of the above Honourable Court. Accordingly, should the above Honourable Court not grant or permit a constitutional exemption in this appeal, bona fide adherents, such as the Appellant, will continually be forced to choose between respect for the law entailing criminal prosecution, and their faith. (See **CESA v Minister of Education 2000 (4) SA 757 (CC)** at [**35]** and the interim judgment of this above Honourable Court in **Prince v President, Cape Law Society and others 2000 (2) BCLR 133 (CC) at 26**].

17. I submit that the above Honourable Court not only has the power to grant constitutional exemptions in situations where important fundamental rights are being seriously abrogated, but that it is incumbent on the above Honourable Court to do so where, in particular, laws of general application which are facially neutral seriously limit and impinge on the core fundamental rights of a small minority of persons (see **paragraph 61 of Appellant=s written submissions**) and where the activities and conduct proscribed, have been shown not to cause serious, substantial or significant harm to other persons and society (and to the individual him/herself).

18. It is precisely due to the fact (the above Honourable Court held in **Prince v President, Cape Law Society and others** (supra) at [**26])** that >*The Rastafari Community is not a powerful one. It is a vulnerable group. It deserves the protection of the law precisely because it is a vulnerable minority*Y=) that small vulnerable minority groups are less likely to have success in relying on the legislative process, that such a group would be more reliant on the Constitution for protection and relief, > *particularly if they express their beliefs in a way that the majority regard as unusual, bizarre or even threatening*=. The approach of the Court is >*not a statistical one dependent on a counter-balancing of numbers, but a qualitative one based on respect for diversity*=. (See **CESA v Minister of Education** (supra) at [**25 and 42**] as referred to in **Appellant=s Supplementary Replying Affidavit** (**paragraph 3.11 thereof)**.

The above Honourable Court has consistently stressed the accomodatory nature of our society under our new constitutional dispensation and acknowledged that our Constitution permits different belief systems and manners of living and that religious communities and persons have >Y*the right to be who they are without being forced to subordinate themselves to the cultural and religious norms of others*Y= and that they have >*the right to be different.*= (**CESA v Minister of Education** (supra) at [**24 and footnote 23 thereof**]. The above Honourable Court has however stressed in that case that >Y*believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land*Y=**[35].**

Exemptions from facially neutral laws of general application accordingly depend on both >sides= attempting to accommodate each other in good faith. I have already referred in **paragraphs 3.15, 7.1, 8.8 and 8.9 of Appellant=s Supplementary Affidavit** and **paragraphs 4.8, 5.1, 5.29. 5.31 - 5.36 of Appellant=s Replying Affidavits** to the genuine attempt by Rastafari and the Rastafari National Council (A RNC@) to accommodate the legitimate concerns of the State in the event that the above Honourable Court should grant or permit a religious exemption to adult Rastafari. For example, Rastafari are even prepared to assist the State by making persons available to assist the courts in deciding whether an arrestee is a genuine Rastafari and therefore subject to any exemption granted, notwithstanding that such a course of action could invariably lead to a certain amount of antagonism towards the Rastafari community by secular recreational users.

20. The above Honourable Court has previously accepted that constitutional exemptions may be necessary in certain instances. I have already referred the above Honourable Court to the comments of O=Regan J in **S v Lawrence; S v Negal; S v Solberg** (supra) at **[122 and footnote 90]** at **paragraph 37** of **Appellant=s written submissions**, and to the unanimous judgment of the above Honourable Court in **CESA v Minister of Education (**supra) as referred to therein at **paragraphs 3.11**. **3.15 and 5.28**.

21. I have already in **Appellant=s written submissions** (at **paragraphs 74 and**

75 thereof) referred to the fact that freedom of religion and the right to religious worship will accordingly often require that exemptions be made to otherwise general laws in order to accommodate the convictions and practices of small religious groups and that this accords with the view of Curry**, A The Constitution of the Federal Republic of Germany@** and the approach of Meyerson**, A Rights Limited, Freedom of Expression, Religion and the South African Constitution@**.

22. I accordingly respectfully submit that not only is it permissible for the above Honourable Court to exempt bona fide adult Rastafari from certain provisions of the impugned Acts, but that it is **imperative and necessary** to do so in this matter.

Approach of Foreign Courts to Constitutional Exemptions

According to Hogg A **Constitutional Law of Canada@** Loose Leaf Edition Vol 2 1997 (at **37 B16**), the Canadian courts have accepted that constitutional exemptions may be necessary for particular individuals or groups under their constitutional dispensation in appropriate cases. As held in **Corbiere v Canada (Minister of Indian and Northern Affairs) [1999] 2 S.C.R. 203** at

[**111**] >*the constitutional exemption may apply when it has not been proven that legislation is unconstitutional in general, but that it is unconstitutional in its application to a small subsection of those to whom the legislation applies*@.=

See also: **R v Big M Drug Mart [1985] 1 S.C.R. 295 at 315**;

R v Edwards Brooks and Art [1986] 2 S.C.R. 713 at 783;

R v Westfair Foods (1989) 65 D.L.R. (4th) 56 (Sask. C.A.);

Rodriguez v British Columbia (Attorney General) [1993] 3. S.C.R. 519

In **R v Parker** (referred to in **paragraphs 7.5.5 and 8.5** of **Appellant=s Supplementary Affidavit** in and in **paragraph 5.28** of **Appellant=s Supplementary Replying Affidavit)** the Court of Appeal of Ontario unanimously (per Rosenberg JA, with Catzman J and Charron J concurring) on 31 July 2000, upheld the judgment of the court a quo which had created a medical exemption for Parker to use and cultivate cannabis, but varied the finding of the court a quo where such court had >*read down*= the relevant portion of the Narcotic Control Act and the Controlled Drugs and Substances Act to >*exempt persons possessing or cultivating cannabis marihuana for the personal medically approved use*= [**195**]. The Court of Appeal preferred to declare the impugned legislation unconstitutional but suspended the declaration of invalidity for a period of 12 months to allow parliament to create the exemption.

The court of appeal furthermore, granted Parker an **interim constitutional exemption** to use and cultivate cannabis during the period of suspension of the declaration of invalidity [**210**].

25. The Court of Appeal further held with respect to >reading in=:

25.1 that it was not appropriate to read a medical exemption into the legislation [**198**] and held: >Y*In this respect, I agree with the submissions of the Crown. In the light of the leading decisions on remedy in Schachter v Canada,[1992] 2 S.C.R. 679, Corbiere v Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203 and Rodriquez, the Crown submits that, should this Court find a violation of s. 7 because the legislation fails to provide adequate exemptions for medical use, the* A*only available remedy*@ *is to strike down those provisions and suspend the finding of invalidity for a sufficient period to allow Parliament to craft satisfactory medical exemptions*= [**198**].

25.2 that, referring to <u>Schachter:</u>

25.2.1 >Y*Reading in is a remedial option under s. 52 of the Constitution Act, 1982, which requires the Court to strike down any law that is inconsistent with the Constitution, but only* A*to the extent of the inconsistency. The purpose of reading in* A *is to be as faithful as*

possible within the requirements of the Constitution to the scheme enacted by the Legislature: Schachter at p. 700. Reading in is also sometimes required in order to respect the purposes of the Charter= [**200**].

25.2.2 >Y*Reading in is particularly appropriate where the legislation fails because it is not carefully tailored to be a minimal intrusion or it has effects that are disproportionate to its purpose. The defects in the Controlled Drugs and Substances Act fall within this rationale and thus reading in is a potential remedy. Even so, reading in will not be appropriate if* A*the question of how the statute ought to be extended in order to comply with the Constitution cannot be answered with a sufficient degree of precision on the basis of Constitutional analysis*@*: Schachter at p. 705. To read in an exemption in such circumstances would* A*amount to making ad hoc choices from a variety of options, none of which was pointed to with sufficient precision by the interaction between the statute in question and the requirements of the Constitution. This is the task of the Legislature and not the courts*@*: Schachter a p. 707*= *[***201**].

25.3 After evaluating a number of >problems= with reading in as listed by the Crown, the Court of Appeal held that whilst it could not accept that all the listed problems flowed necessarily from the reading in remedy of the court a quo [**203**], that the >*Crown had raised matters of*

sufficient complexity that reading in is not an appropriate remedy= [**204**].

25.4 The court went on to hold: >Y*Rather, refusing to read in an exemption demonstrates a recognition of and respect for the different roles of the legislature and the courts. There is, in my view, no question that a medical exemption with adequate guidelines is possible. The fact that such exemptions exist in some states in the United States is testament to that. However, there are many options to consider and this is a matter within the legislative sphere. There is also a particular problem for marihuana because of lack of a legal source for the drug. This raises issues that can only be adequately addressed by Parliament.*= [**204**].

25.5 The court further held: >*There is one other factor that is also worth considering. To avoid an undue intrusion into the legislative sphere, any exemption crafted by a court should probably be the minimum necessary to cure the Constitutional defect. However, faced with the need to open up the Controlled Drugs and Substances Act to address the constitutional defect, Parliament has the resources to address the broader issue of medical use*Y*Put another way, Parliament is not bound to legislate to the constitutional minimum. It can adopt the optimal and most progressive legislative scheme that it considers just*=.[**205**].

25.6 Footnote 21 to this judgment states: >*I also do not accept all of the Crown=s submissions, based on Schachter, for refusing the reading-in remedy. For example, the Crown argues that a medical exemption would undermine the Acomprehensive code@ governing the right of access to controlled substances for medical purposes or would constitute judicial intrusion into the very core of Parliament=s legislative authority over criminal law to decide what conduct should be criminalised. This significantly overstates the issue. The Controlled Drugs and Substances Act already contains a significant number of exemptions for medical use of drugs. It is obvious that absolute prohibition is not at the core of the power to criminalise conduct. The Acomprehensive code@ rationale for refusing to read in is based on the theory that reading in would so markedly change the legislation that it could not be safely assumed that Parliament would have enacted the non-offending provisions. Given the various existing exemptions for medical use of more dangerous drugs, this theory hardly seems credible=.*

26. The Court of Appeal further held, citing Corbiere, that the remedy of a constitutional exemption has only been recognized in a very limited way, A*to protect the interests of a party who has succeeded in having a legislative provision declared unconstitutional, where the declaration of invalidity has been suspended*= [**208**]. The court then granted Parker an **interim constitutional exemption** during the period of suspension of the declaration

of invalidity.

The Harm Principle

27. I have already submitted in **Appellant=s written submissions** that an exemption from facially neutral laws of general application may only be permissible where the conduct or activity proscribed does not cause significant, substantial or serious harm to other persons and society.

28. I have already referred the above Honourable Court in **Appellant=s written submissions to** commissions of enquiry and other official reports in other countries into cannabis (**paragraphs 134 B 182**); to the accelerating international trend in western democracies towards the decriminalisation of cannabis (**paragraphs 183 B 195**); to official scientific literature concerning the low level of harm caused by cannabis (**paragraphs 201 B 213**); to the findings of the German Constitutional Court in **Bverf GE 90, 145** (the AHashish Case@) (**paragraphs 168 B 171)** and to the findings of the Canadian Court of Appeal of British Columbia in **R v Malmo-Levine; R v Caine** at **paragraphs 117 B 162** concerning the low level of harm to society and other persons from the use of cannabis.

The majority of the Court of Appeal of British Columbia in fact found that the >*result was quite close*= and >*that there was no clear winner in the balancing test*=. The Court of Appeal was dealing with the issue of the recreational use

of cannabis and not with fundamental human rights going to the very heart of our Constitution. If it had been, I believe that the court would have tilted the balance in favour of the Appellant, as the use of cannabis by Rastafari is not for recreational purposes; it is a central and vital part of their religion.

29. In **R v Parker** (supra), the Court of Appeal of Ontario, in canvassing other areas pertaining to the use of cannabis, found that the blanket prohibition on cannabis use did not have a long-standing foundation in Canadian legal tradition and societal beliefs [**134**]. (In fact, in **R v Clay,** a case pertaining to the recreational use of cannabis, heard by the same judges of the Ontario Court of Appeal on 31 July 2000, in a unanimous judgment, the court stated: >Y*In considering the other side of the issue, the interests of the state, it has to be conceded that origins of the marihuana tradition in Canada are not based in good public policy. While the objective was to protect Canadians from harm caused by marihuana use,* ***the supposed evidence of that harm was based on racism and irrational, unproven and unfounded fears***=. [**34]. (**My emphasis).

It is interesting to compare this finding to the unarticulated premise underlying the proscription of cannabis in South Africa as referred to in **Appellant=s written submissions** at **paragraphs 22.5 and 234,** and to the fact that cannabis has been used for centuries in South Africa where its use has been regarded as legitimate and acceptable, and not as criminal or immoral (at

paragraphs 189 B 191, 194 and 224 thereof).

30. in addition the court in **R v Parker** (supra) in referring to **R v Clay** stated that the Crown had >*expressly renounced any reliance on the theories that marihuana is a Agateway@ drug to harder drugs; that it provokes criminal activity, that marihuana use leads to lack of motivation; or causes psychosis*Y= [**124**]

It is interesting to compare the above concessions to the submissions of the Respondent in its **heads of argument** and in its **Supplementary Answering Affidavit** where it still relies on the discredited belief that cannabis leads to violence and is the stepping stone or gateway to the use and abuse of dangerous drugs. (**paragraphs 6.1, 6.2 and 11 thereof).**

31. I submit that the scientific literature and even the views of Respondent=s own experts as referred to in **paragraphs 202.2 and 202.3 (b)** of **Appellant=s written submissions** and in **paragraphs 3.3, 3.4 and 3.12** of **Appellant=s Supplementary Replying Affidavit,** show conclusively that cannabis does not lead to violence; in fact, it is one of the few substances that has proven to be negatively correlated with violence, and is not the stepping stone to the use of dangerous drugs.(See **Appellant=s written submissions paragraphs 202.2 and 202.3**) Even one of Respondent=s own experts, Prof. Du Pont has stated that >*Alcohol is a common gateway drug into all non-medical or recreational drug-taking=.*

32. I have already referred the above Honourable Court in **Appellant=s Supplementary Replying Affidavit (**at **paragraph 8.13 thereof**) to the apparent highlight of the Report furnished to the Minister of Health on Decriminalisation of Cannabis in South Africa where the authors found, cynically I submit (referring to cannabis) that >*the negative consequences of legal drugs, such as tobacco and alcohol already outweigh those of illicit drugs. For example, instances of hospitalisation and even death are higher among users of legal drugs than illicit drugs. Adding yet another legal drug to the list will only add to a problem which is already out of control=.*

33. As Appellant stated in **paragraph 3.4** of his **Supplementary Replying Affidavit,** the sooner the general public is informed about the true position (that cannabis does not lead to violence), the sooner accused will no longer be able to attempt to mislead the courts in this regard, and nor will the courts be swayed by intentionally misleading evidence.

34. As submitted in **Appellant=s written submissions (paragraph 225 thereof**) if the prevention of harm to society is the objective of the impugned legislation by discouraging the risk of a person using cannabis, it is difficult to imagine a more intrusive way to protect an individual or society from harm than by criminal prosecution, especially where the proscribed conduct is so widespread and not viewed as immoral, criminal or harmful to a sufficient degree as a reason for its proscription.

As referred to in **Appellant=s written submissions** (**paragraphs 203 B 213**) and in **Appellant=s Supplementary Replying Affidavit** (**paragraph 5.3 thereof**) the harm caused to individuals and society by the proscription of cannabis far outweighs the harm caused by its proscription. By way of an example, **862 persons under the age of 20 were sentenced to imprisonment** for drug-related offences (read as cannabis) for the period 1 January 2000 to 30 October 2000.

35. In Burchell et al >**South African Law and Procedure=** Vol I, second edition 1983 (at **page 9**), the learned authors in a discussion on whether morality ought to be enforced through the criminal justice system, referred to the **Ouimat Report**, a report published by the Canadian Committee on Corrections in 1969 (see the findings of this Report in **Appellant=s written submissions** at **paragraph 154 thereof**). The authors conclude that >*this sort of evaluation of the criminal sanction suggests that it is undesirable for legislators automatically to resort to the criminal sanction as a means of coercing the public into obedience. Alternative and non-punitive sanctions may well exist and ought preferably to be applied*=.

I therefore submit that if the harm principle is accepted as a legal principle, alternatively as a guideline, in South African law, then this principle alone should allow the above Honourable Court to grant or permit a religious

exemption to adult Rastafari to use cannabis for bona fide worship and observances in private.

International Trends Towards Decriminalisation and Medical Exemptions

36. I have already demonstrated the trend in other Western democracies towards decriminalisation of the use and possession of cannabis, and the acceptance of medical exemptions for cannabis. I submit that this developing trend not only lends no support to the presumption of harm, but goes a long way towards rebutting this presumption. Put a differently, the prohibition on the personal use of cannabis and the denial of any medical benefits from cannabis cannot be based on the presumption of harm given that other civilised nations have or are decriminalising this activity and allowing medical exemptions, and commissions of enquiry have called for its decriminalisation.

It is interesting to note the emphatic denial of this trend towards decriminalisation by the Director-General of Health in **paragraph 7.8.3** of his **Affidavit** even despite a grudging acknowledgement thereof in the Report on Decriminalisation (See **paragraph 8.12** of **Appellant=s Supplementary Replying Affidavit**.)

37. I refer the above Honourable Court to **Annexure I** to **Respondent=s Answering Affidavit** (**pages 207 B 287)** and to **paragraphs 5.18 B5.22** of **Appellant=s Supplementary Affidavit** dealing with the approach of the

Dutch Government to cannabis.

I submit that the Dutch government=s *policy of tolerance* by distinguishing >*between drugs which entail an unacceptable risk to public health (hard drugs) and drugs which involve less risk (soft drugs)*= coupled with appropriate education in schools, has had the result that the percentage use of cannabis in Holland is historically lower than that in countries such as the United States of America which is not decriminalised (at least not presently on the Federal level). As referred to in **paragraph 8.3** of **Appellant=s Supplementary Replying Affidavit,** according to the British Medical Journal (as reported in Time Magazine of 2 October 2000), there has been a percentage fall of 13,08 % of cannabis use by Dutch youth since 1996. I submit that this shows that a liberalisation in cannabis policy does not lead invariably to an increase in its use.

I accordingly submit that a religious exemption to adult Rastafari to use cannabis for bona fide religious worship and observances would not lead to any marked increase in use of cannabis by secular users (which use is in any event widespread amongst all strata of society).

38. According to the Court of Appeal in **R v Parker** (supra):

38.1 the English House of Commons in 1999, overwhelmingly passed motion M-381, urging the government to legalise the medical

use of cannabis [**133**];

38.2 a survey of legislation in other countries had shown an increasing tolerance for possession of cannabis for personal use, >*although no country had fully decriminalised possession*= but that there was some movement towards decriminalising cannabis for medical use.

38.3 34 states in the United States of America had legislation recognizing the medical value of cannabis, and that California and Hawaii had enacted legislation implementing those initiatives, namely the Compassionate Use Act of 1996, which added s.11362.5 to the Health and Safety Code and the recent Hawaiian legislation. (Both Acts were annexed to the judgment by the Court).

38.4 on 2 March 1999 a Bill titled the Medical Use of Marijuana Act was introduced in the American Congress which would allow State laws to become fully operative and exempt medical marihuana from federal drug legislation. [**140**].

39. The dismissal of the appeal brought by the State in **People of Guam v Benny Toves-Guerrero 2000 Guam 26** (as referred to in **Appellant=s Supplementary Affidavit** at **paragraph 8.6 thereof**) shows that other jurisdictions are upholding the legitimacy of Appellant=s religion. (It is

interesting to note the off-hand manner in which the Director-General of Health refers to this judgment and the judgment in **R v Parker** (supra) at **paragraph 7.8.5** of his **affidavit)**.

40. I refer the above Honourable Court to **paragraphs 7.3 в7.6** of **Appellant=s Supplementary Affidavit** dealing with medical exemptions for cannabis in Canada and California. It is evident from what is set out therein that there has not been practical difficulties in the implementation or administration of the medical exemptions, and nor have such exemptions led to any grave difficulties in policing or undermined the authorities efforts to combat drug abuse and trafficking.

41. The California Compassionate Use Act of 1996 (being Appendix **I** to **R v Parker** (supra)), provides inter alia;

(A) A*To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person=s health would benefit from the use of marijuana in the treatment of cancer, anorexia, aids, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.*

Y

Section 11357, relating to the possession of marijuana, and Section 11358,

relating to the cultivation of marijuana, shall not apply to a patient, or to a patient=s primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician=.

42. Similarly, the Hawaiian legislation permitting medical exemptions for cannabis (being Appendix **II** to **R v Parker** (supra)), states inter alia:

A*Section 1. The legislature finds that modern medical research has discovered a beneficial use for marijuana in treating or alleviating the pain or other symptoms associated with certain debilitating illnesses such as cancer, glaucoma, human immunodeficiency virus, acquired immune deficiency syndrome, multiple sclerosis, epilepsy, and crohn=s disease*Y.@

In terms of the Hawaiian legislation, a qualifying patient shall register with and provide a copy of the written certification obtained from his doctor, to the Department of Health within 10 days of receipt thereof, and shall obtain from the Department a registration certificate. Upon an inquiry by a law enforcement agency, the Department of Health must verify whether such person has registered with the Department and may provide reasonable access to the registry information for official law enforcement purposes.

The authorisation for medical use of cannabis shall not apply to medical use:

A*(A) In a school bus, public bus, or any moving vehicle;*

In the workplace of one=s employment;

On any school grounds;

At any public park, public beach, public recreation centre, recreation or youth centre; or

Other place open to the public@

(It is clear that the medical exemption for cannabis (as in this appeal) requires use only **in private** by the person/s entitled thereto).

In terms of s 329-H, a fraudulent misrepresentation to a law enforcement official of any fact or circumstance relating to the medical use of cannabis in order to avoid arrest or prosecution is a petty misdemeanour and subject to a fine of $500.

It is interesting again to compare the finding of the Court in **R v Parker** and the medical exemption currently present in other jurisdictions to the views of the Director General of Health in his **Supporting Affidavit** that cannabis has no medical value.

43. The trend towards decriminalisation in other Western democracies, the judgements of courts internationally, and the acceptance of medical exemptions for cannabis in other jurisdictions supports the view that cannabis does not cause sufficient, substantial or serious harm to other persons and society (and to the user) (especially when compared to the licit drugs such as alcohol and nicotine).

International Obligations

44. I refer the above Honourable Court to the **Appellant=s written submissions (paragraphs 221 в 221.6.6 thereof**) and to **Appellant=s Supplementary Replying Affidavit (paragraphs 3.16 and 8.2 thereof)** and respectfully submit that reliance on international agreements is constitutionally misplaced. Our Constitution is the supreme law of the land and binds the executive and the legislature and prevents them from entering into or enforcing any agreement of treaty inconsistent with its provisions. If a prohibition cannot be justified in terms of the general limitation enquiry, any international agreement purporting to require the state to impose it would be unconstitutional and the resultant international obligations would be invalid in South African law. In addition, all the relevant treaties are specifically made subject to such countries= constitutional limitations. In this regard, I refer to section 1(a) of the **Single Convention** of 1961, article 22 of the **1971 Convention** and section 3(2) of the **Vienna Convention.**

45. This is in fact the approach adopted by the Canadian courts. In **R v Parker** (supra) when referring to the **Single Convention**, the Court of Appeal held that as the Treaty was subject to a state=s >*constitutional principles and the basic concepts of its legal system=,* that >*It is self-evident that if under our Constitution, namely s. 7 of the Charter of Rights and Freedoms, the prohibition of possession and cultivation of marihuana for medical purposes is unconstitutional, it would be open for Parliament to enact such an exemption*

and still comply with its treaty obligations= [**147**]

Footnote 11 to the judgment states: >*In any event, the Constitution takes precedence over any treaty obligations: Attorney-General for Canada v Attorney-General for Ontario and others, [1937] AC 326 (P.C.)*

I therefor submit that our Treaty obligations are not a bar to the above Honourable Court granting or permitting a religious exemption to adult Rastafari to use cannabis in their religious worship and observances in private.

Drugs and Medicines Act

The purpose of the Drugs and Drug Trafficking Act 140 of 1992 (A the Drugs Act@) is to prevent the use and abuse of what is considered by the State to be harmful drugs. Cannabis is included in the list of >undesirable dependence-producing substances= in part III of Schedule 2. Notwithstanding this, s 4 and s 5 of the said Act allows for **medical exemptions** for any dangerous or undesirable dependence-producing substance whereby a patient can acquire such substance from a medical practitioner and use such substance for medicinal purposes under the care or treatment of such medical practitioner.

However, s 4 and s 5 of the Drugs Act only permits the medical practitioner to furnish the otherwise illegal substance >*in accordance with the requirements of*

the Medicines Act or any regulations made thereunder=.

The purpose of the Medicines and Related Substances Control Act 101 of 1965 (the AMedicines Act@) is *inter alia* to control the supply of medicines onto the market so as to ensure the safety of the public. Cannabis is listed in Schedule 8 of this Act. Possession of a schedule 8 substance is forbidden save that a person may in terms of s 22 A (10) of this Act, possess it only >*for analytical or research purposes and unless a permit for such Ypossession Yhas been issued to him by the Director-General* (of Health) *on the recommendation of the council* (Medicines Control Council)=.

Thus while the Drugs Acts permits medical exemptions for cannabis, the wording of s 22A(10) above appears to make the medical exemptions in the Drugs Act illusory as cannabis can only be used for analytical or research purposes. However, as submitted in **paragraph 8** of **Respondent=s heads of argument,** this apparent inconsistency between the Drugs Act and the Medicines Act is saved by s 2 of the Drugs Act which provides that the Act >*shall apply in addition to, and not in substitution for, the provisions of the Medicines Act.*

In addition, S 36 of the Medicines Act permits the Minister of Health, >*on the unanimous recommendations of the members present at any meeting of the Council, by notice in the Gazette, exclude, subject to such conditions he may*

determine, any medicine from any or all of the provisions of this Act and may, in like manner, amend or withdraw any such notice=. >Medicine= is defined widely in the definition section of this Act.

The Director-General of Health in his **Supporting Affidavit** at **paragraph 7.7** thereof (notwithstanding the findings of the international scientific and medical community and the presence of operative medical exemptions in other jurisdictions) states categorically that cannabis > *has no medicinal use and there is no person in South Africa who has ever been exempted to use dagga for medicinal purposes*= and at **paragraph 7.8.4** thereof, specifically denies >*that there is any exemption permitting patients to obtain cannabis form medical practitioners and pharmacists. As already said above the exemption in terms of the Drugs and Drugs Trafficking Act is only for the drugs which are of medicinal use*=.

These statements call in question the impartiality of the information and advice furnished to the Director-General of Health and whether he has received the most up-to-date information. The views expressed by the Director-General of Health (if correct) would make the medical exemption in the Drugs Act illusory, if it was not for s 2 of the Drugs Act.

Furthermore it appears that the Director-General of Health is unaware of pending legislation as referred to in **paragraphs 2 в8** of **Respondent=s heads of**

argument. Respondent pointed out that the Medicines Act had been repealed by the Medicines and Related Substances Control Amendment Act no 90 of 1997 but most of this Act was in turn repealed by the SA Medicines and Medical Services Regulatory Authority Act no 132 of 1998 (ASAMRA@). However, the Proclamation (R49 dated 30 April 1999) putting SAMRA into operation was declared null and void (See **Pharmaceutical Manufacturers of S A v Ex President, R S A 1999 (4) SA 788 (T)).** The Medicines Act is therefor presently still in force.

Cannabis is listed as a schedule 7 substance in SAMRA. When this Act is brought into operation, s 31 (9)(a) permits *inter alia* a medical practitioner upon authority being received from the relevant medical authority to prescribe a substance, such as cannabis, for the treatment or prevention of a medical condition in a particular patient.

I submit that the medical exemptions present in the Drugs Act and in the not yet implemented SAMRA make it clear that cannabis can be prescribed by a medical practitioner, but there is at present no legal source of supply (similar to the position that existed in Canada prior to 21 December 2000 when the Canadian Minister of Health announced the issue of a five year contract to Prairie Plant Systems Inc of Saskatoon to produce standardised, affordable, research grade cannabis for medical purposes. In this regard, I refer the above Honourable Court to **paragraph 7.5.7 of Appellant=s Supplementary Affidavit).**

If I am wrong in this submission, then I submit that the >illusory= medical exemptions in the Drugs Act would suffer the same treatment in a challenge by a patient who required cannabis for his medical needs as that meted out by the Canadian court in **R v Parker** (supra) (See [**152-190] thereof**). For as **t**he Canadian court held: >Y*Even if the purpose of the regulatory scheme created by the Narcotic Control Act and the Controlled Drugs and Substances Act and Regulations is valid, the administrative procedures created to bring the purpose into operation produce unconstitutional effects for the group of people like Parker who require marihuana for medical purposes.= Even if I am wrong on this aspect of the case, the theoretical availability of marihuana through the new drug programme does not answer Parker=s claim that the prohibition infringes his right to liberty. I have described that right as the right to make decisions that are of fundamental personal importance, which includes the choice of medication to alleviate the effects of an illness with life-threatening consequences. There may be circumstances in which the state interest in regulating the use of new drugs prevails over the individual=s interest in access. This, however, is not one of those circumstances*Y= [**160-161**].

And further: >*Parliament has created a defence to the possession and cultivation offence if the person can comply with the regulations. Those regulations, for example, permitted a person to legally possess the drug*

under prescription from a physician. The government=s own witness established that this defence or exemption is illusory. This is not consistent with the principles of fundamental justice=. [**163**]

The use of cannabis in South Africa (and the world) is already so widespread amongst all strata of persons in society who do not consider its use to be illegitimate or immoral or consider the risks to be unacceptable (especially when compared to the harm caused by licit drugs such as alcohol or nicotine). Such persons believe that they have a right to privacy and self-autonomy to use cannabis in private especially where the activity has been shown not to cause substantial harm to other persons or to society. I accordingly submit that a grant of a religious exemption to adult Rastafari to use cannabis would be accepted by all right-minded persons and show the public that our Constitution protects all of us and promotes the respect and dignity of all, even those who suffer from marginalisation, stereotyping and prejudice.

Accordingly, a religious exemption would not and could not be seen as being in conflict with the Prevention and Treatment of Drug Dependency Act no 20 of 1992. As submitted in **paragraph 3.7** of **Appellant=s Supplementary Replying Affidavit**, an exemption to Inuits (Eskimos) to kill whales could never be seen as an endorsement to the public that killing whales is acceptable. As held in **Prinsloo v Van der Linde and Another 1997 (3) SA**

1012 (CC) (as cited in **paragraph 3.15 Appellant=s Supplementary Replying Affidavit) >***the essence of equality lies in not treating everyone the same way, but in treating everyone with equal concern and respect.*= (See also **Government of the RSA v Grootboom** (supra) where the Court similarly held >*Furthermore, the Constitution requires that everyone must be treated with care and concern*= [**44**]).

I submit therefor that a religious exemption to adult Rastafari would not undermine the government=s efforts to fight drug abuse and trafficking.

I further submit that the grant of a religious exemption to adult Rastafari to use cannabis for religious worship and observances in private would not effect the regulatory scheme of the Drugs and Medicines Acts (or SAMRA when it is implemented) or increase the availability and supply of cannabis and lead inexorably to an increase in its use, as the Drugs Act presently allows for medical exemptions (whether illusory or not), and the future Medicines Act will also permit medical exemptions for cannabis use.

In any event, as referred to above, countries where the use of cannabis has been decriminalised have not shown any long-lasting increase in its use; in fact, the contrary appears to be the position with lower percentage usage in those countries than in countries that have not decriminalised.

As stated by Appellant in **Appellant=s Supplementary Replying Affidavit** in **paragraph 5.1**, Rastafari are against the use of all dangerous drugs and support governmental efforts to suppress harmful drugs and their abuse and trafficking.

NECESSITY OF A CONSTITITUTIONAL EXEMPTION

56. I have already referred in **paragraphs 5 в 10,15, 16, 18 and 19 supra** to the necessity and reason for a constitutional exemption for Appellant and other adult Rastafari in South Africa. Without an exemption, the marginalisation, prejudice, stereotyping and lack of respect and dignity suffered daily by sincere adult Rastafari will continue unabated. Sincere Rastafari will have to choose between respect for the law and criminal prosecution on the one hand and their religion on the other.

57. Appellant has shown in his **Supplementary Affidavit** *inter alia* that:

57.1 the Rastafari Religion has had a formal presence in South Africa since at least 1975 (**paragraph 3.2 thereof**);

57.2 it has a strong moral code and encourages a respect for all life

(**paragraph 3.4**);

57.3 there are four Houses in South Africa, but that the main two are the Nyahbinghi Order and the Universal Movement of Rastafari (AUMR) and the majority of Rastafari in South Africa are members of these two houses (**paragraphs 3.7 B3.14, and 3.16**);

57.4 the two main orders have their own structures of leadership and authority;

57.5 the Rastafari National Council (A RNC@) although having a predominantly Nyahbinghi inclination, is the governing body of all the different houses of Rastafari in South Africa and can agree policy on behalf of its members. Various structures with different functions exist in terms of the RNC constitution, including the National Constitutional Council which is responsible for all disciplinary matters and has powers to discipline any member who needs discipline or who violates the constitution (**paragraph 3.15**);

The RNC is aware of the belief among certain sections of South African society that the proscription of the use and possession of cannabis by Rastafari serves an important public interest and as long as the use of cannabis is proscribed, the RNC will assist the authorities to the fullest extent of its authority in ensuring that **only**

bona fide adult Rastafari are benefited by any exemption granted (**paragraph 3.15.5.1**); by way of example, in assisting as assessors in courts (**paragraph 3.15.5.4**); and that the RNC is keen to assist with and co-operate with the authorities in helping to set up and administer an administrative permit system, should such be contemplated as part of any exemption granted (**paragraph 3.15.5.3**);

57.6 the UMR supports the position that the RNC is the responsible body to liase with and assist the state authorities in the implementation of an exemption should one be granted (**paragraph 3.10.10**);

58. Appellant has shown the importance of the holy herb in the Rastafari Religion. As set out in **Appellant=s Supplementary Affidavit** (**paragraphs 4.3.1-.4.3.4 and 4.7 в 4.11 thereof**), the use of the holy herb is central to Rastafari religious and spiritual practice. Its use is not to entertain but to facilitate elucidation and to re-establish the eternal relationship of Rastafari with their Godhead. It must be used consciously and in a disciplined manner and in a setting conducive to their religious observance and meditation, and not in a setting offensive to other persons as that would disturb the meditation (**paragraphs 4.4 в 4.6 thereof**).

59. The holy herb is used as a sacrament by all adult Rastafari. Youth are forbidden to smoke the holy herb (**paragraph 3.15.4.3 and 4.11 thereof**) and

are only allowed to use it in another form when they are mature enough to do so with **parent supervision on special occasions (Clause G.4** of **RNC constitution at page 104 thereof**), such as in a non-invasive form such as tea. This practice must be seen from the perspective that many secular users who smoke cannabis for recreational purposes are below the age of 18, which practice is expressly forbidden by the RNC.

60. The origins of the cannabis used by Rastafari in South Africa is set out in **Appellant=s Supplementary Affidavit** in **paragraph 5.** The present difficulty (as existed in Canada) is that there is no legal source of supply notwithstanding the >medical exemptions= present in the Drugs Act. Appellant has stated that Rastafari in South Africa are prepared for the State to supply them with cannabis but that they would like the right to obtain cannabis from their present sources (it is conceded that any exemption granted would not be applicable to Swaziland or Lesotho Bsee **paragraph 5.10** of **Appellant=s Supplementary Replying Affidavit**) should such prove necessary, as well as the right to cultivate their own both collectively and individually.

It is respectfully pointed out that in countries where medical exemptions are permitted, the person entitled thereto is permitted to cultivate cannabis for their own use (See **paragraphs 7.4 7.5.9 (a)** of **Appellant=s Supplementary Affidavit**).

FINAL SUBMISSIONS

61. The question was posed in **Appellant=s written submissions** (at **paragraph 113 thereof**) not whether cannabis causes harm (as few things in this modern age are totally benign), but whether it causes **sufficient** harm to other persons or society **that rises above a minimum threshold** to warrant its prohibition and the overriding of constitutionally protected rights of Appellant and other adult practising Rastafari to use cannabis **in private** for bona fide religious worship and obervance.

I submit from what is set out in **Appellant=s written submissions** and in these **Supplementary written submissions** that cannabis has been shown not to cause sufficient harm to other persons or society (and to the individual user him/herself) warranting the continuing stigmatising and stereotyping of Rastafari in South Africa by their use of cannabis for religious worship and obervance.

62. Appellant has shown that cannabis is central to Rastafari religious and spiritual practices and obervances. Every adult Rastafari uses it in one form or another. It is the compass that gives Rastafari direction.

63. Appellant has demonstrated in **Appellant=s Supplementary Replying Affidavit** (**paragraphs 5.7 в5.9, 5,24 в5.26, 5.29 в5.35 thereof**) that there would not be any serious practical difficulties in the policing of any exemption and submitted that the costs of not granting an exemption far exceeds the costs of refusing one both with respect to the financial costs involved including the costs of prosecuting and imprisoning a Rastafari for use of cannabis and the harm caused to society and the individual user (**paragraphs 5.4 в 5.6 thereof**).

64. Appellant has submitted in his **Supplementary Replying Affidavit** (**paragraphs 5.29 thereof**) that a permit system, based on the system adopted in Canada and San Francisco pertaining to medical exemptions for cannabis, with prior registration with the RNC being a **sine qua non** for recognition as a bona fide Rastafari, would be the most practical approach to adopt and would be the most effective system to administer and implement should the above Honourable Court grant or permit a religious exemption for adult Rastafari.

Appellant further submitted that such permit system would not be unduly costly or difficult to administer or implement, especially when comparing the costs to society and Rastafari should an exemption not be granted.

65. Appellant further submitted (**paragraphs 5.24, 5.25 and 5.32** of **Appellant=s**

Supplementary Replying Affidavit) that initially there would obviously be teething problems in the implementation of any religious exemption and that bona fide Rastafari would probably suffer certain inconveniences during this phase (but in any event they would have their legal right for example, to approach a court for possible release from custody, or for damages for iniuria or malicious prosecution should they be detained unlawfully etc) but that all genuine Rastafari would gladly put up with such (short-term) inconveniences as they would have regained their dignity and respect.

66. It is clear that any exemption would permit the revocation of an exemption granted to a Rastafari should such person breach the terms and conditions thereof. (See for example **Appellant=s Supplementary Replying Affidavit** at **paragraphs 5.25, 5.30 and 5.31)**

67. Appellant has shown that the Rastafari community exists in South Africa, that it is a small minority group and that it is here to stay. Appellant has shown that it is organised and that the Rastafari community is ready and prepared to accommodate the authorities in order to obtain a religious exemption. The RNC and Appellant have set out a practical manner in which a religious exemption could be implemented and administered.

68. Appellant submitted in his **Supplementary Replying Affidavit (paragaph 9 thereof**) that Respondent has not discharged the onus on it in proving that any restriction on the rights of Rastafari to religious freedom and

observances, equality, dignity, privacy and self-autonomy can be justified in an open and democratic society based on human dignity, equality and freedom. I submit in addition, that such foundational rights can only be justifiably limited if the use of cannabis for religious observance can be shown to cause significant harm to other persons or society. I submit that the Respondent has failed to discharge the onus in this regard.

69. I respectfully refer to **paragraphs 223 and 229** of **Appellant=s written submissions** and submit that a >neutral= law which bears a purportedly reasonable relationship to a legitimate governmental purpose must be shown to be **necessary and tailored narrowly** to achieve that purpose, especially where the conduct or activity has been shown not to cause significant harm to other persons and society. I submit that the relevant sections in the impugned legislation overshoots the mark in so far as criminalizing such religious practise in unnecessary for the achievement of the legitimate governmental purpose of combating drug abuse of harmful drugs and trafficking.

COSTS

70. I refer the above Honourable Court to the submissions in **paragraphs 232 B234** of **Appellant=s written submissions**. In addition, I submit that in the event that Appellant is successful in this Appeal, that the ordinary rule that the successful party is entitled to his costs should apply. However, Appellant does not persist in his claim for the costs to the Supreme Court of Appeal

previously sought against Fourth and Fifth Respondents

THE RELIEF SOUGHT

71. I believe that the remedies of the above Honourable Court are more extensive than those considered by the Canadian courts, especially in so far as reading-in is concerned (see for example how the Canadian Courts distinguish between the concepts of >appropriateness= and >justness= referred to in **Hoffman v SAA** (supra) at **footnote36**).

Notwithstanding the entitlement of the above Honourable Court to grant wider remedies than those of the courts in Canada, I do not believe as submitted in **paragraph 20.4.5** of **Appellant=s written submissions** (and in **paragraph 5.28** of **Appellant=s Supplementary Replying Affidavit**), that this is an appropriate case for the above Honourable Court to read in or down the required relief as there are a range of legislative choices that Parliament can adopt to cure the unconstitutionality of the impugned Acts. Furthermore, as held in **R v Parker** (supra) Parliament is not bound to legislate to the constitutional minimum.

72. The approach of the above Honourable Court is that successful litigants should obtain the relief they seek and that >*it is only when the interests of*

good government outweigh the interests of the individual litigants that the Court will not grant relief to the successful litigants. In principle, too, the litigants before the Court should not be singled out for the grant of the relief, but relief should be afforded to all people who are in the same situation as the litigants=. (**S v Bhulwana; S v Gwadiso 1996 (1) SA 388 (CC) at [32]**.

73. I submit that should the above Honourable Court declare the relevant sections of the impugned Acts to be invalid, but suspend the declaration of invalidity for 12 months to enable Parliament to create the exemption, it would not be unfair to grant an interim constitutional exemption valid during the period of suspension, to other adult Rastafari in addition to the Appellant.

As set out in **paragraphs 28.2 B 28.6** of **Appellant=s written submissions**, should a Rastafari or a person claiming to be one, be arrested or detained for a cannabis-related offence during this period of suspension of the declaration of invalidity, it would be for such person to prove that he or she was an adult Rastafari and that the cannabis was for use in bona fide religious practice and observances, and not for some other purpose such as trafficking.

74. If however the above Honourable Court believes that this is not an appropriate case to grant an interim constitutional exemption to >other adult Rastafari= in addition to the Appellant, I submit that it would not be unfair to other adult Rastafari in South Africa for the above Honourable Court to grant Appellant only an interim constitutional exemption during the period of

suspension of the aforesaid declaration of invalidity as the administrative procedures necessary to enable other Rastafari to claim the exemption still have to be decided upon and implemented, and thus granting only Appellant an interim Constitutional exemption during this period would avoid the **perception** of *>unnecessary dislocation and uncertainty in the criminal justice process=*. (See **S v Bhulwana** at [**32**]**)**. (See also for example **Corbiere** (supra) at [**118 B 122]** where the successful litigants did not obtain immediate relief).

If an interim constitutional exemption is not granted to >other adult Rastafari= during this period, then I submit in view of the importance of the fundamental rights that have been violated and the continuing marginalisation, stereotyping and lack of respect suffered daily by Rastafari in South Africa, that the above Honourable Court grant the alternative prayer in 75.2(c) as this would ameliorate the harshness of the refusal of the interim exemption, whilst retaining the authority of the state to prosecute such persons after the expiry of the period of suspension of the period of invalidity, subject obviously to the grant of a religious exemption to those persons for whom prosecution was proceeding or imminent.

As stated by Appellant in his **Supplementary Replying Affidavit** at **paragraph 5.35 thereof**, any period of suspension of the declaration of invalidity would obviously be used by the RNC to organise and prepare for

the implementation and administration of the exemption and to commence liasing with the relevant state authority assigned thereto.

75. I would therefor seek the following order:

75.1 The appeal is upheld;

75.2(a) Declaring sections 4(b) and 5 of the Drugs and Drugs Trafficking Act no 140 of 1992 (as amended) (Athe Drugs Act@) and sections 22A(10) of the Medicines and Related Substances Control Act, no 101 of 1965 (as amended) (Athe Medicines Act@) to be inconsistent with the Constitution, to the extent that they fail to provide an exemption applicable to the use, possession, cultivation and transportation of cannabis sativa by an adult Rastafari for a bona fide religious purpose in private, and accordingly invalid.

75.2(b) Suspending the aforesaid declaration of invalidity for a period of 12 months to enable Parliament to correct the inconsistencies which have resulted in the declaration of invalidity in accordance with the directions of this Honourable Court and after liasing with the Rastafari National Council.

75.2(c) That during the suspension of the aforesaid declaration of

invalidity, Appellant and other adult Rastafari, alternatively the Appellant only, is granted an interim constitutional exemption to use, possess, cultivate and transport cannabis sativa for their alternatively Appellant=s own personal religious use in private.

ALTERNATIVELY TO CLAUSE 75.2(c) above and only in the event that the above Honourable Court does not grant an interim constitutional exemption to >other adult Rastafari=:

A That the Director of Public Prosecutions and all prosecuting authorities falling under his authority, with respect to any alleged offence arising solely from the use, possession, cultivation and/or transportation of cannabis sativa committed by a person claiming to be a bona fide Rastafari over the age of 18 years of age, who claims that the cannabis sativa in question was for use in bona fide religious worship, be directed forthwith:

to stay all present or pending criminal prosecutions or proceedings against such person, during the period of suspension of the aforesaid declaration of invalidity; and

(ii) to release or assist in obtaining the release from custody of such person in (i) above;

not to proceed with any fresh prosecutions against any such or other person/s during the period of suspension of the aforesaid declaration of invalidity, provided that any cannabis found in the possession or control of such person/s by any arresting authority may be retained by the relevant authorities during this period, but may be released at any stage during this period at the discretion of the Director of Public Prosecutions or by persons authorised by him, to such persons from whom the cannabis sativa was confiscated;

(iv) save that the Director of Public Prosecutions may subject to any religious exemption created by Parliament, in his sole discretion, proceed with all stayed prosecutions or proceedings in (i) and (iii) above, after the period of suspension of the aforesaid declaration of invalidity has expired or is no longer in existence;

B That the Minister of Correctional Services be directed forthwith, after liasing with the Director of Public Prosecutions and the Rastafari National Council (Athe RNC@) to release all such persons claiming to be bona fide Rastafari who are presently serving a period of imprisonment solely for offences relating to the use, possession, cultivation and/or transportation of cannabis sativa where the cannabis sativa in question was for use in

bona fide religious worship.

75.2(d) That the aforesaid interim constitutional exemption can be revoked in the event of any material breach of the terms thereof, by a competent court in respect of >other adult Rastafari, and by a court of High Court status only in respect of the Appellant.

75.3 The Third Respondent is directed to register the Appellant=s contract of community service with effect from 15 February 1997.

75.4 The Fifth Respondent is ordered to pay the costs of Appellant in the application for leave to appeal, and in this appeal.

75.5 The costs order granted against Appellant in favour of First to Third Respondents by the SCA be set aside.

J L Abel

Appellant=s Counsel

Huguenot Chambers

Cape Town

22 March 2001

LIST OF ADDITIONAL AUTHORITIES

South Africa

Acts

1. Medicines and Related Substances Control Amendment Act no 90 of 1997
2. SA Medicines and Medical Services Regulatory Authority Act no 132 of 1998
3. Prevention and Treatment of Drug Dependency Act no 20 of 1992.

Cases

4. Shabalala and others v Attorney General of Transvaal and another 1996 (1) SA 725 (CC)
5. Government of RSA and others v Grootboom and others 2001 (1) SA 46 (CC)
6. Hoffman v SAA 2001 (1) SA 1 (CC)

7. Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)

8. CESA v Minister of Education 2000 (4) SA 757 (CC)

9. Prince v President, Cape Law Society and others 2000 (2) BCLR 133 (CC)

10. Prinsloo v Van der Linde and Another 1997 (3) SA 1012 (CC)

Pharmaceutical Manufacturers of S A v Ex President, R S A 1999 (4) SA 788 (T)

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13. Corbiere v Canada (Minister of Indian and Northern Affairs) [1999] 2 S.C.R. 203

14. R v Edwards Brooks and Art [1986] 2 S.C.R. 713

15. R v Westfair Foods (1989) 65 D.L.R. (4^{th}) 56 (Sask. C.A.)

16. Rodriguez v British Columbia (Attorney General) [1993] 3. S.C.R. 519

17. R v Parker [31 July 2001] Court of Appeal for Ontario

18. R v Clay [31 July 2001] Court of Appeal for Ontario

Guam

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Other

Acts

20. The California Compassionate Use Act of 1996

21. State of Hawaii Bill for an Act relating to Medical Use of Marihuana