IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case nr: 32097/2020

In the matter between:

ORGANISATION UNDOING TAX ABUSE	Applicant
and	
MINISTER OF TRANSPORT	1st Respondent
MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	2nd Respondent
ROAD TRAFFIC INFRINGEMENT AUTHORITY	3rd Respondent
APPEALS TRIBUNAL	4th Respondent

APPLICANT'S HEADS OF ARGUMENT

INTRODUCTION

1. This is a constitutional challenge to 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**"). These Acts are unconstitutional for the following reasons:

    1.1. First, the AARTO and Amendment Acts usurp the exclusive legislative authority of the provincial legislatures. The Act regulates road traffic. It creates a single, national system to do so. However, provincial and municipal road and traffic regulation falls within the exclusive legislative competence of the provinces under Schedule 5, Parts A and B of the Constitution.

1.2. Second, the AARTO and Amendment Acts usurp the exclusive executive authority of local government (under Part B of Schedule 5 of the Constitution) to enforce traffic and parking laws at the municipal level. These Acts create a system whereby traffic laws are, by default, enforced through a national system of administrative tribunals, administrative fines and demerit points. All road traffic "infringements"[1] are handled by the Road Traffic Infringement Authority and the Appeals Tribunal (two national organs of state that are created by section 3 and 29A, respectively, of the Amendment Act). This moves the enforcement of all road and traffic laws to the national level.

2. The above aspects of the AARTO Act and Amendment Act are inconsistent with the Constitution. These aspects go to the core of the Acts and are not capable of severance. As such, the Acts fall to be declared unconstitutional. This is the primary relief sought by the applicant.

3. In the event that the Court declines to declare the Acts unconstitutional, the applicant seeks alternative relief. It seeks an order declaring that the service provisions of the Amendment Act (contained in section 17) are manifestly inadequate and are unconstitutional. Section 17 removes the requirement that service under the AARTO Act *must* be personal or by registered mail. It allows service by email, SMS or voice mail. Given the serious consequences that may flow from an infringement, such service is inadequate.

4. These submissions will expand upon the above issues. We will do so by dealing with the following, in turn:

[1] Other than conduct that is labelled as an "offence" by the Minister, all contraventions of road and traffic laws are now classified as "infringements".

4.1. First, we set out the general principles applicable to Schedules 4 and 5;

4.2. Second, we address the proper interpretation of those Schedules;

4.3. Third, we explain how the AARTO and Amendment Acts intrude upon the provinces' exclusive legislative competence and the municipalities' exclusive executive competence;

4.4. Fourth, we show that the unconstitutional provisions of the AARTO and Amendment Acts are not severable;

4.5. Fifth, we address the manifest inadequacy of the service requirements set out in section 17 of the Amendment Act;

4.6. Finally, we deal with the question of remedy.

INTRUSION UPON EXCLUSIVE PROVINCIAL AND MUNICIPAL COMPETENCE

5. The AARTO and Amendment Acts unlawfully intrude upon the exclusive executive and legislative competence of the local and provincial governments, respectively.

i) General principles

6. The Constitution stipulates that each sphere of government must exercise its powers in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.[2] Schedules 4 and 5 of the Constitution list the "functional areas" for which each sphere of government is responsible.

[2] Section 41(1)(g) of the Constitution.

7. In terms of section 104(1)(b)(ii) of the Constitution, the provincial sphere of government has exclusive legislative competence in respect of those functional areas listed in Part A of Schedule 5 of the Constitution. The national government has no legislative power in respect of these areas,[3] save in exceptional circumstances of compelling national interest (section 44(2) of the Constitution).

8. Under section 156(1) of the Constitution, a municipality has executive authority in respect of, and the power to administer, the matters listed in Part B of Schedule 4 and Part B of Schedule 5 of the Constitution. The Constitutional Court has made clear that this executive power is vested exclusively in municipalities, and provincial and parliamentary legislation may not vest executive powers of these matters in organs of state at provincial or national level.[4]

9. When it comes to characterising the substance of a statutory provision for the purposes of Schedules 4 and 5, the inquiry focuses not on the statute as a whole, but on the impugned provision itself:

> *"the substance of a particular piece of legislation may not be capable of a single characterisation only and that a single statute may have more than one*

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[3] *Ex parte President of the RSA: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC) ("the *Liquor Bill case*"). See also *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) at para 257.

Section 44 confers on the National Assembly the power, inter alia, to—

> "(ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5".

[4] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC); *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town* 2014 (4) SA 437 (CC)("*Habitat Council*") at para 12; *Maccsand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC).

substantial character. Different parts of the legislation may thus require different assessment in regard to a disputed question of legislative competence."[5]

ii) Proper interpretation of Schedules 4 and 5

10. In respect of road and traffic regulation and enforcement, the following functional areas are relevant:

    10.1. Part A of Schedule 4 (over which the national and provincial spheres of government have concurrent legislative competence[6]) lists as a functional area "*road traffic regulation*";

    10.2. Part A of Schedule 5 (over which the provinces have exclusive legislative competence) lists as a functional area "*provincial roads and traffic*";

    10.3. Part B of Schedule 5 (over which the municipalities have exclusive executive authority)[7] lists as functional areas "*traffic and parking*" and "*municipal roads*".

11. On the face of it, the above functional areas overlap. The courts have dealt with this form of overlap before. In doing so, they have laid down the following principles for the interpretation of Schedules 4 and 5:

    11.1. The Schedule 4 functional competences should be interpreted as being distinct from, and as excluding, Schedule 5 competences;[8]

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[5] *Liquor Bill case* at para 62.

[6] In terms of ss 44(1)(a)(ii) and 104(1)(b)(i) of the Constitution, both the national and provincial spheres of government have concurrent legislative competence in respect of those functions in Part A of Schedule 4 to the Constitution.

[7] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC)

[8] *Liquor Bill case* at para 50. In *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC) ("*Gauteng Development Tribunal*") at para 50, the

11.2. The functional areas in question must be interpreted such that they are given meaningful content;[9]

11.3. When there appears to be an overlap between a functional area in Schedule 5 and another in Schedule 4, the constitutional scheme requires that meaning be given to the former by "*defining its ambit in a way that leaves it ordinarily distinct and separate from the potentially overlapping concurrent competences set out in Schedule 4*";[10]

11.4. If the Constitution confers responsibilities in respect of the same issue (e.g. planning) on each sphere of government, those are *different* planning responsibilities, based on "*what is appropriate to each sphere"*;[11]

11.5. Where a matter requires regulation inter-provincially, as opposed to intra-provincially, the Constitution ensures that national government has been accorded the necessary power, whether exclusively or concurrently under

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Constitutional Court observed that "*our Constitution contemplates some degree of autonomy for each sphere [of government]. This autonomy cannot be achieved if the functional areas itemised in the schedules are construed in a manner that fails to give effect to the constitutional vision of distinct spheres of government*."

[9] *Liquor Bill case* at para 53 - 54.

[10] *Liquor Bill case* at para 55. See also *Maccsand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC).

[11] *Gauteng Development Tribunal* at para 53. That case was concerned with the apparent overlap in planning responsibilities assigned to the national, provincial and local spheres of government. The Constitution conferred 'planning' on all spheres of government by allocating 'regional planning and development' concurrently to the national and provincial spheres, 'provincial planning' exclusively to the provincial sphere, and executive authority over, and the right to administer, 'municipal planning' to the local sphere. The Court observed at para 52 – 53 that–

> "*if a word is used more than once in the Constitution, it is presumed to carry the same meaning, unless there is a clear indication to the contrary. …The constitutional scheme referred to earlier, together with the different contexts in which the term 'planning' is used, indicates clearly, in my view, that the term has different meanings. The Constitution confers different planning responsibilities on each of the three spheres of government in accordance with what is appropriate to each sphere*."

See also *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town* 2014 (4) SA 437 (CC)("*Habitat Council*") at para 12; *Maccsand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC) at para 47.

Schedule 4, or through the powers of intervention accorded by s 44(2) Where provinces are accorded exclusive powers, these should be interpreted as applying primarily to matters which may appropriately be regulated intra-provincially. Schedule 5 competences must be interpreted as conferring power on each province to legislate in the exclusive domain *"for its province"* only;[12]

11.6. In the context of the Schedule 4 and 5 functional areas, a purposive interpretation of the functional areas must be conducted in a manner that will allow the spheres of government to exercise their powers "*fully and effectively*";[13]

12. The general principles of constitutional interpretation also apply. These include the following:

12.1. individual constitutional provisions cannot be interpreted in isolation and must be construed in light of the Constitution as a whole;[14] and

12.2. different, and potentially conflicting, provisions of the Constitution must be interpreted in harmony with one another.[15]

[12] *Liquor Bill case* at para 51 – 52.

[13] *Gauteng Development Tribunal* at para 49.

[14] See *Matatiele Municipality and Others v President of the RSA and Others (No 2*) 2007 (6) SA 477 (CC) at para 36; *United Democratic Movement v Speaker, National Assembly and Others* 2017 (5) SA 300 (CC) at para 31.

[15] *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2)* 2003 (1) SA 495 (CC) at para 12

13. In light of the above principles, the proper interpretation of Schedules 4 and 5, insofar as they relate to road traffic regulation and enforcement, is the following:

    13.1. Schedule 5 (Parts A and B), must be read as affording provinces exclusive legislative competence in relation to provincial roads and traffic, and municipal roads and traffic and parking.

    13.2. Part A of Schedule 4 grants concurrent legislative competence to the national and provincial parliaments in respect of national roads and traffic regulation, only to the extent that they do not deal with matters of provincial roads and traffic or municipal roads, traffic and parking.

    13.3. Part B of Schedule 5 must be interpreted to mean that only Municipalities have enforcement powers regarding “traffic and parking” at the local level.

14. This interpretation is consistent with the principles set out above. It gives meaning to each functional area; It limits the ambit of the functional competences, such that they are distinct and separate from one another; It confers responsibilities on each sphere of government, based on what is appropriate to each sphere; It confers power on each province to legislate in the exclusive domain of its province, and on each municipality to enforce traffic and parking laws within its domain.

15. The respondents adopt a different interpretation. They contend that the Acts do not regulate matters falling under Schedule 5 of the Constitution. Rather, they regulate issues falling under Part A of Schedule 4 of the Constitution, over which the national and provincial legislatures share concurrent legislative competence.

16. This interpretation is not (and cannot be) correct.

16.1. It interprets Schedule 4 in insolation. It ignores Part A of Schedule 5, which includes the functional area of “provincial roads and traffic” and Part B of Schedule 5, which includes “traffic and parking” at the municipal area. The provinces have exclusive legislative competence over the functional areas in Schedule 5.

16.2. The respondents’ interpretation renders the provincial government’s exclusive legislative competence meaningless. In fact, their interpretation actively contradicts and removes the provinces’ exclusive legislative competence. The respondents suggest that the national government has legislative competence over all matters relating to traffic and roads. This is simply incorrect.

16.3. Similarly, the respondents’ interpretation contradicts and removes municipalities’ exclusive power to enforce laws relating to “traffic and parking” at the local level.

17. The respondents make much of the fact that the AARTO Act was passed in concurrence with the NCOP (in terms of section 76 of the Constitution) and that all provinces but one supported its enactment. [16] This is irrelevant. The national government did not have the power to pass national legislation regulating all road traffic. By so doing it unconstitutionally invaded the exclusive legislative competence of the provinces and the exclusive executive competence of the municipalities. The participation or approval of the provinces cannot not cure this fundamental defect.

[16] Authority’s AA, p 031-11, para 29 - 30; Minister’s AA, p 020-6, para 17.

iii) Intrusion upon exclusive provincial legislative competence

18. The AARTO and Amendment Acts create a single, national system for the regulation of all road traffic. The Minister himself acknowledges that "*the AARTO Act aims to regulate every aspect of road traffic*."[17]

19. This plainly intrudes upon the exclusive legislative competence of provinces (under Schedule 5, Parts A and B) in relation to provincial roads and traffic, and municipal roads and traffic. By purporting to enact both the AARTO Act and the Amendment Act, Parliament has acted beyond the legislative powers conferred on it in the Constitution. Thus, both Acts are unconstitutional and invalid.[18]

iii) Section 44(2)

20. The respondents both make reference to section 44(2) of the Constitution. This provision empowers the national parliament to pass legislation regarding a matter falling within a functional area listed in Schedule 5 in exceptional circumstances of compelling public interest. The provision states:

> *"(2) 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*

[17] Minister's AA, p 020-16, para 49.

[18] FA, p 002-11 to 002-12, para 28 – 29.

(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."

21. Section 44(2) applies only to legislation falling with Schedule 5. The respondents allege that the AARTO Act and Amendment Act fall with Schedule 4. So, on the primary submission of the respondents, section 44(2) would be irrelevant to the two impugned Acts.

22. In any event, the respondents do not make any attempt to justify why the Acts would fall within the scope of section 44(2) of the Constitution. There is no obvious case for concluding that the AARTO Act or the Amendment Act is **necessary** for any of the purposes listed in section 44(2) and the State bears the onus of proof in this regard.[19] As such, the references to section 44(2) do not take the matter further.

iv) Intrusion upon exclusive municipal executive competence

23. Municipalities have exclusive executive competence over the enforcement of laws relating to municipal roads, traffic and parking.[20] So even if this Court were to hold, contrary to the argument set out above, that the legislative competence of Parliament over road traffic regulation under Schedule 4 of the Constitution extends to legislating to regulate municipal road traffic, the AARTO Act and Amendment Act would remain unconstitutional to the extent that they purport to vest in AARTO administrative powers over municipal road and traffic law

[19] *Liquor Bill case*, at para 79.

[20] i.e. matters listed in Part B of Schedule 5 of the Constitution.

enforcement. Part B of Schedule 5 vests municipalities with exclusive executive authority over municipal roads, traffic and parking. Parliament cannot vest any of that authority in AARTO.

24. In the *National Building Regulations* case, the Constitutional Court has stated:

> *"The legislative power that the national and provincial spheres exercise over functional areas allocated to the local spheres does not include the power to arrogate to themselves executive powers vested in the local sphere by the Constitution. The exercise of the executive authority of municipalities is the sole preserve of municipalities."*[21]

25. Therefore, if municipal traffic law decision making and enforcement is to move from a system of judicial decision making and enforcement through the criminal law to a system of administrative decision making and enforcement through administratively imposed fines and demerit points, it is only municipal organs of state that can be vested with those administrative decision making and enforcement powers.[22]

26. The AARTO Act purports to vest the administrative decision making and enforcement powers over municipal traffic laws in the Authority (a national organ of state). The Amendment Act compounds the problem by vesting powers of appeal in the Appeals Tribunal (another national organ of state), and by removing the right that an alleged offender had under section 17(1)(f)(iv) of the AARTO Act (prior to its amendment), to bypass the unconstitutional national administrative

[21] *Johannesburg Metropolitan Municipality v Chairman, National Building Regulations Review Board and Others* 2018 (5) SA 1 (CC) at para 35

[22] FA, p 002-12, para 31.

enforcement system by electing to have his or her alleged traffic offence tried in the courts.[23]

27. In relation to municipal roads, traffic and parking these features of the AARTO Act and Amendment Act are unconstitutional in exactly the same way as similar attempts by Parliament to vest administrative decision making and enforcement powers in provincial or national bodies have been struck down by the Constitutional Court in relation to the exclusive municipal executive functions over

    27.1. municipal planning,[24] and

    27.2. building regulations.[25]

28. So the AARTO and Amendment Acts violate municipalities' exclusive executive powers, as established by section 156(1)(a) read with Schedule 5, Part B of the Constitution. They are unconstitutional and invalid. To paraphrase the Constitutional Court judgment in the *Habitat Council case*: municipalities are responsible for decisions in relation to municipal roads, traffic and parking; AARTO and the Appeal Tribunal are not.[26]

v) Severance

29. The test for severability in constitutional matters is well established:

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[23] FA, p 002-12, para 32.

[24] *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC); *Minister of Local Government, Environmental Affairs & Development Planning, WC v Habitat Council* 2014 (4) SA 437 (CC); *Tronox KZN Sands (Pty) Ltd v KZN Planning & Development Appeal Tribunal* 2016 (3) SA 160 (CC)

[25] *Johannesburg Metropolitan Municipality v Chairman, National Building Regulations Review Board and Others* 2018 (5) SA 1 (CC)

[26] *Minister of Local Government, Environmental Affairs & Development Planning, WC v Habitat Council* 2014 (4) SA 437 (CC) at para 13.

"if the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The test has two parts: first, is it possible to sever the invalid provisions and, second, if so, is what remains giving effect to the purpose of the legislative scheme?"[27]

30. The offending provisions of the AARTO Act and the Amendment Act could, by a process of notional severance, be excised so that the two Acts did not apply

    30.1. to any provincial roads or provincial traffic law infringements, or

    30.2. to any municipal road, traffic or parking by-law infringements.

31. However, what would remain after this process of notional severance would not give effect to the main objective of the statute. If the offensive features of the Acts are severed, very little will remain and what remains will not give effect to the purpose of the Act (i.e. to create a single, national system for administrative enforcement of road traffic laws). Moreover, there would be no purpose in setting up the elaborate administrative machinery of the Agency and the Appeal Board if the vast majority of road traffic infringements did not fall within their jurisdiction. The notional severance would also leave a huge lacuna in its wake because a system designed for the administrative adjudication of road traffic infringements would be left without any administrative adjudicators for the vast majority of road traffic infringements.

32. It follows that if either, or both, of the provincial legislative competence and municipal executive competence challenges are upheld, the AARTO Act and the

[27] *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others* 1995 (4) SA 631 (CC) at para 16; *SA Veterinary Association v Speaker of the National Assembly* 2019 (3) SA 62 (CC) at para 49.

Amendment Act must be declared to be inconsistent with the Constitution in their entirety.

AMENDMENT ACT'S SERVICE PROVISIONS ARE INADEQUATE

33. In the event that the above honourable court finds that the AARTO Act and Amendment Act withstand constitutional scrutiny, OUTA seeks an order declaring section 30 of the AARTO Act (and section 17 of the Amendment Act, to the extent necessary) unconstitutional.

34. These provisions are unconstitutional in that they fail to provide for adequate service of infringers. Proper service, at all stages of the adjudication process, is critical to ensuring that an infringer's constitutional rights are protected.

(i) The adjudication process

35. Under the AARTO and Amendment Acts, the adjudication process for infringements is made up of a number of stages. At each stage, the infringer is given the opportunity to pay the penalty or raise defences through representations or the court process.

36. Broadly, the adjudication process consists of the following:

    36.1. It begins with the service of an **infringement notice**,[28] which sets out (*inter alia)* the details of the infringement committed and the penalty due, as well as the steps that the infringer may take in response to the notice (e.g. pay the penalty or raise a defence or elect to be tried in court);

[28] Section 17 of the AARTO Act.

36.2. If the recipient fails to comply with the infringement notice within the prescribed period, the Authority will serve a **courtesy letter** on the infringer.[29] This letter informs the infringer that he or she has failed to comply with the infringement notice and must, within 32 days of service, make representations, or pay the penalty and the fee of the courtesy letter, or notify the Authority that he or she elects to be tried in a court;[30]

36.3. If the infringer fails to comply with a courtesy letter or fails to apply for the matter to be tried in a court, the Registrar will issue and serve an **enforcement order** on the infringer.[31] The enforcement order must state that:

36.3.1. the infringer may – not later than 32 days after service – pay the penalty, representations fee (if any), fee of the courtesy letter and fee of the enforcement order to the Authority;

36.3.2. the demerit points incurred by the infringer will be recorded in the national contraventions register; and

36.3.3. a failure to comply with the requirements of the enforcement order within the prescribed period will result in a warrant being issued to recover the penalty and applicable fees.

36.4. Having issued the enforcement order, the Registrar will:

[29] Section 19 of the AARTO Act.

[30] FA, p 002-16, para 36.5.

[31] Section 20 of the AARTO Act.

36.4.1. record the demerit points incurred by the infringer for the infringement in the national contraventions register and notify the infringer by registered mail that the Registrar has done so; and

36.4.2. advise the infringer of the number of demerit points left before his or her driving licence, professional driving permit or operator card is suspended or cancelled.

36.5. If an infringer does comply with an enforcement order (and/or does not succeed in having it revoked), the registrar may issue a warrant against the infringer.[32] The warrant may authorise:

36.5.1. the seizure of movable property to defray the costs of the penalty;

36.5.2. the seizure of the infringer's driving licence or professional driving permit;

36.5.3. the defacement of a licence disc of a motor vehicle;

36.5.4. the seizure or defacement of an operator card for a vehicle of which the infringer is the registered operator; or

36.5.5. the immobilisation of the motor vehicle of which the infringer is the owner or registered operator.

[32] Section 21 of the AARTO Act.

ii) Consequences of failing to comply with the above notice, letter and order

37. If the infringer does not respond to the infringement notice and courtesy letter, with the result that an enforcement order is issued, they will suffer the following consequences:

    37.1. The infringer will incur demerit points. These points are added to the infringer's existing points. If the total demerit points exceed the prescribed threshold, the infringer will be disqualified from driving or operating a motor vehicle.[33] During the disqualification period, the infringer may not apply for a driving licence, professional driving permit or operator card;[34] or drive or operate a motor vehicle.[35] If a person is disqualified for a third time, their driving licence (or professional driving permit or operator's card) will be cancelled and destroyed.[36]

    37.2. No driving licence, professional driving permit or licence disc may be issued to the infringer, or in respect of a motor vehicle registered his or her name, until the enforcement order has been satisfied or revoked.[37]

38. If the infringer has a valid defence and does not wish to pay the penalty, he or she must attempt to have the enforcement order revoked. The burden of seeking a revocation will fall upon the infringer. He or she must apply to the Authority and

[33] section 25(1)of the AARTO Act.

[34] section 25(3) of the AARTO Act.

[35] It is an offence for the infringer to drive or operate a motor vehicle during this period. If they do so, they are liable on conviction to pay a fine or to imprisonment for up to one year, or both Section 25(4) of the AARTO Act.

[36] The infringer may only reapply for a licence or permit after the disqualification period has expired and the infringer has successfully completed a rehabilitation program. Section 27 of the AARTO Act.

[37] Section 20(5) of the AARTO Act.

submit reasons to the satisfaction of the registrar. [38] This process may be drawn out and lengthy.[39]

39. This means that an infringer who has not received notice of their infringement (and who would otherwise have contested his or her liability or even paid the penalty) may be barred from obtaining a driver's licence, a professional driving permit or a licence disc and/or be banned from driving a motor vehicle, until they have successfully applied for the revocation of the enforcement order.[40]

40. This would have severe consequences for the infringer's ability to move freely and to practise their profession and/or to make a living (particularly in the case of taxi or truck or bus drivers and fleet operators). This constitutes an unjustifiably 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)[41]. This applies to private persons and professional drivers or fleet owners:

    40.1. If a private person's licence is suspended or cancelled, or they are barred from driving, that person will not be able to drive to and from work. They will do be able to do so until the enforcement order is revoked, or the disqualification period expires, or their grievance, appeal or review is finally resolved. This may take a long time. During this time, the person's ability to

[38] Section 20(9) of the AARTO Act.

[39] There are no prescribed time periods for the revocation of an enforcement order FA, p 002-25, para 49.2.3.

[40] FA, p 002-24 to 002-26, para 49.2.4.

[41] There are two components to this right: it is the right to choose a profession and the right to practise the chosen profession. *Affordable Medicines Trust and Others v Minister of Health and Others 2006* (3) SA 247 (CC) at para 63.

travel will be severely inhibited. This violates his or her right to freedom of movement and freedom to practise their trade;[42]

40.2. Similarly, in the instances where a person is employed or operates in the transport industry (e.g. as a taxi driver or fleet owner), they will be prevented from practising their trade and making a living until the enforcement order is revoked or the disqualification period expires.[43]

41. In addition, if an infringer does not receive and/or read the enforcement order, she may be arrested, have her property and licence seized or have her car immobilised. This, similarly, impacts upon the above constitutional rights.

iii) Amendment Act's inadequate service provisions

42. Thus, severe consequences may flow from an infringer's failure to comply with an infringement notice, courtesy letter and enforcement order. In these circumstances, the importance of service is manifest. If an infringer does not have notice of these documents, they will be unaware of the steps that they are required to take in order to comply.

43. The Amendment Act imposes inadequate standards for service. Section 17 amends section 30 of the AARTO Act, which governs the manner and form of service under the Act. Prior to the amendment, section 30(1) of the AARTO Act

[42] FA, p 002-27, para 50.2.2.

[43] FA, p 002-28, para 50.2.3. The freedom to engage in productive work - even where that is not required in order to survive - is an important component of human dignity. See *Minister Of Home Affairs And Others v Watchenuka And Another* 2004 (4) SA 326 (SCA).

provided that documents must be served upon the infringer personally or sent by registered mail to the infringer's last known address.

44. Section 17 of the Amendment Act removes the requirement that service must be effected by personal service or registered mail. It replaces this with the requirement that all documents must be served on infringers by personal service *or* postage i.e. non-registered mail *or* electronic service.[44] Electronic service includes SMS messages, voice mail messages, and emails.[45]

45. This form of service is patently inadequate. There is a significant risk that, should service be carried out in this manner, the infringer will not receive the document in question. The reasons are as follows:

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[44] Section 17 provides that:

"*Section 30 of the principal Act is hereby amended—*

(a) By the substitution for subsection (1) of the following subsection:

'(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; and'

(b) By the substitution of subsection (2) for the following subsection—

'(2) A document which is sent in terms of subsection (1) is deemed to have been served on the infringer on the tenth day after posting the said document or of the electronic service and such electronic service reflected in the National Road Traffic Offences Register, unless evidence to the contrary is adduced, which evidence may be in the form of an affidavit."

[45] The Amendment Act defines "electronic service" to mean service by electronic communication as defined in the Electronic Communications Act 2005 and as contemplated by the Electronic Communication and Transactions Act, 2002;

The Amendment Act defines "electronic communications" as "communication by means of data messages". This includes SMS messages and emails;

The AARTO Act defines "electronic communications" as:

"*the emission, transmission or reception of information, including without limitation, voice, sound, data, text, video, animation, visual images, moving images and pictures, signals or a combination thereof by means of magnetism, radio or other electromagnetic waves, optical, electromagnetic systems or any agency of a like nature, whether with or without the aid of tangible conduct, but does not include content service*";

45.1. First, messages in the form of an email, an SMS, a voice note, or a letter sent by ordinary post could easily be treated as junk mail or spam and go unopened. There is nothing about this particular form of service that suggests that the document is important and requires special attention.[46]

45.2. Second, there is a reasonable risk that notices served in this manner will not be delivered or will be delivered to the wrong person. Ordinary post may get lost in the postal system. A person's email address or phone number may change.[47] There may be technical errors that mean that the SMS or email is never delivered to the infringer.[48]

46. Given the serious consequences that flow from a failure to receive and respond to the infringement notice, courtesy letter or enforcement order, the above risk is unacceptable.

47. Not only may the infringer suffer the consequences outlined above, but the statutory authorisation of means of service that create a material risk that the recipient will not receive the documents and have proper notice of the allegations against him/her unjustifiably limits the alleged infringer's right to just administrative action.[49]

47.1. The test for procedural fairness (as generally applied by the courts) is whether the affected person was informed of the gist of the case that he

[46] FA, p 002-23, para 48.1.

[47] FA, p 002-23, para 48.2.

[48] RA, p 033-9, para 12.1.

[49] Section 33 of the Constitution.

has to answer.[50] Without notice of the infringement or the options going forward, the infringer will not have an opportunity to make representations in the early stages of the process (i.e. after an infringement notice and courtesy letter have been issued). This undermines (or wholly denies) the infringer's right to *audi*. This renders the process procedurally unfair.

47.2. In the absence of a fair process that allows individuals to make representations, the imposition of severe penalties upon such individuals is irrational and unreasonable. This violates the affected infringer's substantive right to just administrative action.

48. As such, section 17 of the Amendment Act is unconstitutional and invalid.

iv) Respondents' stance on service

49. The respondents maintain that section 17 is constitutionally compliant. In this regard, they make the following arguments:

49.1. First, that section 17 does not remove the option of personal service or service by registered mail. Rather, they contend, section 17 expands the options for service.[51]

49.2. This misconceives OUTA's argument. The argument is not that section 17 removes the option of personal service or service by registered mail. Rather

[50] In *Minister of Education, Western Cape and Another v Beauvallon Secondary School and Others* 2015 (2) SA 154 (SCA) at para 19, the SCA held that:

> "*The fairness of any procedure followed will depend on the circumstances of each particular case*. *A person affected by a decision usually cannot make meaningful representations without knowing what factors are likely to be taken into account. Accordingly, in a test regularly approved by this court, 'fairness will very often require that he is informed of the gist of the case which he has to answer."*

[51] Minister of Transport's AA, p 020-7, para 22; Authority's AA, p 031-6, para 14.

OUTA's argument is that section 17 removes the requirement that service *must be* personal or by registered mail. Thus, instead of serving an infringer personally or by registered mail, the relevant authority may now simply send an SMS or leave a voicemail. By introducing less effective service options, section 17 dilutes the standard of service and increases the likelihood of non-delivery.

49.3. Second, the Minister contends that the risk of non-delivery is overstated.

49.3.1. He notes that, if the email address or telephone number of an infringer changes, they are under an obligation to inform the relevant authorities of that change and ensure that their details are updated on the system.[52]

49.3.2. This answer is inadequate. The above process is bureaucratic in nature and requires time and effort from the infringer. If the infringer is unable to change their details timeously and misses the service of a notice (or notices), they will be severely prejudiced. This risk is heightened if service is by electronic means because an infringer's cellphone number or email address is likely to change more frequently than their postal address.[53]

[52] Minister's AA, p 020-27 – 020-28, para 78.

[53] RA, p 033-17, para 41.

49.4. Third, the Authority argues that the Acts should not limit service options, as persons are currently able choose the method of service that is most convenient to them.[54]

49.5. This claim is unsustainable. There is no provision in the AARTO Act or Amendment Act that requires that a road user must be permitted to elect their preferred form of service of AARTO notices. Thus, as the AARTO and Amendment Acts stand, the choice of which form of service to use is left to the relevant authority that dispatches the notice.[55]

49.6. Fourth, the respondents argue that electronic service is more convenient and, consequently, preferable to many South Africans.[56] This argument is untenable for the following reasons:

49.6.1. It ignores the risks involved with this type of service (outlined above). Personal service or service by registered mail are far more reliable mechanisms. Therefore, it should be mandatory to serve via one of these more reliable mechanisms;

49.6.2. There is nothing to stop the relevant authority from sending notifications or notices to infringers via SMS or email in addition to personal service or service via registered mail.[57] This will ensure that infringers receive the notices via the reliable service

[54] Authority's AA, p 031-13, para 34.

[55] RA, p 033-16, para 39.

[56] Minister's AA, p 020-8 to 020-9, para 25 – 26; Authority's AA, p 031-13 to 031-14, para 36 – 37.

[57] RA, p 033-9, para 12.2.

methods and can then be reminded by electronic notifications; and

49.6.3. The respondents have not provided any evidence to support their claims that South Africans prefer service via email, voicemail or text over personal service or service via registered mail.[58]

49.7. Finally, the respondents argue that the Acts allow for an infringer to submit an affidavit, explaining that they did not receive service of the relevant document.

49.8. This argument does not render section 17 acceptable. It shifts the risk of non-receipt from the State to the road user and places the onus on the road user to prove the lack of service, which will usually come to his/her attention only after the adverse consequences of non-service have been suffered.[59] This is impermissible, considering the impact that an infringement notice and the subsequent process may have on the rights of road users.

50. In light of the above, section 17's amendment of the AARTO service provision is unconstitutional and invalid.

REMEDY

51. Section 172(1) of the Constitution provides that a court *must* declare that any law that is inconsistent with the Constitution is invalid to the extent of its inconsistency.

[58] RA, p 033-9, para 12.3

[59] RA, p 033-12, para 21.

The court may then make any order that is just and equitable in the circumstances.[60]

(i) Primary relief

52. The AARTO Act and Amendment Act are inconsistent with the Constitution. As, has been pointed out above, the constitutionally offensive provisions of the two Acts are not severable. So the AARTO Act and the Amendment Act, as a whole, must be declared unconstitutional and set aside with immediate effect.

53. The Minister disputes such relief. He contends that, should such relief be granted, the court should suspend the declaration of invalidity for 24 months to allow Parliament to rectify the invalidity.[61]

54. The Minister's proposal is not acceptable - such relief would not be just, equitable or appropriate. The reason is that the AARTO system has not yet been rolled out across the country as a whole. The Acts should be set aside with immediate effect to avoid the State incurring significant costs in rolling out the AARTO system (only to reverse such roll-out in the future).

(ii) Alternative relief

55. In the alternative to the primary relief, OUTA seeks an order declaring section 30 of the AARTO Act and, to the extent necessary, section 17 of the Amendment Act, unconstitutional and invalid.

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[60] *Head of Department : Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) at para 96 ("The litmus test will be whether considerations of justice and equity in a particular case dictate that the order be made. In other words the order must be fair and just within the context of a particular dispute.")

[61] Minister's AA, p 020-9, para 29.

56. Prior to its amendment by section 17 of the Amendment Act, section 30 of the AARTO Act provided that service under the AARTO Act may only be effected personally or by registered mail to the recipient's last known address. That is the appropriate standard to meet the constitutional requirements for service under the AARTO Act. The Court should accordingly strike down section 17 of the Amendment Act. This would constitute a just and equitable remedy in the circumstances of the case.

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24 February 2021

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