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## Constitutional Application

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### **Constitutionality of s 38 of the Prevention of Organised Crime Act 121 of 1998**

*National Director of Public Prosecutions v Mohamed NO 2003 (1) SACR 561 (CC)* was an appeal against a finding that s 38 of the Prevention of Organised Crime Act 1998 was unconstitutional. In essence, the section allowed the National Director of Public Prosecutions (NDPP) to use an ex parte procedure to apply to the High Court for a preservation of property order (at para 1). The High Court had to make the order 'if there are reasonable grounds to believe that the property concerned – is an instrumentality of an offence referred to in Schedule 1; or is the proceeds of unlawful activities' (at para 14).

The High Court held that s 38 should be read as if the words 'by way of an ex parte application' did not appear in the section. The court also found that s 38 did not allow for a rule nisi procedure and that this was unconstitutional (at paras 8 and 9). Other challenges against the Act were dismissed by the High Court and the respondent did not challenge these findings in the appeal (at paras 9 and 10).

The question before the Constitutional Court, therefore, was whether s 38 amounted to an unjustifiable infringement of the right to a fair hearing in a court of law, protected in s 34 of the Constitution (at para 11). The court, per Ackermann J, noted that the motivation behind the provision lay in the 'rapid growth of organised crime, money laundering, criminal gang activities and racketeering' (at para 14). Leaders of organised crime often escaped liability because they ensured that they were 'far removed from the overt criminal activity involved' (at para 14). The purpose of the Act was to prevent criminals benefiting from their crimes, in line both with South Africa's international obligations and domestic interests (at para 16).

Under the scheme provided by the Act, once a preservation order is granted by the High Court, the NDPP has 90 days within which to apply for the forfeiture of the property. Affected parties are afforded the right to a full hearing, in which they can use the 'innocent owner' defence to argue that the property should not be forfeited (at paras 17 and 19). The court pointed out that there is even provision for affected parties to have the preservation order set aside or varied before proceedings reach the forfeiture stage (at para 18).

The High Court interpreted s 38 to mean that a court cannot grant ‘a rule nisi calling on all 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, order ‘that the rule nisi should act immediately as a temporary order, pending the return day’ (at paras 20 and 28). The absence of a provision for a rule nisi was what the High Court found to be constitutionally objectionable (at para 33).

The Constitutional Court held that it is a settled principle of constitutional interpretation that an interpretation consistent with the Constitution must be favoured over one inconsistent with the Constitution (at para 35). The High Court’s main reason for finding that s 38 did not allow for a rule nisi was that a rule nisi was explicitly provided for in another section of the Act. The High Court’s approach was based on the idea that the ‘specific inclusion of one implies the exclusion of the other’ (at para 40). However, the specific inclusion of a provision may result from excessive caution or some other reason, and does not necessarily reflect the intent to exclude the provision elsewhere (at para 41). Furthermore, courts granting preservation of property orders have the inherent power to grant a rule nisi at the same time as an interim order pending the return day of the rule nisi. This was in order to prevent the harm that could result if notice were given. Thus, it was unnecessary for the legislature to specifically provide for the rule nisi (at para 42). The court also explored other reasons for not drawing the inference that the legislature intended to exclude the rule nisi from s 38 (see paras 43 – 45).

On the question of a hearing, the court held that the audi principle applied unless the legislature excludes it explicitly or by necessary implication (at para 48). It could not be said that a hearing was excluded from s 38 (at para 49). Taking all this into account, the court found that the temporary deprivation of property might be for a very short period of time, especially if the affected person anticipates the return day of the rule nisi (at para 52). However, even if the temporary deprivation amounted to a limitation of the s 34 right to a fair hearing, the limitation was justified under s 36 of the Constitution. The respondent conceded this point and the court noted that s 38 was narrowly tailored to achieve the extremely important purpose for which the Act was drafted (at para 52).

Whilst the Constitutional Court’s interpretation of s 38 is preferable to the quite strained interpretation favoured by the High Court, there are, it is submitted, some problems with the reasoning on the violation of the right and s 36. The court assumed, without deciding, that the right to a hearing, protected in s 34, was violated by the temporary deprivation of property before the return date of the rule nisi. The court did not explicitly engage in a limitation analysis because the respondent conceded that the limitation was

justifiable. The problem is that everything in the court's reasoning indicates that, on its interpretation of s 38 of the Prevention of Organised Crime Act, the s 34 right to a hearing was not violated. In light of this, it is difficult to make sense of the assumption that the right was infringed but that the infringement was a reasonable and justifiable one under s 36 of the Constitution.

### **Interpretation – right to a fair trial**

In *S v Maputle* 2003 (2) SACR 15 (SCA), the question before the court was whether the second appellant's right to a fair trial, protected in s 35(3) of the Constitution, was violated because the magistrate who convicted him was made aware that the appellant had at least one prior conviction. The appellant had appeared before the magistrate wearing prison clothing and the cover sheet to the proceedings indicated that he had been sentenced to imprisonment (at para 4). The court held that it was well established that disclosure of an accused previous conviction(s) does not, in itself, constitute an irregularity vitiating the proceedings (at para 7). Judicial officers were not obliged to recuse themselves in such circumstances (at para 8). Deciding upon the admissibility of evidence is an example of a way in which the court could become privy to information prejudicial to the accused. This did not render the proceedings automatically unfair (at para 11). The effect of the information, rather than the manner in which it was conveyed was what was important (at para 12). In this case, there was no indication that the magistrate had been influenced by the knowledge of the appellant's previous conviction – on the facts, guilt had been established beyond a reasonable doubt (at para 14).

In *S v Ntuli* 2003 (1) SACR 613 (W), the court held that the right to a fair trial included the right to have counsel prepare and present a proper argument on behalf of the client. In this case, there was no reference either to the record of evidence or to any case law in the 'heads of argument' (at para 1). The court noted that there would be very few cases where a legal representative cannot make a useful contribution on behalf of the client (at para 4). Furthermore, the adversarial nature of the South African criminal procedure system makes a legal representative indispensable (at para 12). Unless the accused is properly represented, the right to a fair trial (or the right to appeal, in this case) is violated (at para 16). In a case of inadequate representation, there are a number of options open to the court. The court can postpone the hearing and direct that proper heads of argument be filed. Legal representatives who do not comply with their obligations in this regard should get no fees. Finally, the legal representative in question may be referred to the appropriate body for disciplinary proceedings (at para 17).

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**Remedies**

In *National Director of Public Prosecutions v Mohamed NO* supra, the respondent argued, in the alternative, that the High Court should have made a declaratory order setting out the constitutionally permissible interpretation of s 38 of the Prevention of Organised Crime Act 1998 (at para 54). The Constitutional Court stated that, under s 172(1)(a) of the Constitution, if a court finds a provision to be invalid, it must declare such provision invalid to the extent of its inconsistency with the Constitution. In such circumstances, the section does not make room for the kind of declaratory order suggested by the respondent (at para 56). The court went on to hold that, even where a court finds a provision to be consistent with the Constitution, a declaratory order is unnecessary because the reasons for the court's order will 'constitute an objective precedent', binding on other courts, according to the principles of stare decisis (at para 57).