CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT: 19/2022

In the application between:

ORGANISATION UNDOING TAX ABUSE	Applicant
and	
MINISTER OF TRANSPORT	First Respondent
MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Second Respondent
ROAD TRAFFIC INFRINGEMENT AUTHORITY	Third Respondent
APPEALS TRIBUNAL	Fourth Respondent
ROAD TRAFFIC MANAGEMENT CORPORATION	Fifth Respondent

MINISTER OF TRANSPORT'S SUBMISSIONS

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OVERVIEW

1 The question is whether the Administrative Adjudication of Road Traffic Offences Act 46 of 1998 ("**AARTO Act**") and the Administrative Adjudication of Road Traffic Offences Amendment Act 4 of 2019 ("**Amendment Act**") are consistent with the Constitution. The High Court concluded that the AARTO Act and the Amendment Act are inconsistent with the Constitution because they "*unlawfully intrude upon the exclusive executive and legislative competence of the local and provincial governments*".[1] We submit that the High Court is wrong. The functional area of the impugned statutes is "*road traffic regulation*", which is within the National and Provincial legislative competence.[2] The High Court's flawed "*bottom-up*" approach[3] has no basis in the text of the Constitution. Nor is it supported by precedent of this Court.

2 We make these arguments:

2.1 Part A of Schedule 4 lists "*road traffic regulation*" as a functional area that falls within the concurrent legislative competence of both national and provincial governments.

2.2 Parliament's disputed powers fall within the functional area of "*road traffic regulation*", and the AARTO Act regulates and provides for road traffic regulation.

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1 Record Vol. 3 p 257, High Court judgment at para 45.

2 Part A of Schedule 4 of the Constitution.

3 Record Vol. 3 page 254; High Court judgment at para 39.

2.3 There is no legislative sphere that the Constitution assigns to deal with road traffic regulation exclusively. Part A of Schedule 5, which sets out the areas of exclusive provincial legislative competence, is concerned with "*provincial roads and traffic*". It is not concerned with road traffic regulation. The same applies to Part B of Schedule 5 (for municipal exclusive competence), which deals with "*municipal roads*" and "*traffic and parking*" but not road traffic regulation.

3 Another issue is the constitutional validity of section 17 of the Amendment Act. The High Court considered it unnecessary to determine the issue because of the outcome that the AARTO Act and Amendment Act unlawfully intrude upon the exclusive executive and legislative competence of the local and provincial governments, respectively. It is not in the interests of justice for this Court to sit as the court of first and last instance on this issue, and the correct approach is to remit that question to the High Court.

4 To address the issues outlined above, we have structured the heads of argument as follows:

4.1 First, we discuss the High Court judgment;

4.2 Second, we explain the nature, purpose and ambit of the AARTO Act;

4.3 Third, we analyse the legislative competence of the national and provincial legislatures as contemplated in the functional areas listed in Schedules 4A and B and 5A and 5B and show that the AARTO Act is within the legislative competence of the enacting legislature and regulates matters that fall under

functional area (road traffic regulation) listed in Schedule 4A of the Constitution;

4.4 Fourth, in the alternative and if the Court finds that the matters in the AARTO Act are within the parameters of the functional areas in Schedule 5, we show that the national government needed to pass the AARTO Act;

4.5 Fifth, we show that section 17 of the Amendment Act does not limit constitutional rights; alternatively, any limitation is rational, reasonable and justifiable under the Constitution; and

4.6 Finally, we deal with the just and equitable remedy if this Court confirms the High Court judgment.

HIGH COURT JUDGMENT

5 The High Court identified two reasons for the applicant's constitutional attack on the AARTO Act as follows:

> "14.1 First, the AARTO and Amendment Acts usurp the exclusive legislative authority of the provincial legislatures by regulating road traffic and creating a single, national system to do so. The applicants submitted that provincial and municipal road and traffic regulation falls within the exclusive legislative competence of the provinces under Schedule 5, Parts A–B of the Constitution.
>
> 14.2 Second, the AARTO and Amendment Acts usurp the exclusive executive competence of local government (under Part B of Schedule 5 of the Constitution) to enforce traffic and parking laws at a municipal level."[4] [Underlining added for emphasis.]

6 The approach of the High Court is to apply the "*bottom-up approach*". It works like this. First, one decides which areas are "*carved out*" by the Constitution and allocates these exclusively to provinces and municipalities. Then what is left is within the shared national and provincial competence. If nothing is left after analysing what has been carved out for provinces and municipalities, then nothing remains for the national sphere. Applying this approach to the facts, the High Court held:

> "[33] Returning to the "*bottom-up*" approach referred to earlier in the judgment. Those competencies which resort under the exclusive legislative and executive competence of municipalities must first be carved out. The next step would be to carve out in this hierarchy those competencies which resort under the exclusive legislative and executive competence of provinces, which, by virtue of the carving out process, will exclude those competencies already carved out in respect of municipalities."[5]

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[4] Record Vol. 3, page 242 High Court judgment at para 14.

[5] Record Vol. 3, page 252 High Court judgment at para 33.

7 The High Court also held that the AARTO Act usurped provincial legislatures' power to legislate road traffic law enforcement matters. The Court reasoned that provincial and municipal road and traffic laws fall within the exclusive legislative competence of the provinces under Schedule 5, Parts A and B of the Constitution.

8 The flaw with the High Court's reasoning is plain. The text of the Constitution must first be considered. Second, the subject matter of the legislation should be examined. If the subject matter falls within the functional areas of the national sphere, properly characterised, then the legislation is within the competence of the national sphere. Nothing in the text of the Constitution or the precedent of this Court justifies applying a "*bottom-up*" approach, which requires a court to sit in a divining role, deciding for itself which areas are appropriate for what sphere. The legislature has made the choices in the Constitution. A court need not divine what functional area is appropriate for what sphere of government. It must simply decide, through a process of interpretation, the legislature's choices. Ordinary meaning and clear language must be applied "*for interpretation is not divination*".[6]

[6] *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC) at para 18.

CONSTITUTIONAL AND STATUTORY FRAMEWORK

The AARTO Act is within Parliament's legislative competence

9 The Constitution has created three spheres of government: national, provincial and local, which are "*distinctive, interdependent and interrelated*".[7] All spheres must conduct their activities within the parameters of Chapter 3 of the Constitution.

10 Each sphere has the authority to legislate.

10.1 Section 44(1) grants the national legislative authority to Parliament, which comprises two houses, the National Assembly and the National Council of Provinces. Parliament is also entitled, under section 44(2), to "*intervene*" in the areas of provincial and municipal legislative competence if the conditions in that section are present.

10.2 Provincial legislatures are entitled to legislate in terms of section 104. A province may legislate in relation to any matter listed in Schedule 4 or Schedule 5.

10.3 Unlike provinces and the national government, where the Constitution separates executive and legislative powers, at the municipal level, the executive and legislative power are vested in the same body, the municipal council.[8] Municipalities have the executive authority and are entitled to "*administer*" local government matters listed in Part B of Schedule 4 and Part

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[7] Section 40(1) of the Constitution.

[8] Section 151(2) of the Constitution.

B of Schedule 5.[9] In terms of section 156(2), a municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer. In sum, municipalities may administer and legislate in relation to the functional areas assigned to them by the Constitution.

11 Because each sphere has legislative power, the Constitution has created functional areas for which each sphere may exercise that legislative authority. These are in Schedules 4 and 5 of the Constitution. Of relevance to this case are:

11.1 "*Road traffic regulation*": this is in Part A of Schedule 4. This Schedule lists functional areas of concurrent national and provincial legislative competence. This means that Parliament may legislate on any matter which falls in this area.

11.2 "*Provincial roads and traffic*": this is in Part A of Schedule 5. This means that the provincial legislatures may exclusively legislate in this functional area.

11.3 "*Municipal roads*" and "*traffic and parking*": these are in Part B of Schedule 5. This means that provinces may legislate on these matters to the extent provided for in section 155(6)(a) of the Constitution. That section, in turn, enables provinces to establish municipalities by legislation, and when it does so, it may set out the powers of municipalities in the legislation itself. [10]

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9 Section 156(1) of the Constitution.

10 *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC) at paras 46 and 47.

12 The issue in this case is whether the AARTO Act is within Part A of Schedule 4. If it is, then the National Parliament is entitled to pass the legislation. The departure point according to *Western Cape Government: In re DVB Behuising*,[11] is this:

> "[36] The inquiry into whether the Proclamation dealt with a matter listed in Schedule 6 involves the determination of the subject matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the Proclamation is about. In determining the subject matter of the Proclamation, it is necessary to have regard to its purpose and effect. The inquiry should focus beyond the direct legal effect of the Proclamation and be directed at the purpose for which the Proclamation was enacted to achieve. In this inquiry, the preamble to the Proclamation and its legislative history are relevant considerations, as they serve to illuminate its subject matter. They place the Proclamation in context, provide an explanation for its provisions and articulate the policy behind them."[12]

13 We submit that the subject matter of the AARTO Act is "*road traffic regulation*". This area is in Part A of Schedule 4. Why do we say this? We start with section 2 of the AARTO Act, which records the objects of the AARTO Act:

> "The objects of this Act are, despite the Criminal Procedure Act, 1977 (Act No. 51 of 1977)—
>
> (a) to encourage compliance with the national and provincial laws and municipal by-laws relating to road traffic and to promote road traffic safety;
>
> (b) to encourage the payment of penalties imposed for infringements and to allow alleged minor infringers to make representations;
>
> (c) to establish a procedure for the effective and expeditious adjudication of infringements;

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[11] *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 (1) SA 500 (CC).

[12] *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* at para 36.

(d) to alleviate the burden on the courts of trying offenders for infringements;

(e) to penalise drivers and operators who are guilty of infringements or offences through the imposition of demerit points leading to the suspension and cancellation of driving licences, professional driving permits or operator cards;

(f) to reward law-abiding behaviour by reducing demerit points where they have been incurred if infringements or offences are not committed over specified periods;

(g) to establish an agency to support the law enforcement and judicial authorities and to undertake the administrative adjudication process; and

(h) to strengthen cooperation between the prosecuting and law enforcement authorities by establishing a board to govern the agency."

14 In line with the stated objectives of the Act,

14.1 the demerit system is introduced to penalise drivers and operators who are guilty of infringements; and

14.2 the adjudication procedure in Chapter 3 of the AARTO Act alleviates the burden on the courts of trying offenders for infringements.

15 Section 17 states that:

"(1) If a person is alleged to have committed an infringement, an authorised officer or a person duly authorised by an issuing authority, must, instead of a notice contemplated in section 56 or 341 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), and subject to section 23, serve or cause to be served on that person an infringement notice, which must—

(a) specify the name and residential and postal address of the infringer, if known, at the time when the infringement was committed;

(b) state the prescribed particulars of the infringement;

(c) specify the amount of the prescribed penalty payable in respect of that infringement, the issuing authority to which the penalty is payable and the place where the penalty may be paid;

(d) specify the prescribed discount which may be obtained if the penalty is paid not later than 32 days after the date of service of the infringement notice;

(e) inform the infringer that the demerit points position may be ascertained from the national contraventions register at the office of any issuing authority, registering authority or driving licence testing centre;"

16 Authorised officers remain officers appointed municipal police officers under the law and traffic officers or wardens appointed in terms of the law of any province. Under section 17, the authorised officers issue infringement notices which inform the infringer of their offence, including their details and specify the penalty for the infringement and the consequences of failing to settle the penalty.

17 Section 56(1) of the Criminal Procedure Act provides:

> "Written notice as method of securing attendance of accused in magistrate's court—
>
> (1) If an accused is alleged to have committed an offence and a peace officer on reasonable grounds believes that a magistrate's court, on convicting such accused of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, such peace officer may, whether or not the accused is in custody, hand to the accused a written notice which shall—
>
> (a) specify the name, the residential address and the occupation or status of the accused;
>
> (b) call upon the accused to appear at a place and on a date and at a time specified in the written notice to answer a charge of having committed the offence in question;
>
> (c) contain an endorsement in terms of section 57 that the accused may admit his guilt in respect of the offence in question and that he may pay a stipulated fine in respect thereof without appearing in court; and
>
> (d) contain a certificate under the hand of the peace officer that he has handed the original of such written notice to the accused and that he has explained to the accused the import thereof."

18 Thus it is the officers appointed municipal police officers under the law and traffic officers or wardens appointed in terms of the law of any province that administer and enforce infringement of traffic laws. The change is that the infringement notice is issued under section 17 of the AARTO Act instead of section 56 of the Criminal Procedure Act.

19 The AARO Act then provides for the enforcement of infringement notices and the consequences of committing road traffic offences and infringements, including the demerit system.

20 These provisions all speak to the "*regulation*" of road traffic. The term "*regulation*" must be given its ordinary meaning. It is about—

20.1 establishing rules for road traffic;

20.2 setting out the penalties which can be imposed;

20.3 creating an infrastructure for monitoring and enforcement; and

20.4 the consequences for breaching the rules in the law.

21 Yes, it is so that provinces may also do this: Part A of Schedule 4 is clear in this regard. But the point of substance is that they may not do it exclusively. Parliament has the concurrent legislative competence also to do this. This really ought to be the end of the matter. The AARTO Act is about road traffic regulation.

22 There was no reason why the High Court embarked upon the "*bottom-up*" analysis. This analysis seems to be based on a misreading of what this Court held in *Ex Parte*

President of the Republic of South Africa: In re Constitutionality of the Liquor Bill.[13.] This Court did not promote any "*bottom-up approach*". Instead, the interpretative framework approved by this Court is the following:

22.1 Schedule 4 functional competence should be interpreted as distinct from and excluding Schedule 5 competence.[14] The Court said:

> "The constitution-makers' allocation of powers to the national and provincial spheres appears to have proceeded from a functional vision of what was appropriate to each sphere, and accordingly, the competencies itemised in Schedules 4 and 5 are referred to as being in respect of '*functional areas*'."[15]

22.2 This does not mean the Court must divine what is appropriate, as the High Court appears to suggest in paragraph 26 of its judgment. Rather, the Constitution-makers have made that choice – the Court's function is to decide what that choice is, not to make it.

22.3 When it came to the specific issues at hand, in the *Liquor Bill* case the term "*trade*" was given its ordinary meaning:

> "Nothing in Schedule 4 suggests that the term should be restricted in any way, and the Western Cape government did not contend that Parliament's concurrent competence in regard to '*trade*' should be limited to cross-border or inter-provincial trade. It follows that in its ordinary signification, the concurrent national legislative power with regard to 'trade' includes the power not only to legislate intra-provincially in respect of the liquor trade but to do so at all three levels of manufacturing, distribution and sale."[16]

22.4 The "*exclusive provincial competence*" to legislate in respect of a functional area in Schedule 5 must "*be done by defining its ambit in a way that leaves it*

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[13] *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 73 (CC).

[14] *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* at para 49.

[15] *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* at para 50.

[16] *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* at para 53.

ordinarily distinct and separate from the potentially overlapping concurrent competencies set out in Schedule 4."[17]

23 This does not mean, as the High Court appears to say, that one starts by "*carving*" out areas at the bottom (local and province), and as one cascades to the top (national), reduces the scope of what the National Parliament can do. The enquiry commences by deciding the subject matter of the statute. Once that is done, content must be given to the actual functional area. Here the exercise is relatively simple: the Act in question is about the regulation of road traffic. The *Liquor Bill* case makes it plain that the term "*regulation*" should not be narrowed down but should be given its ordinary meaning.

24 To return then to where we began. What is the subject matter of the AARTO Act? This Act serves to regulate the enforcement of infringements under the National Road Traffic Act 93 of 1996 and the regulations passed under the Act.[18] The National Road Traffic Act applies throughout South Africa. It regulates the registration and licensing system of motor vehicles for each province, licences to drive, including either learners' or driving licences, among other road traffic matters.

25 The applicant also captures the purpose of the AARTO Act in paragraph 3.1 of its founding affidavit as creating "*a single national system of road traffic <u>regulation</u>*".[19] [Underlining added for emphasis.]

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17 *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* at para 54.

18 Record Vol. 3, pages 241 to 243 High Court judgment at paras 11 and 15.

19 Record Vol. 1, page 6 at para 3.1.

26 Furthermore, as the High Court noted, the Act "*shifts from the default system of judicial enforcement of traffic laws through criminal law to a compulsory system of administrative enforcement of traffic laws through administrative tribunals, administrative fines and demerit points system.*"[20] The criminal law through which the judicial enforcement of traffic laws was governed was national legislation – the Criminal Procedure Act 51 of 1977. This shows that road traffic was regulated by national legislation. Parliament had the constitutional competence to pass such legislation. The legislature had chosen that road traffic would be regulated at a national label, AARTO is intended to amend provisions of the CPA insofar as they apply to traffic offences.

27 A shift from one national legislation (Criminal Procedure Act) to another (AARTO Act) is not a usurpation of the provincial legislatures' exclusive legislative authority or executive competence of local government. The shift is taking place nationally.

28 The case of *Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature*,[21] shows that the empowering legislation for provinces must be expressly assigned by the Constitution. And there is a difference between the national and provincial spheres: "*[u]nlike Parliament, which enjoys plenary legislative power within the bounds of the Constitution, the legislative authority of provinces is circumscribed*."[22] This Court specifically said:

> "[36] In the context of our Constitution, the word '*expressly'* must be given a meaning that is consistent with this scheme. The

[20] Record Vol. 3, page 241 High Court judgment at para 11.

[21] *Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature* 2011 (6) SA 396 (CC).

[22] *Premier: Limpopo Province* at paras 21, 34 to 37.

assignment of legislative powers pursuant to section 104(1)(b)(iii) must leave no doubt about the act of assigning and the nature and the scope of the powers assigned. It is a requirement of the rule of law, one of the foundational values of our constitutional democracy, that when Parliament assigns its legislative powers to the provinces, it must do so in a manner that creates certainty about the nature and extent of the powers assigned. This will enable the provinces to exercise those powers in accordance with and within the limits of the terms of the assignment.

[37] This approach is also consistent with the provisions of Chapter 3 of the Constitution, which requires institutions 'not [to] assume any power or function except those conferred on them in terms of the Constitution' and to 'exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere'. The public should be left with no doubt about which sphere of government has legislative competence with regard to the matter concerned. This is to preclude any dispute about whether the provinces have legislative competence with regard to the matter concerned.

[38] It must be apparent from the empowering legislation and its provisions that the purpose is to assign legislative authority with regard to a matter that falls outside the functional areas listed in Schedules 4 and 5. The ideal way to achieve this, and a method that is generally followed by the legislature, is to declare, in the preamble of the legislation, that its purpose is to make an assignment; or to say so in the provisions that set out the objects of the legislation.

[39] What is required is that the legislation conveys, in clear terms, that a power with regard to a specified matter is being assigned to the provinces so as to render it unnecessary to imply the power from the language used by the statute. For, it seems to me, if the act of assignment can be determined only by way of implication, it is not an assignment contemplated by section 104(1)(b)(iii)."[23] [Underlining added for emphasis.]

29 This Court added that:

"[51] The contention that sections 195, 215 and 216 of the Constitution envisage the enactment of provincial legislation relates to section 104(1)(b)(iv). Section 104(1)(b)(iv) confers a power on the provinces to pass legislation with regard to any

[23] *Premier: Limpopo Province* at paras 36 to 39.

> matter for which a provision in the Constitution envisages the enactment of provincial legislation. It must be understood in the context of the broader scheme for the allocation of powers between Parliament and the provincial legislatures. As pointed out above, the defining feature of this scheme is that matters in respect of which provincial legislatures have legislative powers must be enumerated in Schedules 4 and 5, or be '*expressly assigned'*, or a provision in the Constitution must envisage the enactment of provincial legislation in respect of those matters.
>
> [52] Consistent with this scheme, it seems to me that only those provisions of the Constitution which, in clear terms, provide for the enactment of provincial legislation, must be held to fall under section 104(1)(b)(iv). Our constitutional scheme does not permit legislative powers of the provincial legislatures to be implied. Were it to be otherwise, the constitutional scheme for the allocation of legislative power would be undermined. The careful delineation between the legislative competence of Parliament and that of provincial legislatures would be blurred. This may very well result in uncertainty about the limits of the legislative powers of the provinces. In the light of the plenary legislative powers of Parliament, it would result in the provinces having concurrent legislative competence with Parliament in respect of many matters. This is not what the drafters of our Constitution had in mind."[24] [Underlining added for emphasis.]

30 From the above, provincial legislatures only have the power to legislate on matters expressly assigned to the provinces, and the assignment of legislative competence may not be implied.

31 Yet this is what the High Court did by deciding for itself "*what is appropriate*" instead of what the Schedules say – expressly – when determining whether the national government was usurping the powers of provincial legislatures and municipalities.[25] Schedule 5 does not clearly, expressly and unmistakably empower provincial

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[24] *Premier: Limpopo Province* at paras 51 and 52.

[25] Record Vol. 3, pages 249 and 250 High Court judgment at paras 26 and 28.

legislatures to regulate and enforce road traffic laws. The national government has the competence to legislate for the enforcement of road traffic laws.

32 The Court's application of the "*bottom-up approach*" also led the Court to ignore the text of Schedules 4 and 5. The functional areas of municipalities under Schedule 5 also do not include road traffic regulation or enforcement of such regulation. The regulation and enforcement of road traffic laws do not fall under functions within the parameters of municipalities' defined spaces under Schedule 5.[26]

33 It is not correct that "*the first to fourth respondents suggest that the national government has competence over all matters relating to traffic and roads*."[27] The case made is that if the statute is about road traffic regulation, it is within the competence of Parliament to pass the statute.

34 Schedule 4 does not distinguish between road traffic regulation at a national level, a provincial level and a municipal level. The text is general and allows Parliament to pass legislation for road traffic regulation. It would diverge from the text and purpose of Part A of Schedule 4 to interpret it as distinguishing between national, provincial and municipal road traffic regulation. Therefore, the functional area for road traffic regulation at all three levels falls under Part A, which means there is concurrent legislative competence. Parliament is not limited to legislating only for road traffic regulation at a national level or on national roads.

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[26] See *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* at para 43.

[27] Applicant's heads of argument at para 14.2.

35 Since road traffic regulation falls under Part A of Schedule 4, the local governments or municipalities do not have executive authority over the administration of legislation to provide for road traffic regulation. Further, the AARTO Act does not violate section 151(4) of the Constitution because it does not impede any municipalities ability to perform its function.

Hollowing out provincial legislative competence?

36 It seems that the motivation for the "*bottom-up approach*" is the concern that if road traffic regulation is construed as we argue, that will leave provinces with no powers on matters of municipal roads and traffic and parking which are mentioned as areas of exclusive competence in Schedule 5. There is no basis for this concern. This Court need only to consider the substance of the legislation and decide whether it is within a functional area in Schedule 4. If so, that is the end of the enquiry.

37 Moreover, interpreting Schedules 4 and 5 as empowering Parliament to pass legislation regulating traffic laws nationally will not undermine local governments' objects, powers and functions under the Constitution. Section 152(1) of the Constitution provides for the powers and functions of local government as follows:

> "The objects of local government are—
> (a) to provide democratic and accountable government for local communities;
> (b) to ensure the provision of services to communities in a sustainable manner;
> (c) to promote social and economic development;
> (d) to promote a safe and healthy environment; and
> (e) to encourage the involvement of communities and community organisations in the matters of local government."

38 Municipalities can comply with their powers and functions by administering and implementing the traffic laws prescribed in the AARTO Act as contemplated in section 156(1)(a) of the Constitution. Municipalities may still act in accordance with their competence in Schedule 5B by passing by-laws about the allocation and determination and designation of parking areas, the placement of traffic lights, stop signs and traffic circles, and the determination of speed limits. All these are examples of matters that fall under "*municipal roads*" and "*traffic and parking*" functional areas. The municipalities may administer and prescribe laws about these matters.

39 The AARTO Act allows for officers authorised under provincial laws to administer the laws on provincial roads by issuing infringement notices. Provincial legislatures may still prescribe laws and regulations concerning provincial roads. The AARTO Act does not prohibit provincial legislatures from doing so.

40 For the reasons we give above, the national government is competent to pass legislation that provides for road traffic matters which will apply uniformly throughout South Africa.

The necessity to pass the AARTO ACT

41 It was also necessary for Parliament to intervene and pass the AARTO Act and provide for a national road traffic regulation. This is irrespective of whether the Court holds that the Act falls within Schedule 5 or not.

42 The High Court held that the respondents, including the Minister of Transport, insisted that the AARTO Act falls under Schedule 4, "*the question whether it was necessary*

to do so does not even arise on the respondents' version".[28] But this is an error. The Minister's answering affidavit before the High Court squarely placed reliance on section 44(2).[29]

43 The pleaded facts explain the justification and necessity for the Act:

43.1 South Africa has advanced technologically, which makes it "*more essential to consider utilising other options that are in line with and accommodate such changes. For some individuals, it is more convenient and efficient to communicate via email or SMS's as opposed to the old conventional way of the post office.*"[30]

43.2 The current system is "*totally inadequate and has not helped in reducing the carnage on roads. The fines issued in accordance with this system are in most instances not paid.*" [31]

43.3 Because of the high crime rate, courts must give attention to serious crimes and not administrative infractions such as traffic violations. Because less than 20% of traffic violations are processed in courts, this has "*contributed to bad behavioural conduct by drivers on the road*".[32]

43.4 Traffic fines, imposed throughout the country, have failed to the change behaviour of drivers.

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28 Record Vol. 3, page 256 High Court judgment at para 43.

29 Record Vol. 2, page 125 at paras 13 and 14.

30 Record Vol. 2, page 130 at para 25.

31 Record Vol. 2, page 133 at para 36.

32 Record Vol. 2, page 134 at para 36.

43.5 The Act represents a shift in national executive policy. The Minister of Transport, acting with the concurrence of the Minister of Justice and the MECs for Transport in each province, "*may prescribe penalties, which may be expressed as a single unit or multiple units according to monetary value*".[33]

43.6 The Act—

> "seeks to regulate every aspect of road traffic. However, there is a departure from the old system in that a person who falls foul of the road traffic laws will no longer be regarded as committing a criminal offence. Such person is now regarded as an infringer and becomes a party to an administrative process which culminates in administrative decision… The process is now more of a civil and administrative in nature than criminal."[34]

43.7 The Act "*brings about harmonisation and standardisation at national, provincial and local government in the adjudication process of the traffic infringements*."[35]

44 Plainly then, the necessity for the Act was squarely raised. In effect, the policy underpinning the law was a shift from the criminalisation of traffic infringements to an administrative system. This was necessary because of (i) the high incidence of traffic accidents; and (ii) the failures of the criminal model to address these. The government decided to "*harmonise and standardise*" how traffic offences and infringements are handled. There can be no question that the issue of the necessity for the statute arose "*from the Minister's own papers*".

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33 Record Vol. 2, page 136 at para 41.

34 Record Vol. 2, page 138 at para 49.

35 Record Vol. 2, page 146 at para 68.5.

45 The justification for why the legislation was passed was thus before the High Court. To say that the issue did not arise was in error. Section 44(2) of the Constitution was therefore implicated. It provides ample justification for the AARTO Act. The provision states:

> "Parliament may intervene, by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary—
>
> (a) to maintain national security;
>
> (b) to maintain economic unity;
>
> (c) to maintain essential national standards;
>
> (d) to establish minimum standards required for the rendering of services; or
>
> (e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole." [Underlining added for emphasis.]

46 The Minister expressly stated that the Act was required in order to "*bring about harmonisation and standardisation at national, provincial and local government*" in the regulation of traffic offences. This is precisely what the Constitution refers to when it states, in section 44(3), that Parliament may legislate on a matter referred to in Schedule 5 when it is necessary to maintain essential minimum standards. The facts which prove the carnage on the roads and the failures of the current system clearly cry out for national intervention.

47 The High Court found that the matters the AARTO Act seeks to regulate fall within a functional area listed in Schedule 5 as contemplated in section 44(2) of the Constitution. If this Court agrees with the High Court, we submit that the AARTO Act was necessary as contemplated in section 44(2). There were enough facts before the High Court to reach this conclusion, and it was an error not to decide it.

48 The AARTO Act deals with a matter that can be dealt only with if the regulation applies uniformly on all roads across all provinces and municipalities. Road traffic requires inter-provincial regulation and enforcement instead of intra-provincial regulation and enforcement.

49 The prosecution of traffic violations is a matter of national importance and should therefore be regulated in terms of national legislation. The prosecution is currently undertaken through the criminal justice system. The prosecution under the current system has resulted in a strain on judicial resources. Due to the high incidence of crime in the country, our courts prioritise serious crimes rather than traffic violations, so our Courts finalise less than 20% of the traffic cases.

50 The AARTO Act is meant to change the behaviour of road users not only by levying penalties but also by introducing the point demerit system in terms of which serial transgressors may find their licenses eventually suspended or even revoked.

CHALLENGE TO SECTION 17 OF THE AMENDMENT ACT

51 The AARTO Act requires the enforcement authorities to send documents to infringers by registered mail. Section 30(1) of the AARTO Act provides: "*Any document required to be served on an infringer in terms of this Act, must be served on the infringer personally or sent by registered mail to his or her last known address.*"

52 Section 30(1) is to be substituted by section 17 of the Amendment Act, which says:

> "(1) Any document required to be served on an infringer in terms of this Act must be served on the infringer by—
>
> (a) personal service;
>
> (b) postage; or
>
> (c) electronic service."

53 The President has not proclaimed the commencement date of section 17 yet. We accept that, in accordance with *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development*,[36] this Court may consider provisions in a statute that have not yet been brought into operation.

54 The applicant attacks section 17 of the Amendment Act because it "*removes the requirement that service must be effected by personal service or registered mail*".[37] The applicant then contends that the service process under section 17 of the Amendment Act is inadequate because "*there is a significant risk that, should service be carried out in this manner, the infringer will not receive the document in question*".[38]

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[36] *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC).

[37] Applicant's heads of argument at para 43.

[38] Applicant's heads of argument at para 43.

55 The foundation of the applicant's attack is that section 17 does not make it peremptory to serve documents on infringers by registered mail. Instead, it affords enforcement offices the discretion to serve by personal or electronic service.[39]

56 The High Court did not consider and determine the applicant's attack of section 17. That means that this Court would thus consider the issue as a court of first and last instance. We respectfully submit that it would be appropriate and just for the Court to remit the matter to the High Court. However, if the constitutionality of section 17 is to be decided, there is no basis to the challenge.

Section 17 of the Amendment Act does not limit constitutional rights.

57 The issue is one of interpretation and application, not constitutionality. Since the provision is about service, the question in every case will be about the effectiveness of the mode of service which has been actually employed. This will be an issue of fact. There is no *a priori* constitutional preference for personal service. If an alleged infringer can prove that there has been ineffective service, they would be entitled to challenge the notification.

58 The applicant submits that:

> "[38] . . . an infringer who has not received notice of their infringement (and would otherwise have contested his or her liability or even paid the penalty) may be barred from obtaining a driver's licence, a professional permit or a licence disc and/or banned from driving a motor vehicle, until they have applied for the revocation of the enforcement.
>
> [39] This would have severe consequences for the infringer's ability to move freely and to practise their profession and/or to make a living

[39] Applicant's heads of argument at para 48.2.

> (particularly in the case of taxi or truck or bus drivers and fleet operators). This constitutes a limitation of the infringer's right to freedom of trade, occupation and profession (section 22 of the Constitution) and freedom of movement (section 21 of the Constitution)."[40]

59 There is no basis to this argument. If an infringer has not received notice he or she is entitled to challenge the decision. The applicant does not show an infringement of a constitutional right. Instead, the applicant submits that section 17 of the Amendment Act may or would result in the violation of an infringer's rights to freedom of trade and occupation and freedom of movement if the infringer does not receive a notice of their infringement and does not respond to the notice and the consequences that are stipulated in the AARTO Act and Amendment Act apply because of their non-compliance with the notice.[41]

60 It is not clear how ineffective service would breach the right to freedom of movement, or the right to freedom of trade and occupation. But the main point is that if a chosen mode of service is not effective, it must be challenged when it arises, not in the abstract. As Ackermann J held in *Ferreira v Levin NO*,[42] "*. . . cases for relief on constitutional grounds are not decided in the air . . . The time of this Court is too valuable to be frittered away on hypothetical fears . . .*"[43] The applicant's fears of drivers being deprived their licences because they did not get the notice may or may not eventuate. Nobody knows. But this is not the right time and place to discuss these speculative and academic concerns.

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40 Applicant's heads of argument at paras 38 and 39.

41 Applicant's heads of argument at paras 35.2, 35.3, 36, 38 to 40.

42 *Ferreira v Levin NO* 1996 (1) SA 984 (CC) at para 199.

43 *Ferreira v Levin NO* at para 199.

61 The consequences that the applicant relies on "*may be barred from obtaining a driver's licence, a professional permit or a licence disc and/or banned from driving a motor vehicle, until they have applied for the revocation of the enforcement*," do not arise because an applicant has failed to comply with one enforcement order.

62 In any event, in terms of section 20(1)(c), the enforcement authorities must "*notify the infringer by registered mail in the prescribed manner that the demerit points have been recorded against his or her name in the national contraventions register in respect of the infringement in question;*". An infringer would not be barred or banned without being afforded an opportunity to make submissions about their failure to comply with the infringement notice.

63 The AARTO provides that an enforcement order may be issued only if the requirements or factors under section 20(2) of the AARTO Act are satisfied:

> "No enforcement order is issued, unless the registrar is satisfied that—
>
> (a) a notification contemplated in section 18(7) or courtesy letter, as the case may be, has been served on the infringer in question;
>
> (b) a period of at least 32 days has passed since the date of service of the said notification or courtesy letter, as the case may be;
>
> (c) the applicable penalty and fees have not been paid;
>
> (d) there are no pending representations in the case of a minor infringement;" [Underlining added for emphasis.]

64 There is an obligation to ensure that an infringer indeed received the infringement notice before an enforcement order is issued. The infringer cannot be prejudiced in the process because of the protection in section 20(2)(a) of the AARTO Act.

65 Second, the applicant uses the wrong test to challenge the constitutional validity of section 17 of the Amendment Act. The applicant contends that the section is

"*constitutionally inadequate*" because the provisions of section 17 "*fail to provide for adequate service of infringers*". The applicant's preferences are one thing. And it is quite another to decide if an Act is unconstitutional. Many things could have been written into the statute to make it "*adequate*". The fact is that they have not been written into it. And it is not the business of this Court to write the applicant's preferences into a statute that has been written by Parliament.

Any limitation of constitutional rights is reasonable and justifiable

66 If this Court finds that section 17 of the Amendment Act limits the rights of freedom of movement and trade, the limitation is reasonable and justifiable.

The nature and extent of the limitation

67 The extent of the limitation is not severe. The infringement of the rights that the applicant relies on is conditional or speculative. Unless the modes of service are ineffective or there is a failure to deliver the infringement notice, an infringer's rights are not limited. Furthermore, the AARTO Act allows an infringer to alleviate the consequences that befall her if she fails to respond to an infringement notice by showing that she did not receive the notice.

The relation between the limitation and its purpose

68 The question in this regard is whether the limitation imposed achieves its purpose;[44] in other words, a rational connection must exist between the purpose of the impugned law and the limitation.[45]

69 Service of infringement notices has to be done efficiently and cost-effectively. The enforcement authorities should not incur the cost of serving every infringement notice by registered mail when there are cheaper and less cumbersome avenues through which the infringement notices may be served on infringers.

Are there less restrictive means to achieve the purpose?

70 A limiting means is unlikely to be proportional if less restrictive means could achieve the same purpose. In *Teddy Bear Clinic for Abused Children v Minister of Justice & Constitutional Development*,[46] the Constitutional Court held that a limitation would not be proportional if other, less restrictive, means could have been used to achieve the same ends.

71 In *S v Mamabolo (E TV Intervening)*,[47] the Constitutional Court held that:

> "Where section 36(1)(e) speaks of less restrictive means, it does not postulate an unattainable norm of perfection. The standard is reasonableness. And, in any event, in theory, less restrictive means can almost invariably be imagined without necessarily precluding a finding of justification under the section. It is but one of the enumerated

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44 *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* 2011 (5) BCLR 505 (CC) at para 64.

45 *Minister of Police v Kunjana* 2016 (9) BCLR 1237 (CC) at para 24.

46 *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2013 (12) BCLR 1429 (CC) at para 95.

47 *S v Mamabolo (E TV Intervening)* 2001 (5) BCLR 449 (CC).

> considerations which have to be weighed in conjunction with one another and with any others that may be relevant."[48]

72 There is no limitation on the rights to freedom of trade and movement. Ensuring that infringers receive the infringement notices before any enforcement order is issued means that any limitation arising does not result from the service process contemplated in section 17 of the Amendment Act.

73 The service process is reasonable and has protection to ensure that enforcement orders are not issued without the infringer's notice of the traffic offence they committed.

74 The applicant's constitutional attack should thus be dismissed.

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[48] *S v Mamabolo (E TV Intervening)* at para 49.

JUST AND EQUITABLE REMEDY

75 Section 172(1)(b)(ii) of the Constitution gives this Court the discretion to make any just and equitable order, including an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

76 Thus, in the event that this court upholds the applicant's constitutional challenge and confirms the order of the High Court, it would be appropriate for this court to suspend the order declaring the AARTO Act and the Amendment Act are constitutionally invalid for at least 24 months to allow the Parliament a reasonable time to remedy the invalidity.[49]

77 The suspension would be appropriate because, if the applicant's interpretation is correct, the ambit and purport of the AARTO Act and the Amendment Act may be limited to national traffic regulations. This would mean that the application of the Act is limited to national roads. It is accordingly possible to cure the Acts of the constitutional shortcomings on which the Court relied to declare the Acts constitutionally invalid.[50]

78 There is no reason to expect that Parliament – given the necessary time – will not correctly fulfil its constitutional mandate.

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[49] Record Vol. 4, page 301 at para 51.

[50] Record Vol. 4, page 301 at para 52.

79 We submit in the alternative that if this Court dismissed the challenge to the AARTO Act and Amendment Act, the just and equitable remedy would be to remit the applicant's constitutional attack on section 17 of the Amendment Act to the High Court.

80 It is ordinarily not in the interests of justice for a court to sit as a court of first and last instance for an ordinary challenge about the constitutional validity of a statutory provision with no possibility of an appeal against its decisions. It would be appropriate to remit the matter to the High Court for adjudication of the challenge.

81 Alternatively, it would also be just and equitable to suspend this court's declaration of invalidity for 24 months to allow Parliament to rectify the constitutional defect.

82 In the circumstances, the Court should also grant an order limiting the retrospective effect of the declaration of invalidity as contemplated in section 172(1)(b)(i) of the Constitution. It would be just and equitable that the order of invalidity should remain in place until section 17 of the Amendment Act is appropriately amended.

PRAYERS

83 The Minister of Transport asks that:

83.1 the application for confirmation be dismissed;

83.2 this application for leave to appeal be granted; and

83.3 the High Court's order is set aside.

84 Alternatively, if this Court were to hold that the AARTO Act is unconstitutional to the extent that it applies to provincial roads and traffic and municipalities' executive powers concerning traffic enforcement and section 17 of the Amendment Act is unconstitutional and invalid, then the Minister of Transport asks that its declaration of invalidity be suspended for 24 months to allow Parliament to cure the constitutional defects.

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Chambers
Sandton
14 October 2022

LIST OF AUTHORITIES

Cases

1 *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC)

2 *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 73 (CC)

3 *Ferreira v Levin NO* 1996 (1) SA 984 (CC)

4 *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC)

5 *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC)

6 *Minister of Police v Kunjana* 2016 (9) BCLR 1237 (CC)

7 *Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature* 2011 (6) SA 396 (CC)

8 *S v Mamabolo (E TV Intervening)* 2001 (5) BCLR 449 (CC)

9 *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2013 (12) BCLR 1429 (CC)

10 *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* 2011 (5) BCLR 505 (CC)

11 *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 (1) SA 500 (CC)

Legislation

1 Administrative Adjudication of Road Traffic Offences Act 46 of 1998

2 Administrative Adjudication of Road Traffic Offences Amendment Act 4 of 2019

3 Criminal Procedure Act 51 of 1977