CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 13/02

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Appellant
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Appellant
versus	
YASIEN MAC MOHAMED NO	First Respondent
OMAR JAN MOHAMED NO	Second Respondent
YASMIN MOHAMED NO	Third Respondent
MARIA LULU MOHAMED	Fourth Respondent

Heard on : 21 May 2002

Decided on : 12 June 2002

JUDGMENT

ACKERMANN J:

Introduction

[1] This case concerns the constitutional validity of section 38 ("the section" or "section 38") of the Prevention of Organised Crime Act[1] ("the Act"). The section reads:

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[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] On 19 March 2002 Cloete J, sitting in the Witwatersrand High Court ("the High Court") declared 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."[2]

[2] In case no: 2000/21921, a judgment as yet unreported.

[3] The High Court's full order reads as follows:

> "1.1 Section 38 of Act 121 of 1998 is (subject to the confirmation of the Constitutional Court) declared unconstitutional with effect from the date of this judgment to the extent that it requires the NDPP 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.
>
> 1.2 In terms of section 172(1)(b) of the Constitution (and again, subject to the confirmation of the Constitutional Court) it is ordered that the declaration of invalidity made in paragraph 1.1 shall invalidate:
>
> 1.2.1 any preservation of property order and concomitant seizure order made in terms of section 38 of Act 121 of 1998 which as at the date of this judgment either has not yet been superseded by a forfeiture order made in terms of part 3 of chapter 6 of that Act or which is still in force in terms of section 55 of the Act pending an appeal against a forfeiture order; and also
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> 1.2.2 any forfeiture order made under part 3 of chapter 6 of Act 121 of 1998 which has not yet taken effect in terms of the provisions of section 50(6) of that Act,
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> where the preservation order or seizure order (in the case of 1.2.2, which preceded the forfeiture order) was granted ex parte and where no rule nisi was issued calling upon interested parties to show cause why such an order should not be made.
>
> 2. The orders contained in paragraph 1 are referred to the Constitutional Court for confirmation.
>
> 3. These proceedings are postponed pending the decision of the Constitutional Court and the costs to date are reserved."

Paragraph 1 of this order serves before this Court for confirmation under the provisions of section 172(2) of the Constitution. I deal presently more fully with the issues before this

Court.

[4] 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 . . ."

The High Court found that the section infringed (limited) the fair hearing component of the section 34 right and that such limitation was not justifiable under section 36 of the Constitution.

[5] First appellant is the National Director of Public Prosecutions (the National Director). Second appellant is the Minister of Justice and Constitutional Development (the Minister). 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 claim a further personal interest in the Trust property. Further fixed property (the other property) also features in the case. 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.

The High Court litigation

[6] The case arose from the granting of a preservation of property order under section 38 of the Act. The order was made 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, amongst others, on the first to third respondents. On 11 January 2001, the National Director launched an application in terms of section 48 of the Act for the forfeiture of the immovable property that had been the subject of the preservation of property 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 (that is sections 37 to 62 of the Act, inclusive) is 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 and thereupon its dismissal; and thirdly, condonation of their failure to enter an appearance to oppose the forfeiture proceedings.

[7] The High Court dealt with the second and third heads of relief first. It came to the conclusion, for reasons that are not presently relevant, that Uniform Rule of Court 6(12)(c) did not apply to the application brought by the National Director and further refused the condonation application. The High Court accordingly concluded that "the applicants' only chance of success lies in the constitutional challenge to the validity of chapter 6 of the Act".

[8] The notice of motion to the respondents' counter-application sought, in effect, an order declaring the whole of Chapter 6 of the Act to be constitutionally invalid because of its inconsistency with sections 25(1),[3] 34 and 35(3)[4] of the Constitution. In the founding affidavit to

[3] Section 25(1) of the Constitution provides:

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

4 Section 35(3) of the Constitution provides:

"(3)__Every accused person has a right to a fair trial, which includes the right—

(a) to be informed of the charge with sufficient detail to answer it;
(b) to have adequate time and facilities to prepare a defence;
(c) to a public trial before an ordinary court;
(d) to have their trial begin and conclude without unreasonable delay;
(e) to be present when being tried;
(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
(i) to adduce and challenge evidence;
(_j) not to be compelled to give self-incriminating evidence;
(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
(n) to the benefit of the least severe of the prescribed punishments if the prescribed

the counter-application it was contended that sections 38, 39, 48, 49, 50 and 52 of the Act (all sections contained in chapter 6) were constitutionally invalid and that, as a result of their unconstitutionality "the entire Chapter 6 of the Act is in fact unconstitutional".

[9] Certain procedural preliminaries need to be clarified and disposed of. They relate to a failure by the appellants to lodge an appeal against the High Court order and to the admission of documents under Constitutional Court Rule 30. Section 172(2)(a), (c) and (d) of the Constitution enact the following:

> "**172. Powers of courts in constitutional matters**.–
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> (a) . . . .
>
> (2)(a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
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> (b) . . . .
>
> (c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.
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> (d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of

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punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(o) of appeal to, or review by, a higher court."

constitutional invalidity by a court in terms of this subsection."

[10] Constitutional Court Rule 15 deals with the confirmation of an order of constitutional invalidity made by the Supreme Court of Appeal or a High Court and states:

"**15. Confirmation of an order of constitutional invalidity**

(1) The registrar of a court which has made an order of constitutional invalidity as contemplated in section 172 of the Constitution shall, within 15 days of such order, lodge with the registrar of the Court a copy of such order.

(2) A person or organ of state entitled to do so and desirous of appealing against such an order in terms of section 172 (2) (d) of the Constitution shall, within 21 days of the making of such order, lodge a notice of appeal with the registrar and a copy thereof with the registrar of the court which made the order, whereupon the matter shall be disposed of in accordance with directions given by the President.

(3) The appellant shall in such notice of appeal set forth clearly the grounds on which the appeal is brought, indicating which findings of fact and/or law are appealed against and what order it is contended ought to have been made.

(4) A person or organ of state entitled to do so and desirous of applying for the confirmation of an order in terms of section 172 (2) (d) of the Constitution shall, within 21 days of the making of such order, lodge an application for such confirmation with the registrar and a copy thereof with the registrar of the court which made the order, whereupon the matter shall be disposed of in accordance with directions given by the President.

(5) If no notice or application as contemplated in subrules (2) and (4), respectively, has been lodged within the time prescribed, the matter of the confirmation of the order of invalidity shall be disposed of in accordance with directions given by the President."

[11] On 18 April 2002 the National Director and the Minister lodged appeals against the High Court's order of constitutional invalidity in terms of section 172(2)(d) of the Constitution and

Rule 15(2). The respondents did not, as they were entitled to do, cross-appeal under section 172(2)(d) of the Constitution and Rule 15(2) but, on 25 April 2002, caused a document to be lodged entitled "Notice of Opposition of Appeal and Notice of Relief sought during appeal in terms of rule 29 of the Rules of the Constitutional Court, read with section 22(b) of the Supreme Court Act".

[12] In this document it is intimated that during the hearing of the [National Director and Minister's] appeal the respondents would apply, in terms of the rule and statute mentioned in their notice, for an amendment of the High Court order by substitution of the following order:

> "1. Chapter 6 of the Prevention of Organised Crime Act, Act 121 of 1998 is declared contrary to sections 14, 25(1), 34 and 35(3) of the Constitution . . . and declared null and void;
> 2. The preservation of property order granted in the present matter is hereby set aside;
> 3. In accordance with the order made in paragraph 1 above, the First Appellant's application for forfeiture in the present matter is declared incompetent and is dismissed.
> 4. The Appellants are ordered to pay the Applicant's costs in the present matter."

[13] The procedure thus adopted by the respondents in relation to the amendment of the High Court's order of constitutional invalidity, is misconceived and impermissible. Presumably upon becoming aware of this, the respondents lodged a notice on 15 May 2002 in which they withdrew their notice of 25 April but contended that they –

> "reserve the right to request the Court *a quo* to make rulings on the remainder of the issues raised in their application before the court *a quo*, if necessary."

Lastly, documents lodged by the National Director and the Minister under Rule 30(1)[5] to canvass factual material were admitted by consent. This makes it unnecessary to deal with a contention raised on behalf of the National Director and the Minister that the High Court's order was incompetent because an attack on section 38 was never raised on the papers. The submission was however conditional on the additional documents not being admitted. Upon their admission the point was abandoned.

The purpose of the Act and certain of its relevant provisions

[14] The Act's overall purpose can be gathered from its long title and preamble and summarised as follows: The rapid growth of organised crime, money laundering, criminal gang activities and racketeering threatens the rights of all in the Republic, presents a danger to public order, safety and stability, and threatens economic stability. This is also a serious international problem and has been identified as an international security threat. South African common and statutory law fail to deal adequately with this problem, because of its rapid escalation and because it is often impossible to bring the leaders of organised crime to book, in view of the fact that they invariably ensure that they are far removed from the overt criminal activity involved. The law has also failed to keep pace with international measures aimed at dealing effectively

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5 Rule 30(1) provides:
"Any party to any proceedings before the Court and an *amicus curiae* properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the registrar in terms of these rules, to canvass factual material which is relevant to the determination of the issues before the Court and which do not specifically appear on the record: Provided that such facts –
(a) are common cause or otherwise incontrovertible; or
(b) are of an official, scientific, technical or statistical nature capable of easy verification."

with organised crime, money laundering and criminal gang activities. Hence the need for the measures embodied in the Act.

[15] 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.[6] This approach has similarly been adopted by our

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6 See the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 19 December 1988; the Seventh Recommendation of the Fourty Recommendations by the Financial Action Task Force on Money Laundering, set up by the Group of Seven countries at their summit in Paris, 1989; the Model Regulations Concerning Laundering Offences Connected to Illicit Drug Trafficking and Other Serious Offences issued by the Organisation of American States, 1997; the Model Law for the Prohibition of Money Laundering issued by the Commonwealth, 1996; the United Nations Convention Against Transnational Organised Crime, Palermo, December 2000.

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 to ensure that criminals do not benefit from their crimes. The Act uses two mechanisms to ensure that property derived from crime or used in the commission of crime is forfeited to the state. These mechanisms are set forth in Chapter 5 (comprising sections 12 to 36) and Chapter 6 (comprising sections 37 to 62). Chapter 5 provides for the forfeiture of the benefits derived from crime but its confiscation machinery may only be invoked when the "defendant" is convicted of an offence.[7] Chapter 6 provides for forfeiture of the proceeds of and instrumentalities used in crime, but is not conviction based; it may be invoked even when there is no prosecution.[8]

[17] Section 38 forms part of a complex, two-stage procedure whereby property which is the instrumentality of a criminal offence or the proceeds of unlawful activities is forfeited. That procedure is set out in great detail in sections 37 to 62 of the Act, which form chapter 6 of the Act. Chapter 6 provides for forfeiture in circumstances where it is established, on a balance of probabilities, that property has been used to commit an offence, or constitutes the proceeds of unlawful activities, even where no criminal proceedings in respect of the relevant crimes have been instituted. In this respect, chapter 6 needs to be understood in contradistinction to chapter 5 of the Act. Chapter 6 is therefore focussed, not on wrongdoers, but on property that has been

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7 Section 18(1).

8 Sections 48(1) and 50(1), read with section 38.

used to commit an offence or which constitutes the proceeds of crime. The guilt or wrongdoing of the owners or possessors of property is, therefore, not primarily relevant to the proceedings.

[18] There is, however, a defence at the second stage of the proceedings, when forfeiture is being sought by the state. An owner can at that stage claim that he or she obtained the property 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).

[19] The forfeiture process provided for in chapter 6 of the Act commences when the National Director applies ex parte in terms of section 38 of the Act to a High Court for a preservation order. Section 38(2) of the Act provides that the High Court shall make such an 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."

Once the preservation order is granted, notice must be given to "all persons known to the National Director to have an interest in the property"; and a notice of the preservation order must be published in the Gazette in terms of section 39(1). Thereafter, within 14 days of notice of the order, an affected party who wishes to oppose the grant of a final forfeiture order must enter an appearance of his or her intention to oppose that order. The National Director must then within 90 days of the grant of the preservation order 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.

[20] Chapter 6 also provides other opportunities to affected parties to have preservation orders set aside or varied. So, section 47(3) provides that a person who is affected by a preservation order made in respect of immovable property may apply for the order to be rescinded and the High Court shall rescind the order "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, on the application of an affected party, vary or rescind the preservation order "if it is satisfied" that the order will "deprive the applicant of . . . reasonable living expenses and cause undue hardship for the applicant; and . . . the hardship . . . outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred".

[21] Similarly, section 44 of the Act provides that in making a preservation of property order a High Court may make provision for reasonable living and legal expenses for persons whose property is subject to the preservation order. Such a provision, however, will not be made unless the High Court is satisfied that the relevant person cannot meet the living or legal expenses out of his or her property not subject to a preservation order and that the person has disclosed on oath all her property.

[22] The provisions of chapter 6 are therefore complex and tightly intertwined, both as a matter of process and substance. At the initial stage of the proceedings, when the National Director launches an ex parte application for a preservation of property order, a Court must grant the order if it is satisfied that there are reasonable grounds to believe that the property is the proceeds of unlawful activities or the instrumentality in a crime. Thereafter, the preservation

order may be varied or rescinded in terms of sections 44 and 47. If the preservation of property order remains in force, then – within 90 days – the National Director must apply for an order of forfeiture. In the absence of such application the preservation of property order will lapse.[9]

The issues before the Court

[23] Formally, the issue before the Court is a narrow one. Here, as in *De Beer's* case[10] –

> "[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 s 34 fair hearing right'."

The question is whether section 38 unjustifiably limits (infringes) such right.

[24] However, after argument, an issue arose during the Court's deliberations which strikes at the heart of the order made by the High Court and which, if resolved in a particular manner, would either preclude the Court from hearing the narrow issue presented or make it highly undesirable – and contrary to the interests of justice – to do so.

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9 Section 40.

10 *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.

[25] Although the relief sought by the respondents in the High Court was the striking down of the entire Chapter 6 of the Act, the relief granted to it related to but one aspect of a single section in the Chapter, namely a procedural aspect of section 38, which had not been specifically raised by the respondents in the High Court. In my view the High Court was not entitled, given the broad attack on Chapter 6 of the Act, to consider only this procedural aspect of section 38 and to make the order declaring this 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."

[26] I deal firstly with the order. The order was couched as a notional severance order. If it was intended to be a declaration of invalidity, coupled with a reason for such invalidity, that was not appropriate.[11] I shall assume, however, that it was intended as a notional severance order. It followed from the High Court's construction of section 38, and its consequent finding that the section was inconsistent with section 34 of the Constitution because it precluded an application under section 38 being made on notice, and further precluded the High Court hearing the matter from granting a rule nisi and ordering such rule nisi to act as an interim property preservation and seizure order under the section. The defect in the section which the High Court sought to

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[11] See *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (1) BCLR 39 (CC); 2000 (2) SA 1 (CC) paras 63-64.

remedy was accordingly an omission from the section, namely the failure to provide for the above procedure and remedy.

[27] In these circumstances the order was not a competent one. The High Court attempted to do something that this Court has held cannot be done, namely to remedy, by notional severance formulation, a constitutional invalidity caused by an omission:

> "The device of notional severance can effectively be used to render inoperative portions of a statutory provision, where it is the *presence* of particular provisions which is constitutionally offensive and where the scope of the provision is too extensive and hence constitutionally offensive, but the unconstitutionality cannot be cured by the severance of actual words from the provision . . . . Where, however, the invalidity of a statutory provision results from an *omission,* it is not possible . . . to achieve notional severance by using words such as 'invalid to the extent that', or other expressions indicating notional severance. An omission cannot, notionally, be cured by severance . . . The only logical equivalent to severance, in the case of invalidity caused by omission, is the device of reading in."[12]

12 Id.

[28] On the High Court's finding that section 38 was constitutionally invalid, because of the absence of a rule nisi provision in section 38, there were only two remedial options open to it: declaring the whole of section 38 to be invalid or reading in provisions to cure such invalidity.[13] It does not emerge from the judgment why the High Court did not consider reading in as an appropriate remedy to cure the constitutional inconsistency in question. The remedial powers of a High Court under section 172(1) of the Constitution – when deciding a constitutional matter within its power – are the same as those of the Constitutional Court. In order to avoid any uncertainty that may exist on this score, it needs to be stated that a High Court has the same competence as the Constitutional Court to "read in", as a remedy for the constitutional invalidity of a statutory provision. This may of course only be done in circumstances appropriate to such a remedy[14] and will have no force unless and until confirmed by this Court.

[29] Of the two available remedies referred to in the preceding paragraph, the reading in option was the indicated one in the case before the High Court, because it would have intruded less on the legislative domain and conformed better with the legislative scheme of the Act in

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13 Id para 64.

14 As discussed in the *Gay and Lesbian/Minister of Home Affairs* case above n 11 paras 73 to 76.

general and section 38 in particular.[15] A new sub-section or paragraph, employing wording similar to that used in section 26,[16] could have been read in.

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15 Id.

16 Section 26(1) (in Chapter 5 of the Act) makes provision for the issuing of a restraint order, prohibiting any person from dealing in any manner with any property to which the order relates. Subsection 3(a) provides:

> "_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."

[30] It follows from this that, on the High Court's finding of unconstitutionality and on the basis of the only remedial order it could have made, such relief would not have disposed of the matter. The affected parties – the respondents – were before the High Court and the relief sought by them, namely the striking down of the whole of Chapter 6, was still being sought; there is no suggestion that it had been abandoned and they were entitled to that relief to vindicate their constitutional rights. In this case the constitutionality of Chapter 6 as a whole needed to be determined to resolve the disputes between the parties on the facts of the case.[17] The High Court was seized with this constitutional challenge and was obliged to deal with it. The challenge to the whole of Chapter 6 was a live issue before the High Court and it could not assume, in favour of the National Director and the Minister, that the other provisions of the Chapter were constitutionally valid. The High Court was obliged to deal with them.

[31] Another approach, equally fundamental, leads to the same conclusion. It is one thing for a court, when only one form of relief is sought but based on several distinct causes of action, or based on several distinct legal arguments, to grant the relief sought but to decide only one cause of action or to deal with only one of the legal arguments. It is quite another matter where, as in this case, extensive relief is sought and never abandoned. It is not permissible for a court to

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17 Contrast the case of *Islamic Unity Convention v Independent Broadcast Authority and Others* 2002 (5) BCLR 433 (CC), where a narrower decision on constitutionality resolved the dispute between the parties on the facts of that case.

decide only one aspect of such relief where this does not resolve the whole of the dispute between the parties. It must adjudicate on the validity of all the relief sought by the litigant. The only basis on which the court can grant partial relief is when it has found that the further relief sought by the litigant is unsustainable or adds nothing to the relief granted. In the present case the High Court did not consider the extensive relief sought by the respondents. In the instant case, the only notional basis on which a court could have decided the issues presented solely on the narrow section 38 procedural issue, is if such decision somehow disposed entirely of the case against the respondents. This was not the position. On the High Court's invalidity finding and in the light of the only remedial order it could have made, namely a reading in, the other issues were not resolved.

[32] It follows that the High Court erred in attempting to decide the matter on the narrow basis it did and in not deciding the constitutionality of Chapter 6 of the Act.

[33] It is salutary to re-emphasise the correct approach to be adopted when a constitutional challenge is brought against a statutory provision:[18]

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[18] The approach has been emphasised recently in a judgment of this Court, presently still unreported, namely *S v Van Rooyen and Others* CCT 21/01 delivered on 11 June 2002.

> "[L]egislation must be construed consistently with the Constitution[19] and thus, where possible, interpreted so as to exclude a construction that would be inconsistent with judicial independence. If held to be unconstitutional, the appropriate remedy ought, if possible, to be in the form of a notional or actual severance, or reading in,[20] so as to bring the law within acceptable constitutional standards. Only if this is not possible, must a declaration of complete invalidity of the section or sub-section be made."[21]

Thereafter, consideration should be given to an appropriate order limiting the retrospectivity of the order, or suspending its operation – or both – should the Court be of the view that, by virtue of the provisions of section 172(1)(b) of the Constitution, justice and equity require it.

[34] In the present case, it was strenuously argued – albeit in the alternative – that section 38 was reasonably capable of a construction compatible with section 34 of the Constitution. The merits of such an argument need not be decided now. On the hypothetical assumption that the High Court was entitled to consider only the procedural issue; that its construction of section 38 was correct; and that on such construction section 38 was constitutionally invalid; the remedy ought to have been one of reading in along the lines indicated above. The reading in, with no limitation on its retrospectivity, would have the following effect: Section 38, from its inception,

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19 *S v Dzukuda and Others; S v Tshilo* 2000 (11) BCLR 1252 (CC); 2000 (4) SA 1078 (CC) para 37(a); *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 21-26; *Bernstein and Others v Bester NO and Others* 1996 4 BCLR 449 (CC); 1996 (2) SA 751 (CC) para 59; *De Lange v Smuts NO and Others* 1998 (7) BCLR 779 (CC); 1998 (3) SA 785 (CC) para 85. See also *Olitzki Property Holdings v State Tender Board and Another* 2001 (8) BCLR 779 (SCA); 2001 (3) SA 1247 (SCA) para 20.

20 *Gay and Lesbian/Minister of Home Affairs* case above n 11 paras 64-70; *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) paras 55-57.

21 Above n 18 para 88.

permitted the granting of a rule nisi acting as a temporary property preservation and seizure order. Those cases in the past where no such rule nisi had been granted, despite the fact that section 38 – because of the reading in – permitted it, would simply have been dealt with by the courts on the same basis as the courts would deal with similar matters where rules nisi could have been – but were not in fact – granted.

[35] For the reasons already given, the validity of Chapter 6 is not before this Court; the Court has heard no argument thereon and the Court can make no order on the Chapter's substantive validity. It would serve no purpose for this Court to decide only the narrow procedural issue in isolation. Assuming that this Court could have interpreted the section in isolation, whatever construction were to be placed on section 38 and whatever conclusion reached regarding its constitutional validity, no effective relief could have been granted by this Court to the respondents. It would seem that there are only three possible options, none of which could afford effective relief:

(a) The High Court's construction of and conclusion on the constitutional invalidity of section 38 is correct, in which event the only appropriate order is the reading in order referred to above.

(b) The High Court's construction is correct as well as its conclusion that, on such construction, section 38 limits (infringes) the fair-hearing component of section 34; but such limitation is justified under section 36 of the Constitution.

(c) Section 38 is capable of being construed in conformity with the Constitution, namely, that properly construed it permits the High Court, under section 38, to grant a rule nisi acting as a temporary property preservation and seizure order pending the return day of the rule.

[36] None of these options would provide the respondents with any effective relief at all, because this Court cannot and will not decide – because of the narrow issue before it – the constitutional invalidity of the other aspects of Chapter 6 of the Act.

[37] The only course for this Court to adopt, given the way in which the matter was dealt with by the High Court, and in view of the clear urgency of the matter, is to set aside that Court's order and to refer the matter back to it to decide on the relief sought by the respondents, namely the constitutional invalidity of Chapter 6. It is true that the parties' legal representatives have not been heard on this proposed order. But the effect of the order would be to place the parties in the position they were in when the matter came before the High Court, and they would suffer no substantive prejudice, although – unfortunately – unnecessary costs would have been incurred. Such costs would in any event have been incurred unnecessarily even if this Court decided the section 38 issue, because whatever the conclusion reached by the Court, the matter would have to be referred back to the High Court for consideration of the substantive challenge to Chapter 6. The Court is firmly of the view that, given the nature of the Act and the way its procedural provisions are interwoven with the substantive, it is undesirable to deal with them separately or piecemeal.

[38] As far as the costs of the proceedings before this Court are concerned, what have turned out to be abortive proceedings are the direct result of the High Court's order. It is true that the respondents could have appealed against the narrow order granted, but they omitted to do so. That in itself does not warrant a costs order against them. The substantive issues between the parties still have to be decided by the High Court. Under these circumstances the fairest result

would be to order that the costs of the proceedings in this Court be costs in the cause.

[39] The following order is made:

1. Paragraph 1 of the order of the High Court is set aside and the matter referred back to it in order for it to deal with the application and counter-application, in the light of this judgment.
2. The costs of the proceedings in this Court are to be costs in the cause.

Chaskalson CJ, Langa DCJ, Goldstone J, Kriegler J, Madala J, Ngcobo J, O'Regan J, Sachs J, Du Plessis AJ and Skweyiya AJ concur in the judgment of Ackermann J.

For the appellants:	W Trengove SC, JL van der Merwe SC, A Cockrell, R Chinner and V Ngalwana instructed by the State Attorney, Johannesburg.
For the respondents:	D Marais instructed by Ramsurjoo Du Plessis, Johannesburg.