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Explanatory Note

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

This matter concerns the confirmation of an order made in the High Court in Johannesburg declaring s 38 of the Prevention of Organised Crime Act constitutionally invalid.

The Act is intended to fight organised crime by stripping its organisers of the fruits and instruments of their criminality. Section 38 enables the National Director of Public Prosecutions to apply to a High Court for an order preserving and seizing property suspected on reasonable grounds of being an “instrumentality” of certain listed crimes or of being the proceeds of unlawful activities. This initiates a series of procedures contained in Chapter 6 of the Act aimed at the ultimate forfeiture of the property to the state.

Although the constitutional validity of the entire Chapter 6 was attacked, the High Court dealt with the validity of s 38 alone. It found that this section prohibited the court hearing the property preservation application from granting an interim and provisional preservation order calling on interested parties to show cause why the order should not be made final. Because the section prohibited the court from granting a provisional order, the person affected did not have an adequate opportunity of being heard. Section 38 was consequently found to infringe that part of s 34 of the Constitution which guarantees to everyone the right to “a fair public hearing by a court ...”. Such infringement, the High Court held, could not be justified under s 36 of the Constitution and s 38 was therefore invalid.

The respondents did not appeal against the High Court’s failure to deal with their attack against the whole of Chapter 6. The only issue before the Constitutional Court was the narrow one of s 38’s constitutional validity.

Ackermann J, writing for the Court, found that the High Court ought not to have dealt with the attack on s 38 alone, but should have considered the validity of all the other provisions in Chapter 6. Since the challenge before the Court has been confined to the validity of s38 only, any interpretation that could be given to the section would not result in the resolution of the (broader) constitutional dispute between the parties. The Court therefore set aside the order of the High Court and referred the matter back for that Court to consider the attack on the whole of Chapter 6.