IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG PROVINCIAL DIVISION)

CASE NO: 32097/2020

in the matter 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

FIRST RESPONDENT'S HEADS OF ARGUMENTS

A. INTRODUCTION

1. The applicant challenges the constitutionality of 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 ("The Amendment Act").

2. In its challenge, the applicant is proceeding from the following direction: Firstly, that the AARTO and the Amendment Act usurps the exclusive legislative authority of the Provincial legislature in terms of Schedule 5, Parts A and B of the Constitution of the Republic of South Africa to legislate in relation to Provincial roads and traffic and relation to roads, traffic and parking at local level.

3. Secondly, The Amendment Act shifts from a default system of judicial enforcement of traffic laws through the criminal law a compulsory system of administrative enforcement of traffic laws through administrative tribunals administrative fines and a demerit point system. usurps the exclusive executive authority of local government (under Part B of Schedule 5 of the Constitution).

4. Thirdly, the primary relief sought by the applicant is to declare AARTO Act and Amendment Act unconstitutional.

5. Fourthly, in the event the court declines to declare the AARTO Act and the Amendment Act unconstitutional, the applicant seeks to declare that the service provisions of the Amendment Act contained in section 17 are manifestly inadequate and unconstitutional.

B. CONSTITUTIONAL ISSUES

6. In a nutshell, the applicant raises various constitutional challenges to the AARTO Act and the Amendment Act. The applicant has in some instances relied on its personal opinions without a legal basis for these constitutional

attacks. Same will be clearly shown where the applicant addresses the unconstitutionality of section 17 of the Amendment Act.

7. The applicant seems to raise these constitutional issues without regard to steps taken by the first respondent in compliance with the Constitution itself and the dire consequences on the progress already made by the first respondent in response to contain the road carnage and compliance with traffic regulations in South Africa in its entirety.

8. However, should in the event this Honourable Court find that the applicant has shown that the constitutional attacks as indicated on its notice of motion are valid, the first respondent asks for a period of 24 months (24) to amend whichever provision to be unconstitutional.

9. We shall however, in response to the constitutional issues as raised, respond in the following manner:

9.1 Co-operative Governance and intergovernmental relations;

9.2 Both Acts are within the legislative competence of the Parliament;

9.3 Intrusion upon exclusive municipal executive competence;

9.4 Severance;

9.5 Whether the Amendment Act's service provisions are inadequate

Co-operative Governance and intergovernmental relations

10. All spheres of government according to the Constitution have legislative competencies. It is clear that where the legislative competence of one sphere of government has been encroached by the other, principles of cooperative governance apply. The two spheres are required to follow section 41 of the Intergovernmental Relations Framework Act[1], without having to take each other before court.

11. The Constitutional Court in National Gambling Board v Premier of Kwa Zulu Natal[2], held at paragraph 33 thereof that the obligation to settle disputes is an important aspect of co-operative movement which lies at the very heart of Chapter 3 of the Constitution. Should the above not be done, it will be in contradiction to the spirit of the Constitution as breathed on section 41 (h) and 41(3).

12. It has not come before court that either the provincial or the local sphere of government take the national sphere to court on the basis of encroachment on this particular Act, nor has there been any dispute declared in regard to such an encroachment as alluded by the applicant by both spheres of government. (I however stand to be corrected). There has been consultation and cooperation by all spheres to have both the AARTO and the Amendment Act. That being the case, this should not be construed to mean that the applicant is not entitled to have its opinion or view ventilated before this Honourable Court.

[1] Act 13 of 2005
[2] 2002 (2) SA 715

13. The purpose and effect of AARTO Act is to promote road traffic quality by providing for a scheme to discourage road traffic contraventions, whilst on the other hand the Amendment Act is very clear to improve the manner of serving documents, to repeal certain absolute provisions to name but a few. All spheres of government are in agreement about this, thus there are no proceedings before court in this respect.

14. The above being the status, the question therefore is whether both Acts are within the legislative competence of the Parliament, not unconstitutional as alluded by the applicant.

15. The AARTO Act was passed as a section 76(1) legislation. The concurrence of the provinces was sought prior to the enactment of AARTO Act. All provinces but one supported and gave mandate to the National Council of Provinces in regard to this legislation. In this regard communication by the provinces wherein they gave their concurrence and mandated (except one province – Western Cape) their mandate to the National Council of Provinces to participate and vote in favour of AARTO.

16. The applicant holds a view that it is “irrelevant”, that AARTO was passed in concurrence with the NCOP in terms of section 76 of the Constitution[3]. This view the applicant bases it simply on, “the national government did not have the power to pass national legislation regulating all road traffic”. This view is held regardless of the facts as stated above, simply;

[3] At paragraph 17 of page 9 of its heads of argument

16.1 The provinces and national government because of the principle of co-operative governance and intergovernmental relations had concurrence;

16.2 Schedule 4 Part A provides for functional areas of concurrent national and Provincial legislative competence and road traffic regulations falls under such.

16.3 There is no litigation before any court brought by either national, provincial or local so far disputing the legislative competence. (I stand to be corrected)

17. This brings us to the next question, whether both Acts are within the legislative competence of the Parliament. We turn to deal with this question.

Whether both Acts are within the legislative competence of the Parliament?

18. The court in Exparte President of the Republic of South Africa: In re: Constitutionality of the Liquor Bill Cameron AJ[4], said the following:-

> "*In Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995[94], this Court had to determine whether a provincial Bill fell within the legislative competence granted the provinces in Schedule 6 of the*

[4](CCT12/99)[1999]ZACC15/ 2000 1SA 732 (CC)

interim Constitution. Chaskalson P rejected the argument that the "purpose" of legislation was irrelevant to the constitutionality inquiry:

> *"It may be relevant to show that although the legislation purports to deal with a matter within Schedule 6 its true purpose and effect is to achieve a different goal which falls outside the functional areas listed in Schedule 6. In such a case a Court would hold that the province has exceeded its legislative competence. It is necessary, therefore, to consider whether the substance of the legislation, which depends not only on its form but also on its purpose and effect, is within the legislative competence of the KwaZulu-Natal provincial legislature."*

The question therefore is whether the substance of the Liquor Bill, which depends not only on its form but also on its purpose and effect, is within the legislative competence of Parliament.

19. In order for one to answer this question in relation to our present matter, one has to look at the provisions of the Constitution. Schedule 4 Part A provides for functional areas of concurrent National and Provincial legislative competence of which the road traffic regulations fall under.

20. It is however the applicant's argument that the respondents have wrongly interpreted the Constitution, the first respondent completely disagree with this notion held by the applicant.

21. Schedule 4 Part A indeed indicates that concurrent legislative competency is so far as road traffic regulations. In essence both Acts brings uniformity so far as how infringers of those road and traffic laws should be dealt with. It will somehow be discrimination where one province for an example is having infringers criminally trialled whilst one province has a tribunal which will not impose a criminal sanction when adjudicating over its transgressors.

22. With this, the argument by the applicants that the first respondent failed to properly interpret Schedule 4 and 5 is rather irrelevant.

23. Therefore, as it is gleaned from the AARTO Act itself and as demonstrated hereto, AARTO Act makes provision for road traffic regulation. The National Assembly has legislative competency to pass such legislation.

24. Parliament enjoys plenary legislative power subject only to the bounds of the Constitution. This legislative competence is sourced from the provisions of Section 44 of the Constitution. Section 44(1)(a) provides that [t]he national legislative authority as vested in Parliament-confers on the National Assembly the power - 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[5].

25. Part A of Schedule 4 lists functional areas with regard to which both Parliament and the provincial legislatures have legislative competence. Part A of Schedule

[5] paragraph 12-19 first respondent's answering affidavit

5 lists functional areas with regard to which provincial legislatures have exclusive legislative competence.

26. In terms of section 44(1) *(b)* [t]he national legislative authority as vested in Parliament-confers on the National Council of Provinces the power- [t]o pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76.

27. Section 44(2) of the Constitution provides that the 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- to maintain national security; to maintain economic unity; to maintain essential national standards; to establish minimum standards required for the rendering of services; or to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

28. Parliament may, thus, legislate on 'any matter', including a matter within the functional areas listed in Schedule 4 and, subject to certain specified circumstances, on a matter within the functional areas listed in Schedule 5.

29. Part A of Schedule 4 of the Constitution lists road traffic regulation as a functional area of which the Parliament has legislative competence albeit concurrent with the provinces.

30. The applicant is further wrong on its notion that the respondents suggest that the national government has legislative competence over all matters relating to traffic and roads. This notion is a clear indication of wrong interpretation of the respondents' arguments, which is also misleading.

31. Based on the above arguments, both Acts are within the legislative competence of Parliament.

Intrusion upon exclusive municipal executive competence

32. The applicant further submits that if this Honourable Court were to hold, that legislative competency of Parliament over the road traffic regulation under Schedule 4 of the Constitution extends to legislating to regulate municipal road traffic, then both Acts, that is the AARTO Act and the Amendment Act would remain unconstitutional to the extent that they purport to vest in AARTO administrative powers over municipal road and traffic law enforcement[6].

33. This submission by the applicant is totally not correct. It is clear that Schedule 4 only speaks of road traffic regulations and not road traffic law enforcement. The two may I add are totally different issues. As far as road and traffic law enforcement is concerned, one refers the applicant to section 3I of the National Road Traffic Act[7] and submits that what is noted therein is in respect to road

[6] At paragraph 23 of page 11 – Applicant's Heads of Argument
[7] 93 OF 1996

and traffic law enforcement. It will however be absurd that Schedule 4 will extent to road and traffic enforcement.

34. Courts are inundated with matters, with court roll further being affected by the national lock down of March 2020. Matters were being postponed and alleged offenders are reminded in custody. This will further impact on the state purse where litigation against the state will be at its highest. The advantage brought by the Tribunal in instances like this, is to ease the burden and pressure on our courts. Therefore, the submission by applicant that the Amendment Act compounds the problem by vesting its powers of appeal in the Appeal Tribunal and by removing the right that an alleged offender had under section 17(1)(f)(iv) of the AARTO Act, to bypass the unconstitutional national administrative system by electing to have alleged traffic offence tried in courts is rather not correct[8].

35. Further, due to high incidents of crime in the country, our courts give priority to serious crimes as opposed to traffic violations with the result that less than 20% of the traffic cases are in fact finalized by our Courts. This scenario has significantly contributed to bad behavioural conduct by drivers on the road.

36. The AARTO Act was introduced to amongst others stop this carnage on our roads. It is designed to change behaviour of road users not only by levying penalties but also by introducing the point demerit system in terms of which

[8] At paragraph 26, page 13 applicant's heads of argument

serial transgressors may find their licenses eventually suspended or even revoked.

SEVERANCE

37. It is first respondent's submission that, there are absolutely no "offending provisions", on both Acts[9]. We reiterate that both Acts do not regulate any provincial or municipal road, traffic or parking law infringements as alluded by the applicant[10]. The Constitution is very clear, Schedule 4A provides for matters which are functional areas of concurrent national and provincial legislative competence, key to hereto is the road traffic regulation, which national and provincial has concurrent legislative powers. Whilst on the other hand Schedule 5 provides for matters of exclusive provincial legislative competence and key hereto is the provincial roads and traffic which are on part B thereof. The local government has jurisdiction over traffic and parking.

38. The court in Speaker, National Assembly: Re National Education Policy Bill[11], was confronted with a similar point. This case dealt with the establishment of national consultative and procedures on national education policy. It was argued that these structures and procedures infringed upon provincial powers over education. The Constitutional Court held that the Bill calls for cooperation between the provinces and national government and responses by the provinces to request directed to them in terms of the Bill; Parliament is entitled to make provision for such co-operation and co-ordination of activities in respect

[9] At paragraph 31 page 14 of applicant's heads of argument
[10] at paragraph 30, page 14 applicant's heads of argument
[11] 1996 (3) SA289

of Schedule 6 matters and the objection to such provision on the grounds that they encroach upon the executive competence of provinces can also not be sustained.

39. I therefore submit that the same argument cannot be sustained on our present matter, as stated above, national has concurrent legislative competency as the province so far as road traffic regulations are concerned. There is therefore no infringement, nor offending provisions that needs to be severed as indicated by the applicant.

WHETHER THE AMENDMENT ACT'S SERVICE PROVISIONS ARE INADEQUATE

40. The applicant submits that section 17 of the Amendment Act provisions fail to provide for adequate service to the infringers. This inadequacy, as the applicant contends, is due to the fact that section 17 of the Amendment Act removes the requirement that service under AARTO Act must be personal or by registered mail. And that the Amendment Act relaxes the service provisions and permits that service of documents be effected upon the infringers by way of email, SMS's or voice message.

41. The provisions of section 17 of the amendment Act do not remove the requirement that service be effected by way of registered mail. What these provisions do is to extend the postage service such that the postal services are not limited to registered mail only. In this regard it is submitted that the post office does not provide registered mail services only. There are other services other than registered mail. The use of the word postage in the Amendment Act

is broader and greater than the registered mail which lesser and limited to that service only. It includes other services currently available or which may, in future become available.

42. The sum total of it is that registered mail falls within the postage service. All that is required by the section is that in order to be effective, service must be done, *inter alia,* by way of postal service to the address that would ordinarily have been chosen by the infringer.

43. Registered mail should not be the only prescribed method of service nor should the postal services be the only method of service. Under the postal service there will be many options whether by registered mail or ordinary mail or even secured mail and any other service provided for by the post office.

44. Some individuals may, for instance, choose and prefer use of ordinary or other postal services. The choice of service which an individual make will be respected and given effect to.

45. Further, in a country such as South Africa, that is advancing in the space of technology electronic mode of service should be made available to members of the public. A move to the paperless society due to environmental reasons make it more a reason why a need to have a number of options as far as service is concerned. For some individuals it is more convenient to them to receive correspondence via email than the old conventional way of post office. To some people it is inconvenient that they be required to go to the post of office when

there is a convenient mode of receiving correspondence while at their homes or offices or even in transit.

46. The introduction of a wide range of postal service and electronic services as done by the Amendment is to provide the individuals with a wide choice which they will exercise in choosing their preferred method they would want to be served.

47. The legislation can only prescribe a method that is regarded acceptable to give effect service. There has to be a way of service which is reasonable and, in this instance, the chosen acceptable manner of service is by utilising the postal services. There is nothing unreasonable in this regard. The postal services, I submit in all its forms, is still the reasonable method. However, insistence on the registered mail as the only postal service to be utilised is by itself not reasonable.

48. Applicant submits that personal service or registered mail is the more reliable mechanism, and therefore it should be more reliable to serve via one of those reliable mechanism[12].

49. It is not clear what the applicant relies on with such submissions. The applicant in its submission does not take into consideration that people move houses and at times it is hard to trace or track them. Further, people at times ignore registered mail especially in situations wherein one is not expecting anything

[12] Paragraph 49.6, page 25 applicant's heads of argument

on registered mail, one sees no point of attending to the post office for something he does not expect.

50. It is submitted therefore that the applicant's submissions are baseless, service by registered mail is not excluded. The Amendment Act simply extends the scope of the method of service. It incorporates the use of other services currently offered by or that may become available in future in the post office.

51. Further, the applicant engages in unhelpful speculations and or opinion in alleging that the notice in the form of email, text message, voice note or ordinary postage will be missed by the infringers or that such messages or communications will be treated as junk mail or spam[13].

CONCLUSION

52. In conclusion the AARTO Act seeks to introduce road traffic regulation which is a uniform standard applicable throughout the country.

53. The provisions of Schedule 4 Part A of the Constitution are clear on functional areas of concurrent national and provincial legislative competencies, thus Parliament rightfully passed both the AARTO Act and the Amendment Act.

54. However, in the event it is found that AARTO Act and the Amendment Act are found to be unconstitutional and that there is no interpretation that can survive

[13] Paragraph 48 of applicants founding affidavit

the constitutional invalidity on any of the grounds advance by the applicant, the first respondent pray that the Honourable Court should suspend the declaration of invalidity for a period of twenty months to enable the parliament to rectify the invalidity.

55. Finally, first respondent prays for the dismissal of the applicant's application with costs.

Novuyo Sidzumo

29 March 2021

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(GAUTENG PROVINCIAL DIVISION)

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in the matter between:

ORGANISATION UNDOING TAX ABUSE	Applicant
and	
MINISTER OF TRANSPORT	First Respondent
MINISTER OF CO-OPERATIVE GOVERNANCE	
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ROAD TRAFFIC INFRINGEMENT AUTHORITY	Third Respondent
APPEALS TRIBUNAL	Fourth Respondent

FIRST RESPONDENT'S TABLE OF AUTHORITIES

CASES

1. Ex parte President of the Republic of South Africa: In re: Constitutionality of the Liquor Bill CCT12/99) [1999] ZACC15/ 2000 1SA 732 (CC).
2. National Gambling Board v Premier of Kwa Zulu Natal 2002(2) 715
3. Speaker, National Assembly: Re National Education Policy Bill 1996 (3) SA 289

LEGISLATION

4. Administrative Adjudication of Road Traffic Offences Act 46 of 1998 (henceforth, “AARTO”)
5. Administrative Adjudication of Road Traffic Offences Amendment Act 4 of 2019 (henceforth, “the Amendment Act”)
6. Constitution of the Republic of South Africa, 1996
7. Intergovernmental Relations Framework Act 13 of 2005
8. National Road Traffic Act 93 0f 1996