CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 44/02

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Appellant
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Appellant
versus	
YASIEN MAC MOHAMED N.O	First Respondent
OMAR JAN MOHAMED N.O	Second Respondent
YASMIN MOHAMED N.O	Third Respondent
MARIA LULU MOHAMED	Fourth Respondent

Heard on : 25 February 2003

Decided on : 3 April 2003

JUDGMENT

ACKERMANN J:

Introduction

[1] This case arises out of a declaration of constitutional invalidity made by the Johannesburg High Court (the High Court) in respect of section 38 (the section) of the Prevention of Organised Crime Act[1] (the Act). The section reads:

[1] No 121 of 1998.

"**38. Preservation of property orders.**

(1) The National Director may by way of an *ex parte* application apply to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.

(2) The High Court shall make an order referred to in subsection (1) if there are reasonable grounds to believe that the property concerned —

(a) is an instrumentality of an offence referred to in Schedule 1;

or

(b) is the proceeds of unlawful activities.

(3) A High Court making a preservation of property order shall at the same time make an order authorising the seizure of the property concerned by a police official, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.

(4) Property seized under subsection (3) shall be dealt with in accordance with the directions of the High Court which made the relevant preservation of property order."

In terms of section 1 of the Act a "preservation of property order" means "an order referred to in section 38".

[2] First appellant is the National Director of Public Prosecutions (the National Director). Second appellant is the Minister of Justice and Constitutional Development (the Minister).[2] The first three respondents are trustees of the Zunaid Family Trust (the Trust) and owners in this capacity of certain fixed property (the Trust property). First and fourth respondents also claim a personal interest in the Trust property. The four respondents will be referred to jointly as "the respondents" bearing in mind that they were the applicants in a counter-application brought in the High Court, to which reference will presently be made. This is the second occasion on which this issue of

[2] The appellants appeal as of right under section 172(2)(d) of the Constitution.

the section's constitutional invalidity has served before this Court between the same parties.

The litigation in the High Court and this Court

[3] The litigation commenced with the granting of a preservation of property order by the High Court on 4 October 2000 on the *ex parte* application of the National Director. The order was published in the *Government Gazette* of 13 October 2000 in terms of section 39(1) of the Act and served on, amongst others, the first to third respondents.

[4] On 11 January 2001, the National Director launched an application in terms of section 48 of the Act for the forfeiture, under section 50, of the immovable property that had been the subject of the preservation order. A counter-application, joining the Minister, was then launched by the respondents seeking the following relief: first, a declaration that the whole of Chapter 6 of the Act (comprising sections 37 to 62) was inconsistent with the Constitution and therefore invalid; secondly, the reconsideration of the preservation of property order in terms of rule 6(12)(c) of the Rules of Court[3] and its dismissal; and thirdly, condonation of their failure to enter an appearance to oppose the forfeiture proceedings.

[3] Rule 6(12)(c) of the Rules of Court provides:

> "A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order."

[5] In the first hearing the High Court dealt first with the second and third heads of relief in the counter-application.[4] It came to the conclusion, for reasons that are not presently relevant, that "[t]he applicants' only chance of success lies in the constitutional challenge to the validity of chap[ter] 6 of the Act". In the first hearing the High Court only dealt with the unconstitutionality of section 38, however, and on 19 March 2002 made an order declaring the section to be constitutionally invalid –

> "to the extent that it requires the NDPP [the National Director of Public Prosecutions] to bring an application for a preservation of property order *ex parte* in every case and makes no provision for a rule *nisi* calling upon interested parties to show cause why a preservation of property and seizure order should not be made."

It referred such order for confirmation to this Court and postponed the proceedings pending our decision.

[6] That order came before this Court for confirmation under sections 167(5) and 172(2) of the Constitution,[5] and in a judgment delivered on 12 June 2002 (the "*Mohamed (1)* judgment"),[6] we set aside the High Court's declaration of invalidity on two grounds. The first was that the notional severance order was not a competent order to remedy constitutional invalidity caused by an omission.[7] The second was that the High Court had erred, by dealing solely with the constitutional attack against

---

[4] *Mohamed NO and Others v National Director of Public Prosecutions and Another* 2002 (4) SA 366 (W).

[5] Read with section 8 of the Constitutional Court Complementary Act 13 of 1995 and rule 15.

[6] Reported as *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2002 (9) BCLR 970 (CC); 2002 (4) SA 843 (CC).

[7] Id paras 26-7.

section 38, and by failing to deal with all the relief sought by the respondents against the appellants.[8] We accordingly referred the matter back to the High Court to be dealt with in the light of our judgment.

[7] The High Court did so in a second hearing in which it had before it two applications. One was by the National Director for a forfeiture order under section 52 of the Act and related relief. The other was a counter-application (the counter-application) in which, although various sections in Chapter 6 were separately attacked for their unconstitutionality (sections 38, 39, 48, 49, 50, 52), the respondents also sought to strike down the Chapter in its entirety.

[8] In its judgment of 16 October 2002 the High Court found – as it had in the first hearing – that the section limited the fair hearing component of the section 34 right and that such limitation was not justifiable under section 36 of the Constitution. Section 34 of the Constitution provides, to the extent relevant for the present case, that–

> "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court . . .".

[9] It thereupon made an order declaring the section to be constitutionally invalid, remedying the perceived unconstitutionality by means of a severance and reading in order. The order reads as follows:

[8] Id paras 30-2.

"1.1 The provision in s 38 of Act 121 of 1998 that the National Director may "*by way of an ex parte application*" apply to a High Court for a preservation of property order is declared to be inconsistent with the Constitution.

1.2 s 38 of Act 121 of 1998 is to be read as if the words "*by way of an ex parte application*" did not appear therein.

2.1 The omission from s 38 of Act 121 of 1998 of a rule nisi procedure is declared to be inconsistent with the Constitution.

2.2 s 38 of Act 121 of 1998 is to be read as though it contained a subsection (4) reading as follows:

> '(4)(a) A court to which an application is made in terms of subsection (1) may instead of making a final order, make a provisional preservation of property and seizure order having immediate effect and simultaneously grant a rule nisi calling upon all interested parties (including the parties referred to in s 39(1)(a)) upon a day mentioned in the rule to appear and show cause why the preservation of property and seizure order should not be made final.
>
> (b) If a rule nisi is issued the court may give such directions as it considers appropriate for the rule to be brought to the attention of parties who may have an interest in the property concerned.
>
> (c) Upon the application of any interested party, the court may anticipate the return day for the purpose of discharging the rule nisi if 24 hours' notice of such application has been given to the National Director.'

3. The orders referred to in paragraphs 1 and 2 shall be with retrospective effect save that they shall not invalidate any forfeiture order already made, and those orders are referred to the Constitutional Court for confirmation.

4. Save as set out in paragraphs 1, 2 and 3 above, the counter-application is dismissed.

5. The applicants are ordered jointly and severally to pay the respondents' costs, including the costs of two counsel, occasioned by the application to amend and supplement the counter-application.

6. The respondents are ordered jointly and severally to pay the applicants' costs of the counter-application."

The High Court however dismissed the attacks on the other sections as well as against Chapter 6 as a whole. Despite having found section 38 to be unconstitutional to the

extent indicated in the order, the High Court granted the main application of the National Director. The order of constitutional invalidity is now before this Court for confirmation.

[10] The appellants appeal as of right but the respondents have not appealed against the dismissal of their attacks in the counter-application against the individual sections of Chapter 6 or against Chapter 6 as a whole, nor against the forfeiture order granted on the main application of the National Director.

The issues before this Court

[11] Accordingly there are only three issues now before us:

(i) The correctness of the High Court's declaration of invalidity of section 38.

(ii) The correctness of the remedial order, in the event of the declaration of invalidity having been correctly made.

(iii) The correctness of the costs orders.

These issues fall within a narrow compass. Here, as in *De Beer's* case[9] –

> "[w]e are concerned with the scope of the fair-hearing component of that [the section 34] right in a court of law. This may simply be referred to as 'the section 34 fair-hearing right'."

[9] *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* 2001 (11) BCLR 1109 (CC); 2002 (1) SA 429 (CC) para 10, a judgment that will be considered more fully later.

[12] The question is whether section 38 unjustifiably limits such right. If it does, the only other question is whether the High Court order should be confirmed in the form issued or in some other form.

[13] This issue relates solely to the constitutionality of the procedure established by section 38 and is not concerned with the constitutionality of the substantive provisions of the Act. As the respondents have not appealed against the High Court's dismissal of the challenges to those provisions they must, for purposes of this judgment, be assumed to be constitutional. The statutory context in which section 38 operates and the nature of the order that could be made under its provisions, as well as the gravity of its consequences, may well be relevant to an assessment of the procedural fairness of the section's provisions,[10] but only in the context of evaluating the constitutional fairness of the section 38 procedure.[11]

The purpose of the Act and certain of its relevant provisions

[14] The Act's overall purpose and operation has been dealt with in *Mohamed (1)*[12] and need not be repeated here. The briefest of summaries suffices. The rapid growth of organised crime, money laundering, criminal gang activities and racketeering has become a serious international problem and security threat, from which South Africa has not been immune. It is often impossible to bring the leaders of organised crime to

[10] Id para 15.

[11] Id.

[12] Above n 6 paras 14-22.

book, in view of the fact that they invariably ensure that they are far removed from the overt criminal activity involved. Prior to the Act, South Africa's common and statute law failed to keep pace with international measures aimed at dealing effectively with these problems. Hence the need for the measures embodied in the Act.

[15] As stated in *Mohamed (1)*:[13]

> "It is common cause that conventional criminal penalties are inadequate as measures of deterrence when organised crime leaders are able to retain the considerable gains derived from organised crime, even on those occasions when they are brought to justice. The above problems make a severe impact on the young South African democracy, where resources are strained to meet urgent and extensive human needs. Various international instruments deal with the problem of international crime in this regard and it is now widely accepted in the international community that criminals should be stripped of the proceeds of their crimes, the purpose being to remove the incentive for crime, not to punish them. This approach has similarly been adopted by our legislature."

[16] The present Act (and particularly Chapters 5 and 6 thereof) represents the culmination of a protracted process of law reform which has sought to give effect to South Africa's international obligation and domestic interest to ensure that criminals do not benefit from their crimes. Chapter 5 (comprising sections 12 to 36) provides for the forfeiture of the benefits derived from crime but its confiscation machinery may be invoked only when the "defendant" is convicted of an offence.[14] Chapter 6 (comprising sections 37 to 62) provides for forfeiture of the proceeds of and

[13] Id para 15, footnote omitted.

[14] Section 18(1) of the Act.

instrumentalities used in crime, but is not conviction based; it may be invoked even when there is no prosecution.[15]

[17] Under section 38(2) the High Court must make a preservation of property order–

> ". . . if there are reasonable grounds to believe that the property concerned –
> (a) is an instrumentality of an offence referred to in Schedule 1; or
> (b) is the proceeds of unlawful activities."

Within 90 days of the grant of the preservation order the National Director must apply for the forfeiture of the property. At that stage, affected parties are entitled to a full hearing to determine whether the property should be forfeited or not.[16]

[18] Prior to the forfeiture stage of the proceedings there is an opportunity for affected parties to have preservation orders set aside or varied. So, section 47(3) provides that a High Court shall rescind a preservation order made in respect of immovable property "if it deems it necessary in the interests of justice" to do so. Section 47(1) provides, in respect of movable property, that a High Court may vary or rescind the preservation order, but in much more limited circumstances than in the case of immovable property.[17]

---

[15] Sections 48(1) and 50(1), read with section 38 of the Act.

[16] Sections 40 and 48-50 of the Act.

[17] Section 47(1) of the Act provides as follows:

> "(1) A High Court which made a preservation of property order—

[19] At the forfeiture stage of the proceedings an owner can claim that he or she acquired an interest in the property in question legally and for value, and that he or she neither knew nor had reasonable grounds to suspect that the property constituted the proceeds of crime or had been an instrumentality in an offence ("the innocent owner" defence).[18]

The High Court's construction of section 38 and the parties' respective arguments thereon

[20] The High Court came to the conclusion, as it did in the first hearing that, on a proper construction, section 38 precluded a court from granting a provisional preservation of property order coupled with a rule *nisi*. In reaching this conclusion the High Court set great store by the fact that section 26(3) made express provision for a provisional restraint order having immediate effect and the simultaneous grant of a rule *nisi*.[19] It further reasoned that where no such provision is made in section 38, a provision in the same Act dealing with a similar matter, it must be concluded that the grant of a rule *nisi* under section 38 is excluded.

> (a) may on application by a person affected by that order vary or rescind the preservation of property order or an order authorising the seizure of the property concerned or other ancillary order if it is satisfied—
>
> (i) that the operation of the order concerned will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and
>
> (ii) that the hardship that the applicant will suffer as result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; and
>
> (b) shall rescind the preservation of property order when the proceedings against the defendant concerned are concluded."

[18] Section 52 of the Act. Compare also section 54.

[19] Section 26(3) occurs in Chapter 5 of the Act, however, which deals with forfeiture in criminal cases. See paras 43-7 below.

[21] In both its judgments the High Court pointed out that the rights of a person who has an interest in the property that is made the subject of a preservation order are extremely limited and stressed the fundamental importance to our jurisprudence of the *audi alteram partem* rule (the *audi* rule), to the effect that a party should be given an opportunity of being heard in court before an order is made that might adversely affect such party's rights. The High Court concluded that section 38, in the context of Chapter 6 of the Act, constituted a gross invasion of the section 34 fair hearing rights of a person affected by a preservation of property order. Such limitation, it was further held, could not be justified under section 36 of the Constitution, chiefly because the legislature could have chosen less restrictive means to achieve its purpose, namely by providing in the section for a rule *nisi* having the effect of a temporary order in those cases where an *ex parte* order can be justified.

[22] In the second hearing before us Mr Trengove, who appeared for the National Director and the Minister, advanced three main contentions. The first was that a reasonable and unstrained construction of section 38 did not preclude the High Court, in an appropriate case, from issuing a rule *nisi* and simultaneously making an interim preservation order pending the return day of the rule, and that accordingly section 38 did not limit section 34 of the Constitution. He pointed out that as yet no rules as contemplated in section 62(1) of the Act had been made. Therefore, by virtue of the provisions of section 62(2), the provisions of the Supreme Court Act, 1959, and the rules made under section 43 of that Act would, with the necessary alterations, apply to

proceedings under the present Act.[20] Even in the absence of any rules, so the argument proceeded, the High Court had the inherent jurisdiction, now specifically enshrined in section 173 of the Constitution, to protect and regulate its own process, and to regulate and to develop the common law, taking into account the interests of justice.

[23] He submitted that the High Courts had, over a considerable period of time, developed a coherent and flexible jurisprudence in relation to *ex parte* applications, the granting of rules *nisi* and the making of appropriate interim orders pending the return day of such rules *nisi*. Such jurisprudence could be adapted and applied to new jurisprudential needs. Applied to section 38, it would permit the High Court to deal appropriately with all applications under section 38 in a manner that did not infringe section 34 of the Constitution.

---

[20] Section 62 of the Act provides:

> "62. Procedure and rules of court.—(1) The Rules Board for Courts of Law referred to in section 1 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), shall, in consultation with the Minister and after consultation with the National Director, with due regard to the purpose of this Act make rules for—
>
> (a) the High Court regulating the proceedings contemplated in Chapters 5 and 6;
>
> (b) the magistrate's court regulating the proceedings referred to in section 51.
>
> (2) In the absence of such rules the provisions of the Supreme Court Act, 1959 (Act No. 59 of 1959), and the rules made under section 43 of that Act and the provisions of the Magistrate's Court Act, 1944 (Act No. 32 of 1944), and the rules made under section 6 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), as the case may be, shall, with the necessary changes, apply in relation to proceedings in terms of such hearing except in so far as those rules are inconsistent with procedures prescribed in this Chapter."

Rule 6 of the Uniform Rules of Court, promulgated under the provisions of section 43 of the Supreme Court Act deals, amongst other things, with the regulation of *ex parte* applications. So, for example, rule 6(8) provides as follows:

> "Any person against whom an order is granted *ex parte* may anticipate the return day upon delivery of not less than twenty-four hours' notice."

[24] Mr Trengove's second argument, in the alternative, was premised on this Court upholding the High Court's construction of section 38. Mr Trengove contended that, even on the High Court's construction, section 38 did not limit the section 34 fair hearing right. In the alternative he contended that even if section 38 constituted such a limitation, it was justified under section 36 of the Constitution.

[25] Thirdly, and further in the alternative, he submitted that if section 38 were held to be unconstitutional, appropriate remedial orders should be made in order to ensure, amongst other things, that completed preservation and forfeiture orders made under the Act were not undone.

[26] In his written argument Mr Marais, for the respondents, supported both the order of invalidity and the remedial order made by the High Court. In oral argument, however, he made common cause with Mr Trengove that the High Court could and should have interpreted section 38 in conformity with the Constitution, namely, by finding that under the section's provisions a High Court could grant a rule *nisi* together with an interim preservation and seizure order, pending the return day of the rule *nisi*. As part of this alternative argument Mr Marais submitted that the High Court ought to have granted a declaratory order, as sought by the respondents, embodying such constitutionally compatible construction.

The historical development of ex parte applications, the granting of rules nisi and the making of interim orders pending the return day of a rule nisi

[27] Before considering the above arguments and the High Court's construction of section 38, it is convenient to examine the common law practice relating to *ex parte* applications, the granting of rules *nisi* and the making of interim orders pending the return day of the rules *nisi*, as well as the importance of the *audi* rule for procedural fairness. For the purposes of this case "an '*ex parte* application' in our practice is simply an application of which notice was *as a fact* not given to the person against whom some relief is claimed in his absence."[21]

[28] Our common law has recognised both the great importance of the *audi* rule[22] as well as the need for flexibility, in circumstances where a rigid application of the rule would defeat the very rights sought to be enforced or protected. In such circumstances, the court issues a rule *nisi* calling on the interested parties to appear in court on a certain fixed date to advance reasons why the rule should not be made final, and at the same time orders that the rule *nisi* should act immediately as a temporary order, pending the return day.[23] This practice has been recognised by the South African courts for over a century:

[21] *Simross Vintners (Pty) Ltd v Vermeulen* 1978 (1) SA 779 (T) at 783B.

[22] The High Court rightly cited the judgment of *R v Ngwevela* 1954 (1) SA 123 (A) at 131B-C in which Centlivres CJ referred to the audi rule as "a sacred maxim."

[23] See, for example, Erasmus *Superior Court Practice* B1-52-3 (Juta Service 17, 2002); Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* (Juta 1997) 4ed 232-3 and *Network Video (Pty) Ltd v Universal City Studios Inc and Others* 1984 (4) SA 379 (C) at 381F-H.

> "The term '*rule nisi*' is derived from English law and practice, and the rule may be defined as an order by a court issued at the instance of the applicant and calling upon another party to show cause before the court on a particular day why the relief applied for should not be granted. Our common law knew the temporary interdict and, as Van Zyl points out, a 'curious mixture of our practice with the practice of England' took place and the practice arose of asking the court for a rule returnable on a certain day, but in the meantime to operate as a temporary interdict."[24]

[29] The flexibility and utility of the rule *nisi* acting at the same time as an interim order, has been recognised by the courts and it has been applied to modern problems in commercial suits. I would endorse the following passages from the judgment of Corbett JA, writing for a unanimous Appellate Division in the *Safcor* case:[25]

> "The Uniform Rules of Court do not provide substantively for the granting of a rule *nisi* by the Court. Nevertheless, the practice, in certain circumstances, of doing so is firmly embedded in our procedural law (see, generally, Van Zyl *The Judicial Practice in South Africa* 2nd ed at 355ff, 370-1; Herbstein and Van Winsen *The Civil Practice of the Superior Courts in South Africa* 3rd ed at 89-90). This is recognised by implication in the Rules (see, eg, Rule 6 (8) and Rule 6 (13)). The procedure of a rule *nisi* is usually resorted to in matters of urgency and where the applicant seeks interim relief in order adequately to protect his immediate interests. It is a useful procedure and one to be encouraged rather than disparaged in circumstances where the applicant can show, *prima facie*, that his rights have been infringed and that he will suffer real loss or disadvantage if he is compelled to rely solely on the normal procedures for bringing disputes to Court by way of notice of motion or summons.

[24] Erasmus id B1-53; Van Zyl *Judicial Practice* vol I 3ed (Juta Cape Town 1921) 450 and following; *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others* 1995 (4) SA 1 (A) at 18J-19B.

[25] *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 674H to 675A.

[30] A prime example of the rule *nisi*'s application to modern problems is in the development of the so-called *Anton Piller* order. In *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam and Another*[26] the divergence of judicial opinion concerning such orders was laid to rest by Corbett CJ in the following manner:

> "At this point it is necessary to give a decision in regard to what was left open in both the Universal City Studios case supra and Jafta's case supra, viz whether an Anton Piller order directed at the preservation of evidence should be accepted as part of our practice. In my view, it should; and I would define what an applicant for such an order, obtained in camera and without notice to the respondent, must prima facie establish, as the following:
> (1) That he, the applicant, has a cause of action against the respondent which he intends to pursue;
> (2) that the respondent has in his possession specific (and specified) documents or things which constitute vital evidence in substantiation of applicant's cause of action (but in respect of which applicant cannot claim a real or personal right); and
> (3) that there is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner be spirited away by the time the case comes to trial or to the stage of discovery.
> . . . .
> The Court to which application is made for such an Anton Piller order has a discretion whether to grant the remedy or not and, if it does, upon what terms. In exercising this discretion the Court will pay regard, inter alia, to the cogency of the prima facie case established with reference to the matters listed (1), (2) and (3) above; the potential harm that will be suffered by the respondent if the remedy is granted as compared with, or balanced against, the potential harm to the applicant if the remedy is withheld; and whether the terms of the order sought are no more onerous than is necessary to protect the interests of the applicant."[27]

[26] Above n 24.

[27] Id 15G - 16C.

[31] As important for present purposes, are the following passages in the *Shoba* case where certain *obiter dicta* in the *Universal Studios* case[28] relating to the Court's inherent powers to develop procedural remedies, were implicitly confirmed:[29]

> "With reference to the third component and the views expressed in the *Cerebos Food* case concerning it, the judgment in the *Universal City Studios* case makes the following observation (at 754E-F):
>
> > 'Now, I am by no means convinced that in appropriate circumstances the Court does not have the power to grant *ex parte* and without notice to the other party, ie the respondent (and even, if necessary, *in camera*) an order designed *pendente lite* to preserve evidence in the possession of the respondent. It is probably correct, as so cogently reasoned by the Court in the *Cerebos Food* case *supra*, that there is no authority for such a procedure in our common law. But, of course, the remedies devised in the *Anton Piller* case *supra* and other subsequent cases for the preservation of evidence are essentially modern legal remedies devised to cater for modern problems in the prosecution of commercial suits.' (Emphasis supplied.)
>
> After reference to the Court's inherent power to regulate its procedures in the interests of the proper administration of justice, the judgment proceeds (at 755A-E):
>
> > 'In a case where the applicant can establish *prima facie* [the requisites for an *Anton Piller* order], and the applicant asks the Court to make an order designed to preserve the evidence in some way, is the Court obliged to adopt a *non possumus* attitude? Especially if there is no feasible alternative? I am inclined to think not. It would certainly expose a grave defect in our system of justice if it were to be found that in circumstances such as these the Court were powerless to act. Fortunately I am not persuaded that it would be. An order whereby the evidence was in some way recorded, eg by

[28] *Universal City Studios Inc v Network Video* 1986 (2) SA 734 (A).

[29] Above n 24 at 8G-9D.

> copying documents or photographing things or even by placing them temporarily, ie *pendente lite*, in the custody of a third party would not, in my view, be beyond the inherent powers of the Court. Nor do I perceive any difficulty in permitting such an order to be applied for *ex parte* and without notice and *in camera*, provided that the applicant can show the real possibility that the evidence will be lost to him if the respondent gets wind of the application.'" (Emphasis supplied.)

[32] The Constitution in section 173 now expressly provides that:

> "[t]he Constitutional Court, the Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

There is accordingly in principle no procedural bar to a High Court hearing an application *ex parte* and *in camera* under section 38 of the Act and granting a rule *nisi*, together with an interim preservation and seizure order, pending the return day of the rule.

The proper construction of section 38

[33] I would at the outset point out that it is not the *ex parte* nature of the initial application under 38 that the High Court found to be objectionable, but the fact that on its construction of the section, a High Court is precluded from issuing a rule *nisi*. The phrase in section 38 "[t]he National Director may by way of an *ex parte* application apply" means no more than that, if the National Director is desirous of obtaining an order under section 38, she or he may use an *ex parte* application, in the sense defined in paragraph 27 above. It sanctions a particular initiating procedure to be employed

when relief of a particular nature is being sought.[30] An important consequence of this is that an application by the National Director under section 38 can never be dismissed solely on the ground that it has been brought *ex parte*.

[34] Against this background I proceed to deal with the proper construction of section 38 and the arguments advanced in this regard. It is common cause, and correctly so, that on the High Court's construction of the section, the constitutional fair hearing rights of various persons could be materially limited and that unless such limitation was justifiable under section 36 of the Constitution, section 38 would be constitutionally invalid. On the construction favoured by both parties in the present hearing, this would not be the case and the section would pass constitutional muster.

[35] A settled principle of constitutional construction recognises that a statutory provision may be capable of more than one reasonable construction. If the one construction leads to constitutional invalidity but the other not, the latter construction, being in conformity with the Constitution, must be preferred to the former, provided always that such construction is reasonable and not strained.[31] This principle has been applied in the context of the Constitution's section 34 fair hearing right as follows:

---

[30] See *Director of Public Prosecutions: Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C) at para 96, where the High Court came to a similar conclusion in relation to section 16 of the Proceeds of Crime Act Act 76 of 1996 which provided in its relevant part that a designated person–

> ". . . may by way of an *ex parte* application apply to a competent Superior Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property to which the order relates."

[31] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: in re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC) paras 22-4. See also *De Lange v Smuts NO and Others* 1998 (7) BCLR 779

> "Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and rules of court, where it is reasonably possible to do so, in a way that would render the proceedings fair."[32]

[36] The importance of the *audi* rule, as one of the main pillars of the section 34 fair hearing right needs to be stressed, when construing a statutory provision which, it is contended, excludes *audi.* The following observations in *De Beer's* case are pertinent in this regard:

> "This section 34 fair hearing right affirms the rule of law which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. . . . It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. That reasonable opportunity can usually only be given by ensuring that reasonable steps are taken to bring the hearing to the attention of the person affected."[33]

[37] It is well established that, as a matter of statutory construction, the *audi* rule should be enforced unless it is clear that the legislature has expressly or by necessary implication enacted that it should not apply or that there are exceptional circumstances which would justify a court not giving effect to it.[34]

(CC); 1998 (3) SA 785 (CC) para 85 and *Numsa and Others v Bader Bop (Pty) Ltd and Another* 2003 (2) BCLR 182 (CC) para 37.

[32] *De Beer*'s case above n 9 para 11 and the authorities there cited.

[33] Id para 11, footnotes omitted.

[34] *R v Ngwevela* above n 22 at 131H; *Du Preez and Another v Truth and Reconciliation Commission* 1997 (4) BCLR 531 (A); 1997 (3) SA 204 (A) at 231F; *Cooper NO v First National Bank of South Africa Ltd* 2001 (3) SA 705 (SCA) paras 23-5; and *Transvaal Agricultural Union v Minister of Land Affairs and Another* 1996 (12) BCLR 1573 (CC); 1997 (2) SA 621 (CC) para 25.

[38] For stronger reasons this approach should apply when construing a statutory provision in order to determine its constitutionality. Accordingly, in construing section 38, where no express reference is made to the *audi* principle, or its exclusion, the question to be asked is not whether the *audi* principle can be implied in the section, but rather whether it has been excluded from the section by clear necessary implication, or whether there are exceptional circumstances which would justify a court not giving effect to it.

[39] It is true that section 26(3)(a) of the Act, in Chapter 5, makes express provision for a provisional restraint order and a rule *nisi* in the following terms:

> "A court to which an application is made in terms of subsection (1) may make a provisional restraint order having immediate effect and may simultaneously grant a rule nisi calling upon the defendant upon a day mentioned in the rule to appear and to show cause why the restraint order should not be made final."

The absence of such provisions in section 38, or elsewhere in Chapter 6 of the Act, is the main ground for the High Court's conclusion that the *audi* principle has been excluded from the provisions of section 38, in the sense that the power of a High Court to grant a rule *nisi* together with a temporary restraining order pending the return day has been excluded.

[40] Although there is no express reference thereto in its judgment, the High Court clearly relied implicitly on the interpretative maxim that the "*specific inclusion of one*

implies the exclusion of the other ",[35] in coming to this conclusion. This maxim has been described as "a valuable servant, but a dangerous master".[36] "It is not a rigid rule of statutory construction";[37] in fact it has on occasion been referred to as a "principle of common sense" rather than a rule of construction,[38] and "it must at all times be applied with great caution".[39]

[41] There are circumstances when the inclusion of a particular provision occurs because of excessive caution,[40] or where the legislature is "either ignorant or unmindful of the real state of the law", or for some other reason that does not warrant the inference that its inclusion in one provision means that it was intended to be excluded in the other provision.[41]

---

[35] The translation by Hiemstra and Gonin *Trilingual Legal Dictionary* (Juta 1981) of the Latin maxim *inclusio unius est exclusio alterius* at 208.

[36] By Lopes LJ in *Colquhoun v Brooks* (1888) 21 QB 52 at 65.

[37] *Administrator, Transvaal and Others v Zenzile and Others* 1991 (1) SA 21 (A) at 37G.

[38] *Poynton v Cran* 1910 AD 205 at 222 per Innes CJ.

[39] *Zenzile*'s case above n 37 at 37H. See also, in general, Mureinik "*Expression Unius: Exclusio Alterius?*" in (1987) 104 *South Arican Law Journal* 264.

[40] See, for example, *Ngwevela's case* above n 22 at 130H-131A. See also Mureinik, above n 39 at 274.

[41] In *Maxwell on The Interpretation of Statutes* 11 ed (Sweet & Maxwell 1962) by Roy Wilson and Brian Calpin, the following is stated at 306-7:

> "Provisions sometimes found in statutes, enacting . . . for particular cases only that which was already and more widely the law, have occasionally furnished ground for the contention that an intention to alter the general law was to be inferred from the partial or limited enactment, resting on the maxim *expressio unius, exclusio alterius*. But that maxim is inapplicable in such cases. The only inference which a court can draw from such superfluous provisions (which generally find place in Acts to meet unfounded objections and idle doubts), is that the legislature was either ignorant or unmindful of the real state of the law, or that it acted under the influence of excessive caution."

[42] As pointed out in paras 27-32, the inherent power of a court to grant a rule *nisi* together with an interim order pending its return day, in order to prevent the very harm that might result if notice were given, is incontrovertibly established and can be applied to new situations where necessary. It was accordingly not necessary for the legislature to have inserted the provisions relating to the rule *nisi* and the interim restraint order relating to property in section 26(3)(a) of the Act.

[43] It must be remembered that section 26(3)(a) occurs in Chapter 5 of the Act, which limits the restraint order to a defendant who is charged or is about to be charged with an offence.[42] The property in question may only be realised when, amongst other things, a confiscation order has been made,[43] and a confiscation order may only be made when the defendant is convicted of an offence.[44] Section 26(3)(a) therefore applies in a setting quite different from section 38, the latter applying (in Chapter 6) to the civil recovery of property.

[44] It should also be borne in mind that section 38 is a relative newcomer to the statutory confiscation of property regime, since civil recovery was not a confiscating mechanism in either the Drugs and Drug Trafficking Act[45] or in the 1996 Proceeds of

---

[42] Section 25(1) of the Act.

[43] Section 30(1) and (2) of the Act.

[44] Section 18(1) read with section 12(1) of the Act.

[45] No 140 of 1992.

Crime Act[46] (the 1996 Act), the latter being the immediate precursor to the present Act. Section 16 of the 1996 Act made provision for restraint orders in the criminal context in the same way as section 26 of the present Act, and section 16(3)(a) is in terms identical to the present section 26(3)(a). But when section 16(3)(a) was enacted, there was no equivalent to the present section 38 in the 1996 Act. This considerably weakens any inference to be drawn from the fact that in the present Act section 26(3)(a) makes specific reference to a rule *nisi* and interim restraint order, whereas section 38 does not.

[45] There is a further consideration that militates strongly against the drawing of such an inference, namely, the provisions of section 44(1) and (2) of the Act. A "preservation of property order" is defined in section 1(1) as "an order referred to in section 38". Section 44(1) provides that such a "preservation of property order" may make provision for certain reasonable living and legal expenses. No express provision is made for granting such relief at a stage *after* the making of the preservation of property order, as is the case with the relief that may be granted under sections 47, 52 and 54, but as part of the order made under section 38.

[46] But the only persons who can give information concerning such living and legal expenses are the persons affected by the preservation of property order. Section 44(2)(b) moreover provides that a High Court shall not make provision for such expenses unless the affected person concerned has –

[46] No 76 of 1996.

> "disclosed under oath all his or her interests in the property and has submitted to that Court a sworn and full statement of all his or her assets and liabilities."

From its clear wording the section contemplates that at the time of making a preservation order an investigation of all these matters may take place.

[47] These provisions of section 44 are incompatible with a construction of section 38 which excludes a rule *nisi* and an interim preservation order. Their clear purpose can be defeated if the affected persons do not have the opportunity, afforded by an order which is only interim and provisional, to make their case in the period between the grant of a provisional and interim order and its confirmation on the return day of the rule *nisi*. In my view the fact that section 26(3)(a) of the Act makes express provision for a provisional restraint order and a rule *nisi* does not warrant the inference that such orders have by necessary implication been excluded from section 38.

[48] Furthermore, the issue is not whether the *audi* principle is to be implied in section 38 but, on the contrary, whether –

> "it is clear that Parliament has expressly or by necessary implication enacted that it should not apply or that there are exceptional circumstances which would justify the Court's not giving effect to it."[47]

We have adopted the view, consistently enunciated over the years by the courts, that –

[47] *Ngwevela's* case above n 22 at 131H.

> "words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands"[48]

and that such implication must be necessary in order "to realise the ostensible legislative intention or to make the Act workable".[49]

[49] The same approach must be adopted when considering whether, by necessary implication, the *audi* principle has been excluded from section 38. In my view it cannot be found that it has been so excluded. There are no exceptional circumstances and the purposes of the Act can be fully achieved when, in relation to section 38, the principles relating to the issuing of rules *nisi* and the making of interim preservation orders are applied by a High Court.

[50] The essence of these principles is their practicability, flexibility and adaptability. They can be narrowly and appropriately tailored to accommodate the interests of the State in attaining the purposes of the Act, in particular in preventing property to which the State can lay claim under the Act from disappearing or being squandered, and also to protect, as far as possible, the interests of the individuals by observing the *audi* rule and in so doing to afford them as fair a trial as possible under section 34.

---

[48] *Rennie NO v Gordon NNO* 1988 (1) SA 1 (A) at 22E-F per Corbett JA, adopted in *Bernstein and Others v Bester and Others NNO* 1996 (4) BCLR 449 (CC); 1996 (2) SA 751 (CC) para 105.

[49] *Palvie v Motale Bus Service (Pty) Ltd* 1993 (4) SA 742 (A) at 749C per Howie AJA, adopted in *Bernstein* id.

[51] In my view there is only one proper construction of section 38, namely, that the *audi* rule has not been excluded and that the principles relating to the issuing of rules *nisi* and the making of interim preservation orders by the High Courts, as discussed in this judgment, are applicable to the section 38 procedures when the National Director applies *ex parte*, as he is entitled to do in all cases, for relief under section 38.

[52] On the construction of section 38 adopted in this judgment, the duration of the temporary preservation order might be very short, particularly in the case where an affected person anticipates the return day of the rule *nisi*. I shall assume, without deciding that such temporary deprivation, before the return day, constitutes a limitation of the section 34 fair hearing right. Such limitation is, however, amply justified under section 36 of the Constitution. Indeed this was properly conceded by Mr Marais, the respondents making no attempt to establish the contrary. The limitation of the section 34 right enables the Act to function for the legitimate and most important purpose for which the Act was designed, referred to in paras 14 to 15 above, and to reduce the risk of the dissipation of the proceeds and instrumentalities of organised crime. The limitation is as narrowly and appropriately tailored as it could be and is under the control of the High Court.

Section 38's inconsistency with sections 14(b) and 25(1) of the Constitution

[53] The High Court, on the basis of the construction it placed on section 38, also concluded that the section unjustifiably infringed section 14(c) of the Constitution which, as part of the right to privacy, guarantees to everyone, the right not to have

"their possessions seized" and also unjustifiably constituted an arbitrary deprivation of property in conflict with section 25(1) of the Constitution which provides as follows:

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

No argument was addressed to us by counsel on these grounds of unconstitutionality and, in particular, the respondents did not seek to support these grounds in impugning section 38's constitutionality. Vital to the High Court's conclusions in this regard is its finding that, on procedural grounds, section 38 was constitutionally invalid. Once this conclusion is rejected, as we do, the whole basis for the finding that the section is unconstitutional on these other grounds, falls away and the finding cannot be sustained.

Ought the High Court to have made a declaratory order on the meaning of section 38

[54] Reference has been made in para 26 above to an argument by Mr Marais that if the proper construction of section 38 did not lead to constitutional inconsistency, then the High Court ought to have made a declaratory order to such effect. Such an order would, in my view, be both inapposite and redundant. Inapposite because declaratory orders are not designed for use when the constitutional invalidity of a statutory provision is being considered. Redundant, because the Constitution itself makes provision for an appropriate order.

[55] Section 19(1)(a)(iii) of the Supreme Court Act[50] provides a statutory basis for the grant of declaratory orders[51] without removing the common law jurisdiction of courts to do.[52] It is a discretionary remedy. It is unnecessary to decide in this case whether and to what extent such a declaratory order could be granted in relation to rights generally under the Constitution.

[56] This judgment deals only with the question in relation to section 172(1)(a) of the Constitution[53] when a court, deciding a constitutional matter within its power, is called upon to decide whether it must declare a statutory provision to be constitutionally invalid. Once it finds a law to be inconsistent with the Constitution, it has no discretion; it "must declare" such law to be "invalid to the extent of its inconsistency". The Constitution thus makes provision in section 172(1)(a) for its own special form of declaratory order, and allows no room for a declaratory order as envisaged by the common law or section 19(1)(a)(iii) of the Supreme Court Act. We are not here concerned with the provisions of section 172(1)(b).

---

[50] No 59 of 1959 as amended.

[51] Section 19(1)(a)(iii) provides, to the extent releavnt for present purposes:

> "19(1)(a) A provincial or local division shall . . . have power –
> . . .
> (iii) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."

[52] *Veneta Mineraria SPA v Carolina Collieries (Pty) Ltd* 1987 (4) SA 883 (A) 886I.

[53] Section 172(1)(a) provides, to the extent relevant for this case, as follows:

> "172(1) When deciding a matter within its power, a court –
> (a) must declare that any law . . . that is inconsistent with the Constitution is invalid to the extent of its inconsistency."

[57] Mr Marais' submission relates, however, to the reverse position, when a court comes to the conclusion that a statutory provision is not inconsistent with the Constitution. Even in this event, a formal declaratory order is unnecessary. A court can reach such conclusion at either stage of the two-part inquiry. It may conclude, applying the principles of constitutional construction,[54] that the provision does not limit the constitutional provision in question or that, despite the fact that it does so limit it, such limitation is justified. Whatever the case may be, the court is obliged at all stages of the inquiry to give proper reasons for its conclusion. Such reasons will not only be binding on the litigants but will constitute an objective precedent, with such binding force on other courts as the principles of *stare decisis* and the status of the court delivering the judgment dictate.

[58] There is another, and related reason, why the granting of a conventional declaratory order is inapposite, even when a court finds no constitutional invalidity. It is because the purpose of the conventional declaratory order differs from that of the Constitution's section 172(1)(a) inquiry. The purpose of the former is limited to an order that will be binding on the litigants, in the sense of it being *res judicata* between them,[55] whereas in relation to questions of constitutional validity we have taken an objective approach.[56]

---

[54] See para 35 above.

[55] *Ex Parte Ginsberg* 1936 TPD 155 at 158; *Shoba's* case above n 24 at 14F-H.

[56] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) BCLR 1 (CC); 1996 (1) SA 984 (CC) paras 26-9.

[59] In this context the following was said in *Ferreira v Levin*:[57]

> "The answer to the first question is that the enquiry is an objective one. A statute is either valid or "of no force and effect to the extent of its inconsistency". The subjective positions in which parties to a dispute may find themselves cannot have a bearing on the status of the provisions of a statute under attack. The Constitutional Court, or any other competent Court for that matter, ought not to restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of a law. The consequence of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach."

Mr Marais's contentions in this regard must accordingly be rejected.

Costs

[60] The above conclusion only affects the High Court's orders in relation to the respondents' counter-application and the order made on such counter-application, as quoted in para 9 above. The costs order in paragraph 5 of the order on the counter-application must stand, because the upholding of the appeal has no effect on the award of such costs. The National Director, quite properly, did not seek an order for costs against the respondents in the High Court on their counter-application, which, in the light of this judgment has proved to be unsuccessful; nor did he seek an order for costs in this Court.

[57] Id para 26.

Order

[61] The following order is accordingly made:

1. The appeal is upheld and the High Court's order on the counter-application is amended to read as follows:

   "1. The counter-application is dismissed.

   2. The applicants are ordered jointly and severally to pay the respondents' costs, including the costs of two counsel, occasioned by the application to amend and supplement the counter-application."

2. The Court declines to confirm the order of constitutional invalidity made by the High Court on 16 October 2002 in case no. 21921/00.

Chaskalson CJ, Langa DCJ, Goldstone J, Madala J, Mokgoro J, Moseneke J, Ngcobo J, O'Regan J and Yacoob J concur in the judgment of Ackermann J.

For the appellants:	W. Trengove SC instructed by the State Attorney, Johannesburg.
For the respondents:	D. Marais instructed by Ramsurjoo Du Plessis, Johannesburg.