

**The National Director of Public Prosecutions and Another v Mohamed
NO and Others**

CCT 44/02

Media Summary

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.

The Prevention of Organised Crime Act No 121 of 1998 (the Act) gives effect to South Africa's international obligations and domestic interest to ensure that criminals, and leaders of organised crime in particular, do not benefit from their crimes. The Act makes provision for the forfeiture of the benefits of crime and of the instruments used in crime. Section 38 of the Act is an important preliminary provision in the confiscatory machinery of the Act. It enables the National Director of Public Prosecutions (the National Director) to apply to a High Court, without notice to any interested party, for an order, called a preservation order, prohibiting any person from dealing with property liable to confiscation and authorising a police official to seize the property. This sets in motion a train of procedures, some designed to protect the innocent owner of property, culminating in an application by the National Director to have the property in question confiscated.

The High Court interpreted section 38 as prohibiting the High Court hearing the preservation application from giving the affected party an opportunity to answer the case and as prohibiting the High Court from making a temporary preservation order until the affected person has had an opportunity to answer the case. On this interpretation the High Court found section 38 to be constitutionally invalid because it unjustifiably limited the "fair hearing component" of the right to access to courts guaranteed by section 34 of the Constitution, and declared it invalid to such extent.

The National Director appealed to the Constitutional Court against such declaration of invalidity. In a judgment written by Ackermann J on behalf of a unanimous court, it was decided that contrary to the High Court order, on its proper interpretation section 38 did not exclude the normal procedural powers of the High Court. A cardinal principle of a fair hearing is that persons affected by a court order must be given an opportunity to answer the case against themselves before a court order is made affecting their rights. The Constitutional Court held that for this principle to be excluded in a particular statute, the statute had to exclude it either expressly or by clear, necessary implication and that section 38, properly interpreted, did not exclude this principle. Although the Court held that section 38, so interpreted, might still limit the section 34 right for a brief period of time, it found that even if this constituted a limitation, it was fully justified under section 36 of the Constitution because it was the slightest limitation possible under the circumstances and one essential for the achievement of the very important public interest objectives of the Act. The Constitutional Court therefore declined to confirm the declaration of constitutional invalidity of section 38 made by the High Court.