IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 32097/2020

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED

13.01.2022

SIGNATURE **DATE**

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

JUDGMENT

BASSON J

INTRODUCTION

[1] This is a constitutional challenge to the Administrative Adjudication of Road Traffic Offences Act[1] (the AARTO Act) and the Administrative Adjudication of Road Traffic Offences Amendment Act[2] (the Amendment Act). The question before this court is whether Parliament (national government) had the legislative competence to legislate on matters relating to provincial roads or traffic or in relation to parking and municipal roads at local level and whether the two aforementioned Acts are in violation of the exclusive provincial legislative competence conferred upon provincial and local government in terms of section 44(1)(a)(ii) of the Constitution.[3]

[2] The primary relief sought in the notice of motion is that the AARTO Act and the Amendment Act be declared unconstitutional and invalid. In the alternative to this relief, the applicant seeks an order declaring section 17 of the Amendment Act unconstitutional and invalid.

[3] This dispute is not about the desirability of this legislation which provides for a system that, *inter alia,* provides for the penalising of drivers and operators of vehicles who are guilty of an infringement or offences through the imposition of demerit points which may lead to the suspension and cancellation of driving license.[4] This dispute is confined to the narrow issue of the *legislative competence* of national government to enact these two Acts. In essence it is submitted that the two Acts are unconstitutional

[1] 46 of 1998.
[2] 4 of 2019.
[3] 108 of 1996.
[4] See section 2 of the AARTO Act in in respect of the objects of this Act.

in that they trespass on the narrow constitutional areas over which the national government has no legislative or executive power.

THE PARTIES

[4] The applicant, the Organisation Undoing Tax Abuse (OUTA), is a civil action organisation and a Non-Profit Company (NPC) incorporated in terms of the Companies Act.[5] OUTA submits that it has a substantial interest in the issues raised in this application in that OUTA is mandated by its Memorandum of Incorporation (MOI) to challenge any policies, laws or conduct that offend the Constitution. OUTA submitted that it brings this application in its own interest and in the public interest in terms of section 38(a) and 38(d) of the Constitution respectively.

[5] It is well-known that OUTA has since 2017 engaged in a range of activities and interventions to promote public accountability which include commenting on draft legislation that is relevant to OUTA's mandate of creating accountability, transparency, rational policy and good governance in the areas of transport, energy, water and sanitation and environmental issues. OUTA further states in its papers that it is a strong promoter of road safety and effective traffic legislation and supports effective and fair processes for the adjudication of road traffic infringements. To this end OUTA was actively involved in the public participation processes in relation to the AARTO Amendment Bill during which it raised a number of concerns about the Bill's constitutional validity. OUTA also made oral submissions on the Amendment Bill on 13 February 2018 and attended various public hearings. OUTA has also addressed two letters to President Ramaphosa regarding the constitutional invalidity of the Amendment Act (on 25 March 2019 and 24 July 2019). OUTA further submitted its written comments on the AARTO Amendment Act's Regulations Bill on 10 November 2019 to the Road Traffic Infringement Agency, the Department of Transport and to Parliament's Select Committee on Economic and Business Development.

[6] The first respondent is the Minister of Transport (the Minister). The Minister is cited in his capacity as the executive member who is responsible for the administration of both the AARTO Act and the Amendment Act.

[5] 71 of 2008.

[7] The second respondent is the Minister of Co-operative Governance and Traditional Affairs. The second respondent is the Minister responsible for the implementation of the Intergovernmental Relations Framework Act.[6] This Act establishes the framework for the national government, provincial governments, and local governments to promote and facilitate inter-governmental relations.

[8] The third respondent is the Road Traffic Infringement Authority (the Authority). The Authority is a juristic person established by section 3 of the AARTO Act. The Authority is cited by virtue of its interest in the relief claimed by OUTA. No relief is sought by OUTA against the Authority and no order of costs is sought against it unless it opposes this application.

[9] The fourth respondent is the Appeals Tribunal. The Appeals Tribunal is a juristic person established by section 29A of the Amendment Act. The Appeals Tribunal is cited by virtue of its interest in the relief claimed by OUTA. No relief is sought by OUTA against the Appeals Tribunal and no order of costs is sought against it unless it opposes this application.

[10] This application was opposed by the first and third respondents.

THE PURPOSE OF THE AARTO ACT AND THE AMENDMENT ACT

[11] Minister Fikile Mbalula in his affidavit neatly summarises what the AARTO Act sets out to legislate. He confirms that the AARTO Act creates a single national system of road traffic regulation and seeks to regulate "*every aspect of road traffic*". The system is based on demerit points which are incurred for traffic offences or infringements. The Amendment Act shifts from the default system of judicial enforcement of traffic laws through criminal law to a compulsory system of administrative enforcement of traffic laws through administrative tribunals, administrative fines and demerit points system. Any person affected by the decision in that administrative process may apply to the Magistrate Court designated by the

[6] 13 of 2005.

Minister to review such administrative action in terms of the Promotion of Administrative Justice Act.[7]

[12] Apart from the offences determined by the Minister, all contraventions of road traffic and transport laws will be treated as infringements which are subject exclusively to administrative enforcement under the Amendment Act by two national organs of state namely the Road Traffic Infringement Authority (the third respondent) established by section 3 (responsible to the Minister) and Appeals Tribunal (the fourth respondent) established by section 29A of the Amendment Act. The Minister appoints the chairperson and other members of the Appeals Tribunal. In terms of section 3(1) of the AARTO Act, the Road Traffic Infringement Authority is established as a juristic person responsible to the Minister. This effectively means that this Authority acts as an organ of state at national level of government in relation to road traffic issues through an administrative process.

[13] The Amendment Act also provides in section 17 for different methods of service of infringement notices on the infringer which includes personal service, postage, or electronic service. The constitutional invalidity of section 17 of the Amendment Act is sought in the alternative to the primary relief sought in the notice of motion.

CONSTITUTIONAL CHALLENGE

[14] The crux of the applicant's challenge is that these two Acts are unconstitutional for the following reasons:

14.1 First, the AARTO and Amendment Acts usurp the *exclusive legislative* authority of the provincial legislatures by regulating road traffic and creating a single, *national* system to do so. The applicants submitted that provincial, and municipal road and traffic regulation falls within the *exclusive legislative* competence of the provinces under Schedule 5, Parts A and B of the Constitution.

[7] 3 of 2000.

14.2 Second, the AARTO and Amendment Acts usurp the *exclusive executive competence* of local government (under Part B of Schedule 5 of the Constitution) to enforce traffic and parking laws at municipal level.

[15] As already pointed out: These two 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*"[8] are handled by the Road Traffic Infringement Authority and the Appeals Tribunal. This proposed new dispensation moves the enforcement of all road and traffic laws to national level.

[16] As its primary relief, the applicant submitted that the AARTO Act and Amendment Act are inconsistent with the Constitution and, because these aspects go to the core of the Acts, they are not capable of severance. As such, the applicants submitted that the Acts fall to be declared unconstitutional.

[17] Governmental power is distributed between national, provincial and local spheres of government.[9] To this end, the various legislative and executive competencies (or functionalities) of each of these three spheres of government are identified and listed in Schedule 4 (functional areas of *concurrent* national and provincial legislative competence) and Schedule 5, Parts A and B (functional areas of *exclusive* provincial legislative competence and the exclusive executive competence of local government) of the Constitution.

Section 41 and 44 of the Constitution

[18] Section 41(1)(g) of the Constitution stipulates that each sphere of government must exercise its powers in a manner that does not encroach on the geographical,

[8] Other than conduct that is labelled as an *"offence"* by the Minister, all contraventions of road and traffic laws are now classified as "*infringements*".
[9] See *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (*Liquor Bill case*) ad para 41.

functional or institutional integrity of government in another sphere.[10] Section 44(2)[11] of the Constitution provides for one exception, but only in respect of the functional areas listed in Schedule 5 and in accordance with section 76 of the Constitution, where such infringement is, *inter alia*, necessary for some national interest. The onus to make out such a case rests on the national government. Apart from a cursory reference to section 44(2) of the Constitution, no such case is made out on the papers. (I will return to the relevance on this section later in the judgment.)

Schedules 4 and 5

[19] Schedules 4 and 5 (Parts A and B) of the Constitution both provide for the following in respect of – broadly speaking – road traffic:

19.1 Part A of Schedule 4 (over which the national and provincial spheres of government have *concurrent legislative* competence)[12] lists as a functional area "*road traffic regulation*";

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

19.3 Part B of Schedule 5 (over which the municipalities have *exclusive executive* authority)[13] lists as functional areas "*traffic and parking*" and

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[10] Section 41(1)(g) of the Constitution:
"***Principles of co-operative government and intergovernmental relations***
(1) All spheres of government and all organs of state within each sphere must –
(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere;"

[11] Section 44(2) reads as follows: "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."

[12] 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.

[13] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC).

"*municipal roads*". In terms of Part B Schedule 5, local government thus have the exclusive executive authority to enforce traffic and parking laws at municipal level. In respect of issues relating to municipal executive authority, which is exclusive, section 156(1) of the Constitution stipulates that a municipality has *exclusive* powers to administer matters listed in Part B of Schedule 4 and Part B of Schedule 5.

[20] Section 104(1)(b)(ii)[14] of the Constitution (which provides for the legislative authority of provinces) confirms that 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,[15] save that national government may in respect of the exclusive legislative competencies provided for in Schedule 5, in *exceptional* circumstances of compelling national interest as provided for in section 44(2) of the Constitution, encroach upon the exclusive competencies listed in Schedule 5.

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[14] "**104 Legislative authority of provinces**

(1) The legislative authority of a province is vested in its provincial legislature, and confers on the provincial legislature the power-

(a) to pass a constitution for its province or to amend any constitution passed by it in terms of sections 142 and 143;

(b) to pass legislation for its province with regard to-

(i) any matter within a functional area listed in Schedule 4;

(ii) any matter within a functional area listed in Schedule 5;

(iii) any matter outside those functional areas, and that is expressly assigned to the province by national legislation; and

(iv) any matter for which a provision of the Constitution envisages the enactment of provincial legislation; and

(c) to assign any of its legislative powers to a Municipal Council in that province.

(2) The legislature of a province, by a resolution adopted with a supporting vote of at least two thirds of its members, may request Parliament to change the name of that province.

(3) A provincial legislature is bound only by the Constitution and, if it has passed a constitution for its province, also by that constitution, and must act in accordance with, and within the limits of, the Constitution and that provincial constitution.

(4) Provincial 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.

(5) A provincial legislature may recommend to the National Assembly legislation concerning any matter outside the authority of that legislature, or in respect of which an Act of Parliament prevails over a provincial law."

[15] See the *Liquor Bill case supra*. 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".

[21] The applicant submitted that the two Acts usurp the exclusive authority of provincial legislatures in that the Acts regulate road traffic and create a single national system to do so. This is so because provincial and municipal roads and traffic regulation falls within the *exclusive legislative competence* of provinces and local government under Schedule 5, Parts A and B of the Constitution respectively. Moreover, the Acts usurp the *exclusive executive authority* of local government (under Schedule 5, Part B) to enforce traffic and parking laws at municipal level because the Acts create a system whereby traffic laws are enforced through a national system of administrative tribunals, administrative fines and demerit points.

[22] The Constitutional Court has, in a number of judgments, made clear that the executive power conferred *exclusively* on municipalities and provincial government may not be encroached upon by national legislation.[16] For example, in *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council and others* the Constitutional Court stated:[17]

> "[12] That constitutional vision of robust municipal powers has been expanded in the jurisprudence of this court, and succinctly summarised by Mhlantla AJ in *Lagoonbay*:
>
> > 'This court's jurisprudence quite clearly establishes that: (a) barring exceptional circumstances, national and provincial spheres are not entitled to usurp the functions of local government; (b) the constitutional vision of autonomous spheres of government must be preserved; (c) while the Constitution confers planning responsibilities on each of the spheres of government, those are different planning responsibilities, based on what is appropriate to each sphere; (d) 'planning' in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships'' (emphasis added); and (e) the provincial competence for urban and rural development is not wide enough to include powers that form part of municipal planning.'"

Similarly in *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others*[18] the Constitutional Court held as follows:

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[16] See *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC) (*Gauteng Development Tribunal*) and *Maccsand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC).
[17] 2014 (4) SA 437 (CC) (*Habitat Council*).
[18] *Supra*.

"[43] Section 40 of the Constitution defines the model of government contemplated in the Constitution. In terms of this section the government consists of three spheres: the national, provincial and local spheres of government. These spheres are distinct from one another and yet interdependent and interrelated. Each sphere is granted the autonomy to exercise its powers and perform its functions within the parameters of its defined space. Furthermore, each sphere must respect the status, powers and functions of government in the other spheres and 'not assume any power or function except those conferred on [it] in terms of the Constitution'.

[44] The scope of intervention by one sphere in the affairs of another is highly circumscribed…"

And in *Tronox KZN Sands (Pty) Ltd v Kwazulu-Natal Planning and Development Appeal Tribunal and Others*[19] the Constitutional Court held:

"[23] The court considered whether there are circumstances in which a province may permissibly veto a municipality's land-use decision through procedures or approvals operating in parallel to municipalities' powers. The provincial minister argued that there must be some provincial surveillance over municipal planning decisions because big decisions could have extra-municipal impact. Cameron J rejected this reasoning:

> 'This bogey must be slain. All municipal planning decisions that encompass zoning and subdivision, no matter how big, lie within the competence of municipalities. This follows from this court's analysis of municipal planning in Gauteng Development Tribunal. Provincial and national government undoubtedly also have power over decisions so big, but their powers do not lie in vetoing zoning and subdivision decisions, or subjecting them to appeal. Instead, the provinces have co-ordinate powers to withhold or grant approvals of their own.'

[24] The reason behind this strict allocation is that municipalities are best suited to make planning decisions as they are localised decisions which should be based on information which is readily available to them.

[25] In *Lagoonbay* Mhlantla AJ summarised this court's approach to autonomous municipal power as follows:

> (a) (B)arring exceptional circumstances, national and provincial spheres are not entitled to usurp the functions of local government;
>
> (b) the constitutional vision of autonomous spheres of government must be preserved;"

[19] 2016 (3) SA 160 (CC).

OVERLAPPING FUNCTIONAL AREAS

[23] At first glance it does, however, appear that the functional areas provided for in Schedules 4 and 5 overlap and are seemingly in conflict with each other in that they all refer to functions that (broadly) relate to traffic and roads.

[24] Schedule 4 makes provision for conflicts between national and provincial legislation in that it provides for *concurrent legislative* competence in respect of the functional areas listed in this schedule. No similar provision is made in respect of Schedule 5. In respect of Schedule 5, the national legislature may, in the event of a possible conflict between the competencies, only encroach upon the exclusive legislative competencies listed in Schedule 5 under section 44(2) of the Constitution.[20] In this regard the Constitutional Court in *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* remarked that "*if regard is had to the nature of the exclusive competences in Schedule 5 and the requirements of s 44(2) 'the occasion for intervention by Parliament is likely to be limited'*".[21]

[25] On behalf of the applicant it was contended that the Schedule 4 functional competences should be interpreted as being distinct from and as excluding those competences listed in Schedule 5. In argument this approach was referred to as the "*bottom-up approach*" requiring carving out those listed competencies starting from the bottom of the hierarchy –namely the municipal sphere –and working up to the provincial sphere and lastly the national sphere of competencies. The approach was more eloquently explained by the Constitutional Court in the *Liquor Bill case*:[22]

> "[50] It follows that, in order to give effect to the constitutional scheme, which allows for exclusivity subject to the intervention justifiable under s 44(2), and possibly to incidental intrusion only under s 44(3), the Schedule 4 functional competences should be interpreted as being distinct from, and as excluding, Schedule 5 competences. That

[20] *Liquor Bill case supra* ad paras 48 and 49.
[21] *Ibid* ad para 49.
[22] *Ibid*. In *Gauteng Development Tribunal* ad para 50, the 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."

> the division could never have been contemplated as being absolute is a point to which I return in due course."

[26] Where there seemingly is an overlap between the functional areas provided for in Schedule 4 and Schedule 5, meaning should be given to the functional areas in Schedule 5 by *"defining its ambit [Schedule 5] in a way that leaves it ordinarily distinct and separate from the potential overlapping concurrent competences set out in Schedule 4*".[23] In doing so regard must be had to "*what is appropriate to each sphere*".[24] A responsibility conferred in respect of the same issue will therefore be interpreted to mean different responsibilities based on "*what is appropriate in each sphere*". In the *Liquor Bill case*[25] the Constitutional Court emphasised that the functional areas in question must be interpreted in such a way that they are given meaningful content:

> "[53] It is in the light of this vision of the allocation of provincial and national legislative powers that the inclusion of the functional area 'liquor licences' in Schedule 5 Part A must, in my view, be given meaning. That backdrop includes the express concurrency of national and provincial legislative power in respect of the functional area of 'trade' and 'industrial promotion' created by Schedule 4."

[27] Where there appears to be an overlap between a functional area in Schedule 5 and another in Schedule 4, as in this matter, meaning should be given to the competence provided for in Schedule 5 "*by defining its ambit in a way that it leaves it ordinarily distinct and separate from the potential overlapping concurrent competences set out in Schedule 4*".[26] As stated by the Constitutional Court in the *Liquor Bill case*[27] the "*Constitution-makers' allocation of powers to the national and provincial spheres appears to have proceeded from a functional vision of what was appropriate to each sphere and, accordingly, the competences itemised in Schedules 4 and 5 are referred to as being in respect of 'functional areas'*".

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[23] *Liquor Bill case supra* ad para 55.
[24] *Gauteng Development Tribunal supra* ad para 53.
[25] *Supra*.
[26] *Liquor Bill case* ad para 55 quoted *supra* in para 29.
[27] *Ibid* at para 51.

[28] To restate: Where the Constitution thus confers functional areas regarding the same issue to different spheres of government, the functional areas should be interpreted based on what is appropriate in the different spheres. In unravelling the allocation of power to the different spheres and to determine what is appropriate, regard should also be had to the historical allocation of power. The power to enforce traffic laws on municipal roads has historically been conferred on municipalities. The submission on behalf of the applicant is that it speaks for itself that traffic law enforcement on municipal roads must be handled on municipal level. Because this power was traditionally conferred upon municipalities, it must, so it was submitted, be accepted that the Constitution regarded this function as an appropriate function to retain at local government level.

[29] The prefixes used in respect of certain functionalities are also instructive: National government has *concurren*t legislative and executive jurisdiction with provinces over an item referred to as "*road traffic regulation*" (Schedule 4 Part A). This power of national government must be interpreted in light of the *exclusive* legislative power that is granted to provinces in terms of Schedule 5 Part A in respect of "*provincial roads and traffic*" and the *exclusive* legislative jurisdiction granted to local government in respect of "*traffic and parking*" and "*municipal roads*".

[30] A similar interpretative exercise was conducted by the Constitutional Court in *Gauteng Development Tribunal*.[28] In that matter concurrent legislative jurisdiction was granted in terms of Schedule 4, Part A to national government and province in respect of "*regional planning and development*" and "*urban and rural development*". This concurrent jurisdiction had to be interpreted in light of the exclusive legislative power granted to provinces in respect of "*provincial planning*" in Schedule 5 Part A and the exclusive executive competence granted to municipalities in respect of municipal planning in terms of Schedule 5, Part B. The Constitutional Court held as follows:

> "[55] It is, however, true that the functional areas allocated to the various spheres of government are not contained in hermetically sealed compartments. But that notwithstanding, they remain distinct from one another. This is the position, even in

[28] *Supra*.

respect of functional areas that share the same wording, like roads, planning, sport and others. The distinctiveness lies in the level at which a particular power is exercised. For example, the provinces exercise powers relating to 'provincial roads', whereas municipalities have authority over 'municipal roads'. The prefix attached to each functional area identifies the sphere to which it belongs and distinguishes it from the functional areas allocated to the other spheres. In the example just given, the functional area of 'provincial roads' does not include 'municipal roads'. In the same vein, 'provincial planning' and 'regional planning and development' do not include 'municipal planning'.

[56] The constitutional scheme propels one ineluctably to the conclusion that, barring functional areas of concurrent competence, each sphere of government is allocated separate and distinct powers which it alone is entitled to exercise. Of course, the constitutionally mandated interventions in terms of ss 100 (national interventions in the provincial sphere) and 139 (provincial interventions in the municipal sphere) constitute an exception to the principle of relative and limited autonomy of the spheres of government."

[31] The following important points emerge from this decision: Firstly, it is acknowledged that, although the different functional areas allocated to the different spheres are not "*contained in hermetically sealed compartments*", they are nonetheless distinct. Secondly, the distinctiveness of the different powers lies in the level at which a particular power is exercised. The Constitutional Court emphasised that a responsibility conferred in respect of the same issue but to differ spheres will have to be interpreted with due regard to "*what is appropriate to each sphere*".[29] Thirdly, barring functional areas of concurrent competence, each sphere of government is allocated separate and distinct powers which it alone is entitled to exercise. Fourthly, the functional area of "provincial roads" does not include "*municipal roads*".

[29] *Gauteng Development Tribunal supra* ad para 53. And in the *Liquor Bill case supra* ad para 51 the Constitutional Court emphasised that: "The Constitution-makers' allocation of powers to the national and provincial spheres appears to have proceeded from a functional vision of what was appropriate to each sphere and, accordingly, the competences itemised in Schedule 4 and 5 are referred to as being in respect of functional areas. The ambit of the provinces' exclusive powers must, in my view, be determined in the light of that vision."

[32] Returning to the present matter. From a reading of Schedule 5 Parts A and B, it appears that provinces exercise exclusive powers relating to "*provincial roads and traffic*", and municipalities in respect of "*municipal roads*". This is evident from the prefix attached to each function identified in respect of the sphere to which it is allocated. This in itself distinguishes the functional area from the functional areas allocated to the other spheres. The functional area of provincial roads does not include municipal roads and *vice versa*.

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

[34] This bottom-up carving out process was endorsed by the Constitutional Court in *Gauteng Development Tribunal*.[30] In that matter it was submitted that the Development Tribunal zoning power should not be regarded as an intrusion on the exclusive local government power in respect of municipal planning in view of the fact that "*urban and rural development*" was a competency that fell within the functional area of concurrent national and provincial legislative competence. The Constitutional Court rejected this argument.[31]

[35] I am in agreement with Mr. Chaskalson's submission that this means that what is given to local government, cannot be taken away by the higher levels in the hierarchy namely provincial and thereafter national government. The court was referred to the matter in the *Liquor Bill* matter where a similar approach was followed. That matter concerned the exclusive power of provincial government in terms of Schedule 5, Part A to grant liquor licences. The Court had to interpret that functional power against the background that Schedule 4, Part A grants concurrent legislative competence to national government in respect of "trade" and "industrial promotion". The Constitutional Court held that:

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[30] [30] *Supra*.

[31] *Gauteng Development Tribunal supra* ad para 63.

"[55] But the exclusive provincial competence to legislate in respect of 'liquor licences' must also be given meaningful content and, as suggested earlier, the constitutional scheme requires that this be done 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.

….

[58] The structure of the Constitution, in my view, suggests that the national government enjoys the power to regulate the liquor trade in all respects other than liquor licensing. For the reasons given earlier, this, in my view, includes matters pertaining to the determination of national economic policies, the promotion of inter-provincial commerce and the protection of the common market in respect of goods, services, capital and labour mobility."

[36] Schedule 5 Part A must therefore be read to afford provinces exclusive legislative competence in respect of "*provincial roads and traffic"* and affording municipalities exclusive legislative competence in respect of "*municipal roads*" and "*traffic and parking*". Schedule 4, Part A therefore grants, in my view, concurrent legislative competence to national and provincial government only in respect of national roads and traffic regulation, but only to extent that they do not deal with those competencies which were carved out following the bottom-up approach – which are matters dealing with provincial roads and traffic or municipal roads, traffic and parking. This approach limits the ambit of functional competence to the extent that it is distinct and separate and confers powers on each sphere of government based on what is appropriate to each sphere duly taking into account which powers have been granted exclusively to a particular sphere in terms of the provisions of the Constitution.

[37] Where inter-provincial regulation is required as opposed to functionalities that fall within the boundaries of a province, national government is provided with the necessary powers in terms of section 44(2)[32] of the Constitution to deal with such situations.

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[32] "**44 National legislative authority**
(1) The national legislative authority as vested in Parliament –
(a) confers on the National Assembly the power–
(i) to amend the Constitution;

[38] The respondents adopt a different interpretation to the one proposed by the applicant. They contend that the Acts do not regulate matters falling under Schedule 5 of the Constitution. Rather, these Acts regulate issues falling under Part A of Schedule 4 of the Constitution over which the national and provincial legislatures share *concurrent legislative* competence.

[39] I am in agreement with the applicant that this approach cannot be correct and is an approach that was rejected by the Constitutional Court in *Gauteng Development Tribunal*. First, this approach inverts the bottom-up approach. Second, this approach interprets the functionalities conferred by Schedule 4 in isolation. Third, this approach ignores the exclusive functionalities conferred upon provinces and local government. Fourth, this approach effectively deprives provincial and local government of legislative competence over a functional area which was reserved exclusively to those two government spheres. Five, because municipalities are deprived of its exclusive traffic law enforcement powers in respect of traffic on municipal level and in respect of municipal roads, those exclusive legislative and executive competencies are effectively rendered meaningless. Returning to the bottom-up approach: the functional

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(ii) o 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; and

…

(b) confers on the National Council of Provinces the power–

…

(ii) to 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; and

…

(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
(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.

(3) Legislation with regard to a matter that is reasonably necessary for, or 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.

(4) 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."

areas granted exclusively to provinces and local government can only be given meaningful content if they are carved out first. Only that which remains will fall within the functional area granted (concurrently) to national government.

[40] Although not addressed in their papers, the respondents now rely in their heads of argument on section 44(2) of the Constitution. I have already briefly referred to this section. To recap: This section grants national government a limited power to legislate on a functional area which falls within the exclusive legislative competence of provinces in terms of Schedule 5. In essence national government may do so in exceptional circumstances of compelling public interest but only in as far as it is "*necessary*" to do so to maintain national security; to maintain economic unity; to maintain essential national standard; 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.

[41] The respondents submitted that the legislative competence of national government is rooted in Part A of Schedule 4 and *not* in Schedule 5. No case is made out in the respondents' papers that, should this court disagree with this view and hold that the legislative competence is rooted in Schedule 5 (and not in Schedule 4), that national government nonetheless has, in terms of section 44(2)[33] of the Constitution, the legislative power to intervene by passing legislation in respect of a matter that falls within a functional area listed in Schedule 5 where it is "*necessary"* to, for example, maintain essential national standards. Although Mr. Mokhari for the third respondent argued that the court may still consider this "exception", the papers do not establish any factual basis for this court to consider this argument. But, moreover, there is no concession, even in the alternative, on the part of the respondents that Schedule 5 may well determine the legislative competency in this matter. In the *Liquor Bill case,*[34]

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[33] "**44 National legislative authority**
(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
(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."

[34] *Supra*.

the issue of "*necessity*" was pertinently raised by the President who justified the passing of the Liquor Bill (although the legislative competency fell with a functional area listed in Schedule 5) on the basis that it was "*necessary*".

[42] Apart from the fact that the respondents do not make out such a case in their papers, the exception provided for in section 44(2) of the Constitution to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, excludes a matter within a functional area listed in Schedule 5. It is only when there is a necessity to do so as contemplated in that section, that government has the power to pass legislation to legislate on a functional area which falls under Schedule 5.

[43] In light of the respondents' insistence that the AARTO Act was enacted in respect of a functional area falling under Schedule 4 and not Schedule 5, the question of whether it was necessary to do so does not even arise on the respondents' version (apart from the fact that such a case is not made out on the papers). The onus to proof necessity falls squarely on the respondents. Such case further has to be made out on the papers. The Constitutional Court in the *Liquor Bill case*[35] dealt with this issue as follows:

> "[80] While the Minister's evidence, in my view, shows that the national interest necessitated legislating a unified and comprehensive national system of registration for the manufacture and distribution of liquor, it failed to do so in respect of its retail sale. There he averred only that 'consistency of approach' is 'important'. This may be true. But importance does not amount to necessity and the desirability from the national government's point of view of consistency in this field cannot warrant national legislative intrusion into the exclusive provincial competence and no other sufficient grounds for such an intrusion were advanced."

[44] Lastly, the respondents pointed out that the National Council of Provinces (the NCOP) has supported the amendment (except for one province) in terms of section 76 of the Constitution. This is, correctly pointed out by Mr. Chaskalson, irrelevant

[35] *Supra*.

simply because national government did not have the power to pass the AARTO Act in the first place. The fact that the NCOP supported the legislation cannot cure the shortcomings alluded to in this judgment.

CONCLUSION

[45] The AARTO and Amendment Acts unlawfully intrude upon the exclusive executive and legislative competence of the local and provincial governments, respectively and as such the two Acts are unconstitutional. In light of my finding it is thus not necessary to consider the alternative arguments mainly relating to the constitutional challenge of sections 17 and 30 of the Amendment Act.

REMEDY

[46] 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 and may make any order that is just and equitable in the circumstances.[36]

[47] As pointed out, the primary remedy sought by the applicant is an order that the AARTO Act and Amendment Act are inconsistent with the Constitution. On behalf of the applicants it was submitted that the constitutionally offensive provisions of the two Acts are not severable with the result that the AARTO Act and the Amendment Act, as a whole, must be declared unconstitutional and set aside with immediate effect.

[48] On behalf of the Minister it was contended that, should the court grant the relief, the court should suspend the declaration of invalidity for 24 months to allow Parliament to rectify the invalidity.

[49] The test for severability in constitutional matters is well established:

> "[16] Although severability in the context of constitutional law may often require special treatment, in the present case the trite test can properly be applied: if the good is not dependent on the bad and can be separated from it, one gives effect to the good that

[36] *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) at para 96.

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?"[37]

[50] I am not persuaded that the offending provisions of the AARTO Act and the Amendment Act can be severed. Once the provisions relating to provincial roads or provincial traffic law infringements or any provisions relating to municipal road, traffic or parking by-law infringements are removed, what would remain would not be able to give effect to the main objective of the statute which is to create a single, national system for administrative enforcement of road traffic laws. There would also be no purpose in setting up the administrative machinery of the Agency and the Appeal Board if the vast majority of road traffic infringements do not fall within their jurisdiction. It therefore follows in my view that the AARTO Act and the Amendment Act must be declared to be inconsistent with the Constitution in their entirety.

ORDER

[51] In the event the following order is made:

1. It is declared that the Administrative Adjudication of Road Traffic Offences Act, 46 of 1998 and the Administrative Adjudication of Road Traffic Offences Amendment Act, 4 of 2019 are unconstitutional and invalid.

2. The first and third respondents are ordered to pay the applicant's costs jointly and severally the one paying the other to be absolved. Such costs to include the costs of two counsel.

AC BASSON

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

[37] *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).

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 13 January 2022 .

APPEARANCES

For the Applicant:	ADV MATTHEW CHASKALSON SC ADV EMMA WEBBER
For the First Respondent:	ADV MAKHOSI GWALA SC ADV NOVUYO SIDZUMO
For the Third Respondent	ADV WILLIAM MOKHARE SC ADV ELIAS PHIYGA ADV NEO NTINGANE
Date of hearing:	18 October 2021
Date of judgment:	13 January 2022