IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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 INFRINGMENT AUTHRORITY	Third Respondent
APPEALS TRIBUNAL	Fourth Respondent

THIRD RESPONDENT'S HEADS OF ARGUMENT

INTRODCUTION

1. This is an application seeking to have 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") declared unconstitutional and invalid. In the alternative, the applicant wants the court to declare section 17 of the Amendment Act unconstitutional and invalid.

2. The grounds upon which the applicant rely on are wide-ranging and broad. It is convenient to categorise the various grounds under separate headings. We propose to address these grounds, each under its own separate heading, although there will be some overlapping.

3. The applicant's grounds, can conveniently be summarised as follows:-

3.1. The Act and the Amendment Act unlawfully intrude upon the exclusive legislative competence of provinces as set out in Schedule 5, Part A and Part B of the Constitution of the Republic of South Africa ("The Constitution"), to legislate in relation to provincial roads and traffic and in relation to roads, traffic and parking at local government level.

3.2. The Act and the Amendment Act move away from a 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 a demerit points system.

3.3. The Act and the Amendment Act infringes on the executive authority of the municipality and its right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5, these matters include “traffic and parking”.

4. As an alternative, should the applicants not succeed in obtaining the relief as aforesaid, then the applicant seeks an order that section 17 of the Amendment Act be declared unconstitutional and invalid on the basis that:

4.1 Section 17 of the Amendment Act has introduced inadequate service provision in that it replaces this adequate form of service in the principal Act with “postage or electronic service”.

4.2 Service on infringers electronically is unconstitutional given the serious consequences that may follow as a result of the demerit points systems introduced by the Amendment Act.

5 Before dealing with the afore-going grounds we propose to first briefly sketch the legal principles applicable in the adjudication of this matter.

APPLICABLE LEGAL PRINCIPLES

NATIONAL LEGISLATIVE AUTHORITY

6. When exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution.

7. Section 44(1) of the Constitution sets out the National legislative authority as vested in Parliament-

"(a) confers on the National Assembly the power: -

(i) to amend the Constitution;

*(ii) to pass legislation with regard to **any** [own emphasis] 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; and*

(iii) …

(b) confers on the National Council of Provinces the power: -

(i) …

*(ii) to pass, in accordance with section 76, legislation with regard to **any** [own emphasis] 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; and*

(iii) *…"*

8. Section 44(2) further states that:

"*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."

9. According to section 76(1) of the Constitution, when the National Assembly passes a Bill referred to in subsection (3), (4) or (5), the Bill must be referred to the National Council of Provinces ("the NCOP") and it is dealt with in accordance with the following procedure: The NCOP must: (i) pass the Bill (ii) pass an amended Bill or (iii) reject the Bill.

10. In terms of section 76(3) a Bill must be dealt with in accordance with the procedure established by either subsection (1) or subsection (2), if it falls within a functional area listed in Schedule 4, that is, it must be referred to the NCOP for the NCOP to pass the bill, pass an amended bill or reject the bill.

11. In terms of section 44(3) of the constitution, the legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise

of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.

12. Schedule 4 sets out the functional areas of concurrent National and Provincial Legislative competence under Parts A and Part B. Road traffic regulation is listed in Part A as an area where National and Provincial Legislature share concurrent competence.

13. Schedule 5, Part A, sets out the functional areas of exclusive Provincial Legislative competence while Part B of Schedule 5 sets out matters reserved for local government. Provincial roads and traffic are among the competences exclusively reserved for provinces. A matter under Schedule 5 Part B reserved for local government is '' traffic and parking''.

14. The Act and the Amendment Act were passed by the National Assembly as a 76(1) Bill. After being passed by the National Assembly the Bill was referred to the NCOP for its consideration and concurrence. The provinces constituting the NCOP, excluding, the Western Cape, supported the Bill and ensured that the Bill was passed by the NCOP after which it was submitted to the President for his assent.

15. The notion of co-operative government, as enshrined in Chapter 3 of the Constitution, lies at the heart of the law-making process in the national Parliament. This is because the procedure for enacting legislation under the Constitution requires institutional co-operation and communication between

national and provincial legislatures as well as between the executive and Parliament. Such co-operation is necessary to implement the national legislative programme. It is important to note that this need for co-operation is ultimately linked with the fact that the legislative process assumes that provincial interests are considered in the national law-making whenever such interest arises.

16. As such, the National Council of Provinces ("the NCOP") plays an important role in institutionalising the principle of co-operation and communication involving the nine provinces directly in the national legislative process and other national matters. As the Constitutional Court pointed out in ***Doctors for Life***:

> *"The local government is also involved indirectly in that local government may designate up to ten part-time, non-voting representatives to participate in the NCOP proceedings. Thus, the NCOP represents the concerns and interests of the provinces and as well as those of local government in the formulation of national legislation."*[1]

The court proceeded to note that:

> *"Indeed, the principle of institutional co-operation and communication finds expression in the principle of co-operative government to which chapter 3 of the Constitution is devoted. The role of the NCOP should be understood*

[1] Doctors for Life para 81. Doctors for life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006) at para 81.

in the light of the constitutional principle of co-operative government, which shares similarities with the principle of Bundestreue. The basic structure of our government consists of a partnership between the "national, provincial and local spheres of government which are distinctive, interdependent and interrelated." The principle of co-operative government requires each of the three spheres to perform their functions in a spirit of consultation and co-ordination with the other spheres."[2]

17. In ***Ex Parte President of the Republic of South Africa***: In re Constitutionality of the Liquor Bill [3], Acting Justice Cameron affirmed at paragraph 45 that;

"By contrast with Schedule 5, the Constitution contains no express itemisation of the exclusive competences of the national legislature. These may be gleaned from individual provisions requiring or authorising "national legislation" regarding specific matters.[81] *They may also be derived by converse inference from the fact that specified concurrent and exclusive legislative competences are conferred upon the provinces, read together with the residual power of the national Parliament, in terms of section 44(1)(a)(ii), to pass legislation with regard to* ***"any matter".*** *This is subject only to the exclusive competences of Schedule 5 which are in turn subordinated to the "override" provision in*

[2] Doctors for Life para 82

[3] Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill (CCT12/99) [1999] ZACC 15; 2000 (1) SA 732; 2000 (1) BCLR 1 (11 November 1999)

section 44(2). An obvious instance of exclusive national legislative competence to which the Constitution makes no express allusion is foreign affairs[4]. [own emphasis]

The list of exclusive competences in Schedule 5 must therefore be given meaning within the context of the constitutional scheme that accords Parliament extensive power encompassing "any matter" excluding only the provincial exclusive competences. The wide ambit of the functional competences concurrently accorded the national legislature by Schedule 4 creates the potential for overlap, not merely with the provinces' concurrent legislative powers in Schedule 4, but with their exclusive competences set out in Schedule 5.[5]"

19. In the ***First Certification*** Judgment, it was held that:

[*50] …From the provisions of section 44(2) it is evident that the national government is entrusted with overriding powers where necessary to maintain national security, economic unity and essential national standards, to establish minimum standards required for the rendering of services, and to prevent unreasonable action by provinces which is prejudicial to the interests of another province or to the country as a whole.* " [6]

[4] Para 45 of Ex Parte President; Constitutionality of the Liquor Bill case.
[5] Para 46 of Ex Parte President; Constitutionality of Liquor Bill case.

[6] Certification of the Amended Text of the Constitution of The Republic of South Africa, 1996 (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996).

20. The constitutional attack of the principal Act on the basis of separation of powers and autonomy of local government is misplaced, as it arises from a misinterpretation of the constitution.

21. We further note applicant's admission in paragraph 12 of the founding affidavit that the purpose of the AARTO Act is to establish a framework for the national government, provincial governments and local governments to facilitate intergovernmental relations. We emphasise that the legislation is aimed at ensuring uniform standards of road and traffic regulation and harmonisation among all spheres of government. We submit that the standardisation and harmonisation of road and traffic regulation will add to better and certain regulatory environment throughout the country.

22. We submit with respect that in enacting the AARTO Act, the requirements of the Constitutional processes for passing section 76 Bills, a process which the AARTO Bill was enacted in accordance with, were duly fulfilled by seeking and obtaining the concurrence of the NCOP. I submit that as road and traffic regulation falls within the legislative competence of the National and Provincial legislatures the AARTO Bill was properly passed.

23. There is no merit in the applicant's assertion that the matters are in the exclusive domain of provincial governments as, according to the applicant, the matter is with respect to *"provincial roads or traffic in relation to traffic and*

parking at local government level". The narrow interpretation proffered by the applicant cannot be sustained.

24. The AARTO Act is aimed at creating a regulatory environment for "road traffic regulation'', as envisaged in Schedule 4 Part B of the Constitution, and that this is done in order to establish national standards and harmonization for the whole Republic.

25. Subsequent to the above, it is rejected that the AARTO Act intrudes on the legislative competence of provinces, and accordingly the Act and its Amendment Act are not unconstitutional. Parliament has therefore acted lawfully within its national legislative powers.

CONFLICTING LAWS

26. By the same token, where a conflict occurs between national legislation and provincial legislation dealing with a topic listed in Schedule 4, the provincial legislation will prevail unless one of the criteria listed in section 146 is present.

27. Section 146 applies to a conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4.

28. Section 146(2) is instructive that national legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions are met:

"(a) *The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.*

(b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing: -

(i) norms and standards;

(ii) frameworks; or

(iii) national policies.

(c) The national legislation is necessary for: -

(i) the maintenance of national security;

(ii) the maintenance of economic unity;

(iii) …

(iv) the promotion of economic activities across provincial boundaries;

(v) …

(vi) …"[7]

29. Furthermore, when there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2)(c) and that dispute comes before a court for resolution, the court must have due regard to the approval or the rejection of the legislation by the National Council of Provinces.[8]

[7] Section 146(2)(a) to (c) of the Constitution.
[8] Section 146(4) of the Constitution.

30. Provincial legislation prevails over national legislation if subsection (2) or (3) does not apply.[9]

31. National legislation referred to in section 44(2) prevails over provincial legislation in respect of matters within the functional areas listed in Schedule 5.[10]

32. If a dispute concerning a conflict cannot be resolved by a court, the national legislation prevails over the provincial legislation or provincial constitution.[11]

33. Section 149 makes provision for the status of legislation that does not prevail and provides that:

> *"A decision by a court that legislation prevails over other legislation does not invalidate that other legislation, but that other legislation becomes inoperative for as long as the conflict remains."*[12]

34. We submit that even if there was a conflict, the above mentioned prescripts of the Constitution are clear that were there is a conflict that concerns a topic in Schedule 4, national legislation must prevail.

35. Accordingly, it is our submission that the AARTO Act, deals with a matter effectively requires uniformity across the nation. It is further submitted that

[9] Section 146(5) of the Constitution.
[10] Section 147(2) of the Constitution.
[11] Section 148 of the Constitution.
[12] Section 149 of the Constitution.

AARTO creates a single national system of road traffic regulation which is a standardised system of dealing with infringements on the national provincial and local levels of government. The purpose of the legislation is to standardise traffic regulation throughout the republic which satisfies the requirements of section 146(2).

36. An ineffective or improperly regulated road usage poses a threat to national security and the Act aims to prevent same. South Africa has unacceptable high levels of road traffic accidents with the resultant high mortality rate. A remarkably high percentage of these accidents are caused by bad behaviour such as speeding, drunken driving, reckless and negligent driving by drivers on the Road. The AARTO Act seeks to ensure that errant drivers suffer the consequences inter alia by paying fines as penalties. Accordingly, the AARTO satisfies the requirements of section 146(2)(c)(i).

37. In light of the afore-going, it follows that there has been compliance with section 146(2)(c). This Court is enjoined to interpret both the Act and the constitution purposively. One of the factors this court is enjoined to take into account is the certification of the Bill and its passing by the NCOP when the section 76 process was undertaken. The NCOP would have rejected it had it found it not compliant. As we point out herein, the AARTO Act passes constitutional muster.

38. With regards to conflicts of functional areas listed in Schedule 5, the Constitution makes it clear that Parliament may intervene by passing legislation in accordance with section 76(1) and therefore such national legislation will

prevail over provincial legislation. It is therefore submitted that the applicants have not had due regard to the specific powers and functions bestowed upon parliament by the Constitution. These powers of Parliament to intervene are spelt out. On the afore-going the AARTO Act and Amendment Act must prevail over the legislative competences of the provinces and local government.

39. The applicants have failed to properly interpret the Act within the prism of the constitution.

INTERPRETATION OF THE ACT AND AMEDMENT ACT

40. The interpretation of legislation involves more than analysing the particular provision in question. To interpret a text in its context includes the intra-textual context, that is the enactment as a whole, including its unique structure and legislative codes, as well as the extra-textual context (the rest of the existing law and other contextual considerations that may be applicable).

41. The interpreter has to study the legislation as a whole. **In *Nasionale Vervoerkommissie van Suid-Afrika v Salz Gossow Transport (Edms) Bpk***[13], the court pointed out that:

[13] 1983 (4) SA 344 (A)

"*when interpreting certain provisions, statute must be studied in its entirety.*"

42. The interpretation of the Act requires a careful consideration of the scheme of the Act and its object and same be measured against the rights embodied in sections 44(2) and 76(1) of the Constitution.

43. The object of the Act seeks to promote road traffic quality by providing for a scheme to discourage road traffic infringements, to facilitate the adjudication of road traffic infringements, to support the prosecution of offences in terms of the national and provincial laws relating to road traffic, and implement a points demerit system, to provide for the establishment of an agency to administer the scheme, to provide for the establishment of a board to represent the agency and to provide for matters connected therewith.[14]

44. Futher, the Amendment Act aims to amend the Act, so as to substitute and insert certain definitions, to improve the manner of serving documents to infringers, to add to the functions of the Road Traffic Infringement Authority, to repeal certain obsolete provisions, to establish and administer rehabilitation programmes, to provide for the apportionment of penalties, to provide for the establishment of the Appeals Tribunal and matters related thereto, to effect textual corrections and to provide for matters connected therewith.[15]

[14] The preamble of the Act.
[15] The preamble of the Amendment Act.

45. **In *Cool Ideas***, the test for statutory interpretation is set out at paragraph 28 of the judgment. The Constitutional Court reaffirmed the SCA and expressed itself thus:

> *"A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:*
>
> *(a) that statutory provisions should always be interpreted purposively;*
>
> *(b) the relevant statutory provision must be properly contextualised; and*
>
> *(c) all statutes must be construed consistently with the Constitution, that, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."*[16]

46. In ***Natal Joint Municipal Pension Fund***, the Supreme Court of Appeal postulated a modern approach to interpretation. Wallis JA formulated it thus:

> *"the general rule is that the words used in a statute are to be given their ordinary grammatical meaning unless they lead to absurdity. He referred*

[16] Cool Ideas v Hubbard 2014 4 SA 474 (CC) at paragraph 28

to authorities that stress the importance of context in the process of interpretation and concluded that:

'A court must interpret the words in issue according to their ordinary meaning in the context of the Regulations as a whole, as well as background material, which reveals the purpose of the Regulation, in order to arrive at the true intention of the draftsman of the Rules."[17]

47. In the circumstances, the background to the legislation, the context and the surrounding circumstances are important. The purpose of the legislation and the intention of the legislature. This exercise is not undertaken in a piece meal fashion, nor is it a step by step exercise. A wholistic approach should be adopted.

48. First, the applicant has not made out a case that the whole Act is unconstitutional. Second no case has been made out that the impugned sections of the Act are unconstitutional. The court should read a legislation in a manner that makes it to be constitutionally compliant. It is only when the legislation cannot be salvaged as a whole that the striking down of the entire legislation is envisaged. In certain instances the reading in or the reading down of words becomes desirable. In this case, neither of the two arise because no factual basis has been laid by the applicant for such an exercise to be carried.

[17] *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13 (15 March 2012)

49. It is by now trite that our courts, when interfering with legislation insofar as that offends the principles enunciated in the Constitution has a discretion on whether to apply a remedy of severance, one of reading in, or reading down or a combination of the above. The aim of our courts is to render the legislation compliant with the provisions of the Constitution. Dealing with the question of severability, (see ***Coetzee v Government of the Republic of South Africa;***[18] ***State v Manamela and Another***)[19]

50. A two-stage approach is required to be adopted when considering the validity of any provision vis-à-vis the legal principles. Firstly, the question needs to be asked whether the provision offends any of the fundamental rights provided for in the Constitution. If the answer is in the negative, that will be the end of the enquiry. Should the answer however be in the positive, the second stage requires to balance the perceived infringement of a fundamental right with the opposing rights and interest which may come into play. The principle may be explained as follows "*Should a provision not survive constitutional muster, then the next question is whether the provision is to be read down or not*".

51. We submit further that the AARTO Act does not intrude on the legislative competence of municipalities to enact by-laws.

METHOD OF SERVICE AS PROPOSED IN THE ACT IS ADEQAUTE

18 1995 (4) SA 631 (CC).
19 2000 (3) SA 1 (CC).

52. The Applicant attacks the amended section 17 on the basis that it removes the requirement for registered service and substitutes this requirement with a requirement that service must be effected by personal service, postage or electronic service.

53. The attack is that by removing the words “registered post" and replacing them with the words “postage service “the Respondents have rendered inadequate the requirement for service.

54. A further attack is that service by electronic means such as email, text messages, voice notes will be missed by infringers and thus not come to their attention.

55. The Applicants therefore regard only personal service and service by registered mail as the only viable methods of bringing an infringement to the attention of an infringer.

56. It is submitted that the legislation must be interpreted having its purposive intention in mind.

57. Eventually the intention of the amendment is to ensure that the notice comes to the attention of the infringer, who by the way would have selected the appropriate method in terms of which he wishes to be served.

58. It bears further notice that the South African Post Office is no longer the sole provider of postal services. There are other institutions whose functions mimic those of the South African Post Office, but whose services do not, in this case, include registration. Their methods of bringing to the attention of an infringer, although not being registration as such are rigorous.

59. Our submission is therefore that instead of demising the rigour which registration at the post office brings, the amendment seeks to transform the service by extending this to other methods and other suppliers.

60. We submit further that the Applicant's attack that service by electronic means is inadequate is and could lead to the messages being treated as junk mail fails to recognize that electronic communication is now the most used and relied on method of communication.

61. We emphasize that the method which would be used to bring the infringement notice to the attention of the infringer would have been chosen by the infringer herself.

62. In paragraph 20 of ***Kubyana v The Standard Bank of South Africa Ltd (CCT 65/13) [2014] ZACC1 2014 BCLR 400(CC)*** the Constitutional Court held that in matters where the consumer makes an election regarding how a notice is to be brought to the consumer's attention, such an election must be respected and further that an act must not be relentlessly one-sided and concerned only

with rights and benefits of consumers without any regard to the interests of credit providers.

63. We submit that the document needing to be served needs to be brought to the attention of the infringer in terms of the election that the infringer would have made.

64. The infringer retains the election to be served in any other manner which he chooses.

65. The attack on section 17 of the Amendment Act is an attack on efficiency, transformation and a choice to be exercised by an infringer without taking away her right to make the election. It is, in our submission a transformational way forward and takes into account the rights of a citizen to make choices.

SHIFT FROM ENFORCEMENT THROUGH CRIMINAL LAW TO ADMINISTRATIVE ENFORCEMENT

18. The Amendment Act shifts enforcement from a default system of judicial enforcement of traffic laws through criminal law to a compulsory system of administrative enforcement of traffic laws through administrative enforcement of traffic laws through administrative representations, administrative fines or penalty and demerit point system.

19. In ***Howard Dembovsky v Minister of Justice and*** others, at para 34 and 99, the court held that

> *"But while the AARTO legislation seeks potentially to regulate just about every aspect of road traffic, there is this difference: persons falling allegedly foul of the AARTO legislation in respect of infringements would no longer in the first instance commit criminal offences in terms of its provisions. The would be called infringers, or alleged infringers, and become liable to pay penalties levied by and payable to organs of state established for that express purpose."*
>
> *one of the purposes of the AARTO legislation is to remove alleged infringers from the jurisdiction of the criminal court and have their alleged infringements dealt with administratively. The applicant's reliance on section 35 of the Constitution which protects the rights of accused persons, and section 179, which provides for the establishment of a single prosecuting authority within the Republic, are therefore misplaced. The focus should more properly be on section 33, which protects the rights to just administrative action and provides, inter alia, that everyone has a right to administrative action that is lawful, reasonable and procedurally fair. "*[20]

[20] Howard Dembovsky v Minister of Transport and other, 2018 SAFLII

20. The completion of enforcement through the criminal law system often results in an infringer being left with a criminal record against their name. One of the advantages of enforcement through administrative process means that an infringer who has failed to comply with the infringement notice, courtesy letter and/or enforcement order or whose representations to the Authority have been rejected will have demerit points recorded against their name and have their name and demerits updated on the National Road Traffic Contraventions Register ("the Register"). However, at the end of it all, judicial oversight is the ultimate to those who still remain aggrieved by the administrative process which did not yield desired results for them. A court could still be approached for judicial review under PAJA.

CONCLUSION

66. In the premises we submit that the application has no merit and stands to be dismissed.

67. We submit that the following order be made : -

> "The application is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel."

ADV. WILLIAM MOKHARE SC

ADV. ELIAS PHIYEGA

ADV. NEO NTINGANE

CHAMBERS

SANDTON

8 APRIL 2021