

## Key v Attorney General, Cape and another

Case CCT 21/94

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### Explanatory Note

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

Mr Key was indicted on criminal charges after representatives of the Office for Serious Economic Offences, acting under the Investigation of Serious Economic Offences Act 117 of 1991, searched his home and offices and seized documents which they disclosed to investigative accountants. Key initiated proceedings in the Cape Provincial Division of the Supreme Court challenging the constitutionality of ss 6 and 7 of the Act, which allowed for searches and seizures and the disclosure of documents. He also challenged the use of evidence obtained or derived from such conduct in his pending criminal trial. The Supreme Court referred the issues to the Constitutional Court.

The Constitutional Court held that the challenges to the constitutionality of the Act could not be sustained because the facts which gave rise to the challenges - the search and seizure, the arrest of the applicant, the disclosure of the documents to the accountants, the preparation of the accountants' report, and the formulation and service of the indictment - all took place before the Constitution came into force. Applying the reasoning of the Court in *Du Plessis and others v De Klerk and others* CCT 8/95 (15 May 1996), the Court held that the coming into operation of the Constitution could not render actions unlawful that were lawful at the time they took place.

Following its reasoning in the previous judgments of *Ferreira v Levin NO and others* CCT 5/95 1996 (1) SA 984 (CC), *Bernstein V Bester NO and others* CCT 23/95 (27 March 1996) and *Nel v Le Roux NO and others* CCT 20/95 (4 April 1996), the Court reiterated that the question of admissibility of evidence at a criminal trial is to be determined by the trial court to ensure a fair trial in accordance with s 25(3) of the Constitution. The manner in which the evidence had been obtained might be a factor in that determination. There is however no blanket exclusion or inclusion of evidence on the basis that such evidence was obtained pursuant to a statute which prior to the adoption of the Constitution permitted as much.

Accordingly, the Court made no order with regard to either of the questions referred.

The judgment of the Court was delivered by Kriegler J and concurred in by all of the other members of the Court.