IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT: 19/22

In the intervention application between:

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

In re 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

FOUNDING AFFIDAVIT

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I, the undersigned,

MORNE GERBER

do hereby make oath and state that:

INTRODUCTION

1. I am the General Manager: Legal and Compliance of the applicant for leave to intervene.

2. I am duly authorised to depose to this affidavit on behalf of the applicant for leave to intervene.

3. The contents of this affidavit are, unless otherwise specified, within my personal knowledge and are, to the best of my belief, both true and correct.

4. Where I make any legal submissions, I do so on the advice of the legal representatives of the applicant for leave to intervene.

PARTIES AND JURISDICTION

5. The applicant for leave to intervene is the **ROAD TRAFFIC MANAGEMENT CORPORATION** (**"the RTMC"**), an organ of state established by section 3 of the Road Traffic Management Corporation Act[1] (**"RTMC Act"**) as a juristic person and listed as a Schedule 3A public entity in terms of the Public Finance

[1] Road Traffic Management Corporation Act 20 of 1999.

Management Act, 1 of 1999. principal place of business is situated at at Eco Origin Office Park, Block F, 349 Witch-Hazel Street, Highveld Ext 79, Gauteng.

6. The RTMC was not cited as a party to the proceedings before the court below, notwithstanding that it has a direct and substantial interest in the relief sought which could be adversely affected by the court's judgment. It seeks leave to intervene in the application for confirmation brought by the first respondent under the above case number, to which I refer in this affidavit as "**the main application**".

7. The first respondent is the **ORGANISATION UNDOING TAX ABUSE** ("**OUTA**"), a non-profit company incorporated in accordance with the company laws of South Africa. OUTA's registered address and/or principal place of business is situated at Unit 4, Boskruin Village Office Park, Cnr President Fouche & Hawken Ave, Johannesburg, 2188. OUTA was the applicant in the main application.

8. The second respondent is the **MINISTER OF TRANSPORT** ("**the Minister**"). The Minister is cited as the first respondent in the main application, in his official capacity as the executive member responsible for the legislation impugned in the main application. The Minister's official office is situated at 123 Francis Baard Street, Pretoria.

9. The third respondent is the **MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS**, cited in her official capacity as the Minister responsible for implementing the Intergovernmental Relations Framework Act.[2] The third respondent is the second respondent in the main application. The office

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2 Intergovernmental Relations Framework Act 13 of 2005.

of the Minister of Co-operative Governance and Traditional Affairs is situated at 87 Hamilton Street, Arcadia, Pretoria, 0083.

10. The fourth and fifth respondents are the **ROAD TRAFFIC INFRINGEMENT AUTHORITY** ("**RTIA**") and the **APPEALS TRIBUNAL.** They are each organs of state within the definition under section 239 of the Constitution, being entities imbued with juristic personality, and being entities which are established by legislation. Respectively, the RTIA and the Appeals Tribunal are established by sections 3 and 29A of the AARTO Act.

11. I am advised and submit that this Honourable Court has the necessary jurisdiction to consider the present application given that it is the apex court in the Republic, which is already seized with the sole jurisdiction to determine the confirmation proceedings to which this application refers.

SUMMARY OF THIS APPLICATION AND ITS PURPOSE

12. This is an intervention application, brought in terms of Rule 8 of the Rules of this Honourable Court. In the main application, OUTA seeks confirmation of an order of constitutional invalidity with respect to an Act of Parliament, which was handed down by the Gauteng Division, Pretoria ("**High Court**"),[3] on 13 January 2022.

13. The High Court declared that the Administrative Adjudication of Road Traffic Offences Act[4] ("**AARTO Act**") and the Administrative Adjudication of Road Traffic Offences Amendment Act[5] ("**Amendment Act**") were unconstitutional and

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3 The relevant judgment of the High Court is reported as *Organisation Undoing Tax Abuse v Minister of Transport and Others* [2022] ZAGPPHC 1 ("**High Court judgment**").

4 Administrative Adjudication of Road Traffic Offences Act 46 of 1998.

5 Administrative Adjudication of Road Traffic Offences Amendment Act 4 of 2019.

invalid. For convenience, I shall refer to the AARTO Act, as amended by the Amendment Act, simply as "**the AARTO Act**" throughout this affidavit, unless the context indicates otherwise.

14. The RTMC seeks an order permitting it to intervene as a party and co-appellant to appeal against the judgment of the High Court as envisaged in sections 167(5) and 172(2)(d) of the Constitution, read with Rule 16 of the Constitutional Court Rules and section 15 of the Superior Courts Act, 10 of 2014. Alternatively, it seeks to be joined as the fifth respondent in the main application to oppose the confirmation of the declaration of constitutional invalidity.

15. Certain of the submissions that the RTMC makes below may not have been placed before the High Court. However, to the extent that any of the information contained in this affidavit is 'new', I am advised that it will not, by dint that fact, constitute 'new' or further evidence. If it were new or further evidence, I am advised that there would be little point in advancing it, as I am advised such evidence would be of little use in the context of a question of constitutional invalidity, as it has been the law since the dawn of the Constitution that the question of constitutional validity must be considered objectively. This Court has held questions of constitutional invalidity are not to be judged by reference to "*[t]he subjective positions in which parties to a dispute may find themselves*".[6]

16. Although I accept that there may be new matter in this affidavit of a factual nature, all such 'new' factual information, I am advised and submit, comprises either (*a*) relevant context with respect to the applicable legislative scheme; or (*b*) the

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6 *Ferreira v Levin* NO 1996 (1) SA 984 (CC) at para 26.

history of road traffic regulation insofar as it is relevant to the issues that arise in these proceedings (indeed, the order in the High Court was expressly informed by legislative history, albeit that the purported history relied on was erroneous). As such, I am advised that any new factual matter in this affidavit is not 'new' or further evidence. Instead, I am advised and submit that it constitutes relevant context of which this Court is entitled to take judicial notice.

17. I am advised that it is therefore unnecessary to apply for the RTMC to seek the leave of the Court to furnish it with 'new' or further evidence. However, out of an abundance of caution, in the event that the Court holds differently, i.e. that given new information not placed before the High Court constitutes 'new' or further evidence, RTMC shall seek leave for the admission of such new facts. I explain below why a case is made out for the admission of any new facts. Similarly, although I am advised that RTMC has not violated any time periods presently applicable to it, in case the Court deems it necessary to do so, the RTMC also seeks condonation for any delay that may be found to exist in bringing this application for intervention.

18. Once leave to intervene is granted, the RTMC will make submissions on the merits of the confirmation application. It will submit for the reasons set out below that confirmation of the constitutional invalidity of the AARTO Act should be refused. The AARTO Act should be declared to be constitutional and valid. Should the confirmation succeed, the RTMC will apply for any order of constitutional invalidity to be suspended for a period of 18 months to enable the identified defects to be corrected.

19. The basis for the intervention, as I demonstrate below, is that the RTMC has the requisite legal standing, as well as a direct and substantial interest to intervene in the main application and to appeal against the judgment of the High Court. The grant of leave to intervene would be in the interests of justice. That is so because, *inter alia*, the main application concerns the constitutionality and validity of the AARTO Act, which is the adjudicative spoke in the larger wheel constituted by the Republic's road traffic regulatory framework, which I am advised and submit is a complex regulatory scheme. The RTMC is an organ of state vested with various statutory functions in relation to the administrative adjudication of road traffic offences, road traffic regulation and road traffic matters more generally. The constitutionality and validity of the AARTO Act therefore has grave implications for the RTMC's statutory mandate and is of primary concern to it.

20. For introductory purposes, I pause to draw this Honourable Court's attention to the following salient facts in relation to the RTMC's statutory functions:

20.1 First: in terms of the RTMC Act, the RTMC is conferred with statutory powers and obliged to establish functional units in respect of the functional areas of, among others, "*administrative adjudication of road traffic offences*" and "*road traffic law enforcement*".[7] The subject matter of the AARTO Act is thus at the core of the RTMC's statutory mandate;

20.2 Second: the AARTO Act itself confers the RTMC with the statutory function of being an issuing authority under that Act;[8] and

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7 See section 18 of the RTMC Act.

8 See the definition of "*issuing authority*" in section 1 of the AARTO Act.

20.3 Third: the RTMC Act establishes the RTMC expressly "*as a partnership between national, provincial and local spheres of government*", in the interest of "*enhanced co-operative and co-ordinated road traffic strategic planning, regulation, facilitation and law enforcement*" and with the aim "*to regulate, strengthen and monitor intergovernmental contact and co-operation in road traffic matters*".[9] The RTMC therefore:

20.3.1 performs a unique statutory role as the glue between national, provincial and local spheres of government in relation to road traffic regulation and the enforcement of road traffic laws. It is mandated to enhance co-operation and co-ordination among the spheres. It therefore has an interest in any proceedings where one sphere is alleged to have trenched upon the powers of another, as this has implications for co-operation and co-ordination; and

20.3.2 possesses specialist knowledge regarding the intersection and boundaries of the powers demarcated to each of the spheres of government in relation to road traffic, and how these powers are to be understood in light of the broader national, provincial and municipal road traffic regulatory framework in the Republic. This knowledge is pivotal, and should be before any court deciding whether any piece of road traffic legislation is unconstitutional on the bases advanced in the main application.

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[9] Section 2(a) of the RTMC Act

21. I am advised and submit that under the above circumstances, the RTMC's interest in whether the AARTO Act and the Amendment Act are declared unconstitutional and invalid is respectfully undeniable.

22. This Honourable Court has confirmed in a number of its judgments that an entity's interest may lie in its status in relation to a particular statutory framework, and that intervention should be granted to a party where a court's determination will have a material effect on that party's core statutory functions.[10]

23. Given the circumstances set forth above, the RTMC would have expected OUTA to have cited the RTMC as a party to the main application from the outset when it was before the High Court. It did not. I am unaware of the reasons. Whatever they may be, I am advised and submit that the RTMC not only has a direct and substantial interest as I am advised is the test in the present application, the RTMC has a sufficiently strong interest which would be sufficiently adversely affected such that the application ought not to have been allowed to 'leave the gate', as it ought to have been dismissed for non-joinder.

24. The failure by OUTA to cite the RTMC had the following fatal results:

24.1 The High Court was deprived of key information on the history, context, purpose and goals of the AARTO Act, and on the scope of the respective functions of the national, provincial and municipal spheres of government in relation to those goals in light of each sphere's role in the Republic's road traffic regulation framework and the enforcement of road traffic laws. This

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[10] See, for example, *South African Riding for the Disabled Association v Regional Land Claims Court Commissioner and Others* [2017] ZACC 4 at para 11 (referring with approval to *Nelson Mandela Metropolitan Municipality v Greyvenouw CC* 2004 (2) SA 81 (SE) at para 9; and *Snyders v De Jager (Joinder)* [2016] ZACC 54 at paras 9 to 11.

directly led to the High Court misconstruing the AARTO Act and finding that it dealt with "*matters relating to provincial roads or traffic or in relation to parking and municipal roads at local level*",[11] which matters are reserved for exclusive provincial and municipal competence in terms of Schedule 5 of the Constitution.

24.2 As I demonstrate below, that finding was a mischaracterisation of the AARTO Act, whose express provisions, read in light of the Act's history, context and purpose, indicate that the Act's appropriate characterisation is that it falls within the concurrent competence of the national and provincial legislatures under the functional area of "*road traffic regulation*" in Schedule 4 of the Constitution.

24.3 The mischaracterisation of the AARTO Act as aforesaid was bound up in and precipitated by several other factual and legal errors in the High Court's judgment, which were fatal to its order of constitutional invalidity. These errors, which I set out in more detail below, would not have been made had the High Court been apprised of the pivotal historical and contextual information which the RTMC intends to provide to this Court should it be granted leave to intervene. It is thus of utmost paramountcy that leave be granted to the RTMC.

24.4 The High Court impermissibly granted an order of constitutional invalidity in circumstances where the RTMC and various role players whose powers were directly implicated in the application were not cited and were thus

[11] High Court judgment at para 1.

deprived of an opportunity to be heard, and where OUTA had no standing to advance arguments on behalf of those role players. Indeed, OUTA's interest in the arguments which it advanced on the alleged unconstitutionality of the AARTO Act is not immediately clear, and I submit below that its application ought to have been dismissed outright for lack of standing, and for failure to cite the parties whose powers it sought to impugn.

25. The matter is however now before the apex Court, nonetheless. This being so, the RTMC does not seek to press this or other preliminary points that may avail. To borrow a phrase from a recent judgment of this Court,[12] it is not necessary for the matter to be remitted back to the High Court in order to "*wend its way through the judicial hierarchy*".[13] In the interests of the expeditious resolution of issues that arise, the RTMC will pray that this Court determine and dismiss the confirmation order sought by OUTA, on its merits.

26. I shall explain the reasons for this submission in the paragraphs that follow further below. In doing so, I shall furnish the Court with information and submissions with respect to the history, context and purpose of the AARTO Act, and the respective functions of the national, provincial and municipal spheres of government in relation to road traffic matters which I am advised and submit ought to have been before the court below, and which I respectfully submit will be helpful to this Court in deciding whether it should confirm the High Court's order of invalidity.

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[12] *Democratic Alliance in re Electoral Commission of South Africa v Minister of Cooperative Governance and Others* [2021] ZACC 30.

[13] Id at para 47.

27. It is trite that this Court will grant leave to intervene where a party seeks to advance information and submissions that will be helpful to the determination of the issues.[14] I am advised that what I have said above establishes that, further to the RTMC's unassailable interest in the main application, it is in the interests of justice to grant leave to intervene to the RTMC. So much so that I am advised and submit that leave to intervene falls in a category of cases in which this Court has held that there is "*no discretion*",[15] and that leave to intervene must therefore be granted to the RTMC.

28. I expand on these introductory submissions by addressing nine substantive topics, in sequence. I shall structure the remainder of this affidavit as follows:

28.1 First, I set out the history, context, purpose and goals of the AARTO Act. I shall submit that the express provisions of the AARTO Act, when read in light of its history, context, purpose and goals, make plain that the Act is, and was always, about ushering road safety, discouraging road traffic contraventions and crafting a scheme to facilitate the equitable and effective adjudication and prosecution of road traffic infringements and offences. I shall show that, properly understood, the AARTO Act is not concerned with matters relating to provincial roads and traffic or municipal roads and parking, as the High Court found.

28.2 Second, I provide an account of the functions of the national, provincial and municipal spheres of government in relation to road traffic regulation, the

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[14] City *of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC) ("***Gauteng Development Tribunal***") at paras 21 and 25; *Gory v Kolver N.O. and Others (Starke and Others Intervening)* 2007 (4) SA 97 (CC) at paras 11-3.

[15] *South African Riding for the Disabled Association (supra)* at paras 9 to 11.

enforcement of road traffic laws and road traffic matters more broadly. I shall respectfully submit that the substance and goals of the AARTO Act quite clearly fall within the purview of the national legislature, they being primarily concerned with "*road traffic regulation*" as contemplated in schedule 4 of the Constitution.

28.3 Third, I explain why, in view of the history, context, purpose, substance and goals of the AARTO Act, the RTMC maintains that the Act is constitutionally valid. I shall submit that:

28.3.1 The AARTO Act, when read in light of its history, context, purpose and goals, is constitutional because the Act:

28.3.1.1 pursues legitimate national regulatory objectives aimed at enhancing the safety and security of all drivers and passengers on the roads of the Republic; securing the efficient and speedy adjudication and prosecution of road traffic infringements and offences; and guaranteeing all road users equal application and protection of the law; and

28.3.1.2 given its substantive provisions and the national regulatory objectives which it seeks to achieve, quite clearly falls within the national legislature's concurrent competence to legislate in respect of "*road traffic regulation*" as contemplated in schedule 4 of the Constitution.

28.3.2 The AARTO Act is, in any event, constitutional in terms of:

28.3.2.1 section 44(3) of the Constitution, on the basis that the national legislature's ability to establish a uniform regulatory regime of adjudicating road traffic offences throughout the Republic is reasonably necessary for or incidental to its power of "*road traffic regulation*" in Part A of Schedule 4; *alternatively*

28.3.2.2 section 44(2) of the Constitution, because the Act is necessary in order to maintain national standards and prevent unreasonable action by provinces in relation to road safety and road traffic, which may prejudice other provinces and the Republic as a whole.

28.4 Fourth, I shall briefly foreshadow some of the factual and legal errors which the RTMC contends are plain from the judgment of the High Court and are fatal to its order of constitutional invalidity. These errors include, *inter alia*, that the Court erred by:

28.4.1 incorrectly formulating the question which was before it and thus answering the wrong constitutional question;

28.4.2 finding that:

28.4.2.1 "*[t]he power to enforce traffic laws on municipal roads has historically been conferred on municipalities*",[16] which is not the case and which is irrelevant; and

[16] High Court judgment at para 28.

28.4.2.2 *"it speaks for itself that traffic law enforcement on municipal roads must be handled on a municipal level"*;

28.4.3 applying what it referred to as the "*bottom-up*" approach to Schedules 4 and 5 of the Constitution. That supposed approach is not supported by the jurisprudence of this Honourable Court on which the High Court purported to rely, and I am advised that it is wholly incongruent which the conception, structure and purpose of the Constitution; and

28.4.4 interpreting the Constitution's devolution of road traffic powers in a manner which leads to absurdity, including, *inter alia*, that the applicable road traffic regulatory regime depends on the type of road on which a road user is for the time being driving.

28.5 Fifth, I address the question of remedy, in the event that this Honourable Court confirms that the AARTO Act and the Amendment Act are unconstitutional. I shall submit that given the lacuna which a declaration of invalidity would occasion, a suspension of the order of invalidity to allow government to cure the defect would clearly be the just and equitable remedy. The High Court erred in neglecting this aspect despite suspension having been pleaded by the Minister and the RTIA.

28.6 Sixth, to the extent that I have not already done so in prior sections of this affidavit, I explain the RTMC's legislatively mandated roles and responsibilities in relation to the legislative scheme of the AARTO Act and related road traffic legislation, which I shall respectfully submit are central roles.

28.7 Seventh, I shall summarise what I am advised and submit are the reasons why the RTMC meets the requirements for intervention in the main application, being the RTMC's direct and substantial interest and the interests of justice, to the extent that I have not already done so in the prior sections of this affidavit.

28.8 Eighth, out of caution and to the extent that the Court deems condonation to be necessary for any reason, I explain the reasons why I respectfully submit that it is in the interests of justice that condonation be granted.

28.9 Ninth, similarly out of caution, I shall explain why I am advised and submit that, to the extent that there may be any new information in this affidavit that was not before the High Court, and to the extent that the Court holds that such new information constitutes evidence as opposed to context of which this Court may take judicial notice (which is denied), I explain why the RTMC respectfully submits that such evidence should be admitted.

29. I shall summarise the RTMC's conclusion and prayer in the final section of this affidavit. In that summary, I shall respectfully submit that the application should succeed and, in the event that any party opposes the application, that such success should be with costs against that opposing party, which costs order should include the costs of two counsel.

HISTORY, CONTEXT, PURPOSE AND GOALS OF THE AARTO ACT

30. It is common cause that one of the core disputes before the High Court was whether the AARTO Act fell within the national legislature's concurrent competence in Schedule 4 to legislate in respect of "*road traffic regulation*", or

whether it fell within the exclusive competence of provinces and municipalities under "*provincial roads and traffic*" and "*municipal roads*" and "*traffic and parking*" as contemplated in Schedule 5.

31. This Honourable Court has held that the proper approach to characterising legislation for purposes of Schedules 4 and 5 is to have regard to the substance, purpose and goals of the legislation.[17] This, the High Court did not do.

32. The RTMC submits that determining the purpose and goals of the AARTO Act must necessarily entail reading its substantive provisions in light of the history and context of the AARTO Act. I reiterate that the High Court's failure to engage with the history, context, purpose and goals of the AARTO Act necessitates the granting of this intervention application, so that the RTMC may provide this Court with that information.

33. Before I provide the aforesaid information, I interpose to submit, very respectfully, that the High Court's lack of engagement with the history, context, purpose and goals of the AARTO Act must be seen in the context of the impermissible manner in which the matter was prosecuted in the High Court.

The High Court's impermissible prosecution of the matter in view of OUTA's lack of standing and the non-joinder of relevant parties

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[17] *Liquor Bill* at paras 62-3; *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995* 1996 (4) SA 653 (CC) at para 19.

34. The RTMC submits, with respect, that there were a number of fatal irregularities in the manner in which the matter was conducted in the High Court, which directly led to the several factual and legal errors made by the High Court in its judgment.

35. OUTA lacked standing to advance certain contentions that found favour before, and formed part of the *ratio* of the decision of, the High Court:

35.1 OUTA lacked standing to argue that there is an unlawful usurpation of the powers of local and provincial authorities,[18] particularly in circumstances where it failed to join those parties.

35.2 Had OUTA joined the relevant parties before the court of first instance, the court would have been furnished with material factual and legal information which would have shown that the impugned legislation is constitutionally valid.

35.3 OUTA further lacked standing to advance its argument in regard to sections 17 and 30 of the Amendment Act. Indeed, it is not clear why OUTA had standing to rely on the hypothetical potential rights-violations of other individuals in order to advance its case on the alleged constitutional invalidity of the powers in sections 17 and 30, due to the allegation that those powers could hypothetically be abused. In any event, the potential abuse of powers is not a basis upon which to declare legislation unconstitutional. The proper course is to challenge the abuse whenever it manifests.

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[18] High Court judgment at para 21.

36. OUTA's lack of standing, coupled with its failure to join necessary parties and the absence of those parties in relation to whom OUTA purported to advance argument, resulted in an insufficiency of factual and legal information before the High Court.

37. The insufficiency of factual information before it directly led to the High Court making incorrect conclusions of fact, such as, for example, that –

37.1 "*[t]he power to enforce traffic laws on municipal roads has historically been conferred on municipalities*",[19] which is not the case and which is irrelevant; and

37.2 the notion that it is in any way relevant that "*it speaks for itself that traffic law enforcement on municipal roads must be handled on a municipal level*",[20] which it is not.

38. As I show later, these errors of fact in turn led to the High Court's incorrect conclusions of law.

39. OUTA claimed that it brought the application in its own interest and in the public interest. The main ground on which OUTA relied for this standing, which is repeated in its affidavit in the main application,[21] is that a clause in its memorandum of incorporation ("**MOI**") mandates it to challenge policies and conduct which offend the Constitution. With respect, the reliance which OUTA placed on its MOI, which the High Court appears to have accepted, is misplaced.

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19 High Court judgment at para 28.

20 Ibid.

21 See OUTA's founding affidavit in the main application at para 8.

40. Were OUTA's contention to be accepted, then OUTA would have boundless standing in every matter where it is alleged that legislation offends the Constitution. OUTA must, in each case, plead the grounds on which it has standing to advance the *particular challenge* to the *particular legislation* it seeks to challenge. A faint-passing reference to a general clause in its MOI authorising it to challenge the constitutionality of legislation does not meet this basic standard.

41. Remarkably, despite the obvious deficiencies in OUTA's case for standing, the High Court did not address OUTA's standing at all.

42. The RTMC submits that had the High Court engaged with the standing and non-joinder issues inherent in OUTA's application, it would probably have dismissed the application.

43. Either way, OUTA's lack of standing and non-joinder of relevant parties meant that the matter was dealt with in the absence of relevant information on the history, context, purpose and goals of the AARTO Act, to which I now turn.

The history and context of the AARTO Act

44. South Africa has, for a number of decades, struggled with road safety, and the high rate of road accidents and fatalities on the Republic's roads.

45. One of the primary causes of the Republic's road safety quagmire has been, among other things, a culture of disobedient driver behaviour; the prevalence of road traffic infringements; a scourge of nonchalance and impunity in violations of road traffic laws; and the Republic's poor, inefficient and outdated system of adjudicating and prosecuting road traffic infringements and offences.

46. The government has, over the years, attempted to address these problems by enacting various statutory instruments in order to establish a comprehensive regulatory framework through which the Republic's road safety crisis can be addressed. The AARTO Act is one of those statutory instruments, which must be understood as forming part of a single legislative scheme governing road safety and road traffic matters in the Republic.

47. I must, at this earliest available opportunity, highlight that the regulatory reform in road safety and road traffic matters has happened with full co-operation and co-ordination between the national, provincial and municipal spheres of government.

48. The national government has taken the lead, and most of the regulatory reforms have been pursued through national legislation. I believe that this is in line with the national legislature's competence to legislate in respect of "*road traffic regulation*" as contemplated in Part A of Schedule 4 of the Constitution.

49. It is relevant to note that provincial and municipal governments, whose powers are alleged to have been violated by the AARTO Act, have never contested the pursuit of road safety and road traffic reforms through national legislation. I believe this to be so because all spheres of government recognise that the problem of lack of road safety is a national one, and that any policy response aimed at creating a strong regulatory framework must be undertaken at the national level.

50. The RTMC submits that the provisions of the AARTO Act must be understood in light of the entire legislative scheme of which the Act is part. Indeed, this Honourable Court has said that this must happen "*in the context of the*

[applicable] legislative scheme",[22] which, in the case of the AARTO Act, includes a number of statutory enactments. The following pieces of legislation form part of the legislative scheme within which the AARTO Act has to be understood:

50.1 The National Road Traffic Act ("**the NRTA**"),[23] the various amendments thereto introduced over the years, and the comprehensive regulations promulgated pursuant to the NRTA (as amended);

50.2 The Cross Border Road Transport Act ("**the CBRTA**");[24]

50.3 The National Land Transport Act ("**the NLTA**");[25] and

50.4 The RTMC Act.

51. This scheme of legislative instruments represent the core of the reform agenda which government has pursued in its efforts to transform the Republic's road safety and road traffic regulatory regime. All of them were enacted on the same basis, namely that, like the AARTO Act, they could permissibly be regulated at the national level.

52. As already intimated, one of the areas which cried out for reform in the Republic's road safety and road traffic framework prior to national government's legislative efforts was the Republic's system of adjudicating and prosecuting road traffic infringements and offences.

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22 *Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) and Others* [2017] ZACC 43 at para 30; *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) at para 28.

23 National Road Traffic Act 93 of 1996.

24 Cross-Border Road Transport Act 4 of 1998.

25 National Land Transport Act 5 of 2009.

53. Prior to the AARTO Act, road traffic infringements and offences were adjudicated and prosecuted via the judicial system in terms of the provisions of the Criminal Procedure Act ("**CPA**").[26]

54. The system of adjudication and prosecution of road traffic infringements and offences by courts under the CPA regime had the following problems and/or deficiencies:

54.1 First, since each and every infringement and offence, no matter its severity, fell to be dealt with by the courts, the CPA regime unduly burdened an already overburdened criminal justice system;

54.2 Second, actors within the criminal justice system inevitably relegated road traffic infringements and offences to the bottom of their pile of cases, given the Republic's crime problem and the need to prioritise more "serious" crimes and offences. As a result, a substantial number of road traffic infringements and offences were either never adjudicated and prosecuted at all or took too long to do so;

54.3 Third, the CPA regime had a glaring loophole in that wealthy offenders could simply pay hefty admission of guilt fines and thus escape accountability for their road traffic infringements. I should mention that the payment of an admission of guilt fine in this manner did not attract any criminal record.

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[26] Criminal Procedure Act 51 of 1977.

54.4 Fourth, the aforesaid loophole resulted in the CPA regime unfairly discriminating against poor offenders:

54.4.1 Offenders endowed with deep pockets could violate road traffic laws time and time again and simply pay their way out of liability under the CPA regime.

54.4.2 Poor offenders, on the other hand, would have to wait for years for their infringements and offences to be tried in the penal system – possibly facing incarceration simply because, unlike their wealthy counterparts, they were unable to pay admission of guilt fines.

54.5 Fifth, the CPA regime was almost completely unable to address road safety. That was so because, notwithstanding capacity constraints the unequal treatment of the wealthy and poor offenders under the regime, there was no mechanism to rid the Republic's roads of either offender in the event of repeated transgressions:

54.5.1 The wealthy offender would just continue in their merry way while paying themselves out of every road traffic violation;

54.5.2 The poor offender would also continue driving on the Republic's roads while awaiting for their eventual trial in the criminal courts, which could take years.

54.5.3 The CPA regime therefore did not efficiently protect the safety of road users from the dangerous and potentially fatal practices of repeat offenders of road traffic laws.

55. The government sought to address the problems in the CPA regime by introducing legislation to overhaul that regime and usher a new regulatory framework in the adjudication and prosecution of road traffic infringements and offences in the Republic.

56. To that end, the legislature sought to move the greater part of adjudicating and prosecuting road traffic offences away from the courts to specialised administrative bodies. It is in that pursuit that the legislature shifted to the scheme of administrative adjudication and prosecution of road traffic infringements and offences.

57. In line with its role as the sphere of government vested with the primary regulatory function in respect of road safety and road traffic matters, the national legislature took the lead in passing legislation to move the Republic towards the administrative adjudication of road traffic infringements.

58. To this end, the national legislature passed:

58.1 the RTMC Act, which obliges the RTMC to establish a functional unit dedicated to the administrative adjudication of road traffic offences in order to "*ensure the effective management of the functional area*";[27] and

58.2 the AARTO Act, with which the main application is concerned.

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[27] Meaning that RTIA is responsible for the day-to-day operation, and the RTMC is responsible for the functional area, which falls within the functional area of law enforcement as well.

59. Having dealt with the history, context and broader legislative scheme within which the AARTO Act must be understood, I now turn to the substance, purpose and goals of the AARTO Act.

The substance, purpose and goals of the AARTO Act

60. In line with the history and context provided above, the AARTO Act seeks to usher road safety and promote road traffic quality through the establishment of a scheme to:

60.1 discourage road traffic contraventions;

60.2 facilitate and support the adjudication and prosecution of road traffic infringements and offences;

60.3 implement a points demerit system; and

60.4 provide for the establishment of an agency to administer the scheme.[28]

61. I reiterate that the AARTO Act must be seen in the context of the broader regulatory reforms which have been pursued by government in the areas of road safety and road traffic. The provisions of the Act embody a policy choice of government to introduce fundamental reforms to the conceptual and regulatory framework applicable to road safety and road traffic, which reforms have been led by the national legislature in furtherance of its function of "*road traffic regulation*".

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[28] See preamble of the AARTO Act.

62. I hasten to point out that "*road traffic regulation*" is explicitly a concurrent national and provincial legislative competence, under Part A of Schedule 4 to the Constitution.

63. Properly understood, the provisions of the AARTO Act are a direct response to the deficiencies in the adjudication and prosecution of road traffic infringements and offences under the CPA regime. Whereas under that regime, each and every road traffic infringement engaged the judicial system through the provisions of the CPA, the AARTO Act vests the adjudicative function in specific and purpose-built administrative system for most road traffic infringements. The exceptions are only those road traffic offences which are regarded as serious enough to warrant the attention and prosecution of the courts.

64. In essence, the AARTO Act embodies a new legislative approach, which is designed *inter alia* to enhance road safety by (*a*) ensuring that all drivers are subject to equal application and protection of the law; and thereby (*b*) enhancing the safety and security of all drivers and passengers on the roads of the Republic.

65. No longer will wealthy and offending drivers have the capacity to violate traffic laws with impunity, by paying substantial fines in order to avoid prosecution. No longer will impecunious and offending drivers be a necessary burden to the judicial system, the penal system and the public purse.

66. Instead, a points demerit system, to be evaluated by specialist administrative bodies is contemplated, whereby the wealthy are no longer enabled to violate road traffic laws with impunity; the poor are no longer necessarily subjected to the penal system; and the already-overburdened judicial system is released from the determination of each and every road traffic offence.

67. Under the points demerit system introduced by the AARTO Act, road safety is enhanced by ridding the Republic's roads of serial road traffic offenders. As each infringement accumulates demerit points, repeat offenders carry the risk of having their driving licences suspended and/or cancelled. It is no longer possible for offenders to pay themselves out of their obligations to obey road traffic laws and to heed the safety of other road users.

68. As the reforms introduced by the AARO Act are about transforming the entire culture of unsafe driving on the Republic's roads, the Act no longer "rewards" relatively wealthy drivers for paying their way out of their difficulties. Instead, it seeks to disincentivise dangerous road use in a uniform and equal manner.

69. The RTMC submits that the above goals of the AARTO Act are plainly legitimate legislative objectives, under the Constitution. I have set out facts which show that the need for uniformity in the regulation of road safety and road traffic is self-evident, particularly given the national nature of the governmental goals at stake.

70. The disaggregated system of regulation commended by the judgment of the High Court would be antithetical to the legitimate governmental aims sought to be achieved through the AARTO Act and related legislation.

REASONS WHY THE AARTO ACT IS CONSTITUTIONALLY VALID

71. In concluding that the AARTO Act was constitutionally invalid, the High Court held that the function of national government in road traffic matters has historically been a localised function. That is not correct. The correct position is that the function of national government has always been seen as regulatory.

National provides the regulatory framework, and then the provinces and municipalities carry out the more specific and localised functions.

72. The RTMC contends that the AARTO Act is not constitutionally invalid, but is instead constitutionally valid and lawful, for the following reasons, in summary:

72.1 It falls under the national legislature's concurrent competence to legislate in respect of "*road traffic regulation*" in Part A of Schedule 4 of the Constitution;

72.2 Its provisions are constitutionally compliant by virtue of section 44(3) of the Constitution in that the national legislature's ability to establish a uniform regulatory regime of adjudicating road traffic offences throughout the Republic is reasonably necessary for or incidental to its power of "*road traffic regulation*" in Part A of Schedule 4;

72.3 In any event, any encroachment on the exclusive competencies of provincial and municipal spheres is justified in terms of section 44(2)(c) and (e) of the Constitution. The AARTO Act is necessary in order to maintain national standards and prevent unreasonable action by provinces which may prejudice other provinces and the Republic as a whole.

73. I deal with each of the above grounds of constitutionality in turn.

The AARTO Act falls into "road traffic regulation" in Schedule 4

74. I have provided facts which show that the provisions of the AARTO Act pursue national regulatory objectives aimed at enhancing the safety and security of all drivers and passengers on the roads of the Republic; securing the efficient and

speedy adjudication and prosecution of road traffic infringements and offences; and guaranteeing all road users equal application and protection of the law.

75. The provisions of the AARTO Act are thus concerned with purely national regulatory objectives, and fall neatly within the national legislature's function of "*road traffic regulation*" as contemplated in Part A of Schedule 4.

76. The RTMC submits, with respect, that the High Court misconceived the constitutional inquiry that was before it. The High Court formulated the question it had to answer as this:

> "*[W]hether Parliament ... had the legislative competence to legislate on matters relating to provincial roads or traffic or in relation to parking and municipal roads at a local level*".[29]
>
> (Emphasis added).

77. The High Court then went on to conclude that the answer to whether "*provincial roads or traffic*", "*parking*" and "*municipal roads*" were exclusive competencies was 'yes'.[30]

78. This should have been uncontentious: "*provincial roads or traffic*", "*parking*" and "*municipal roads*" are expressly exclusive competencies. The question before the Court was *inter alia* whether the AARTO Act, properly interpreted, violates these exclusions in a manner that renders the Act invalid and unlawful.

79. In framing the question as it did, the High Court erred by answering a question it was not asked. The Court incorrectly framed a premise or predicate that

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29 High Court judgment at para 28.

30 Ibid at para 36.

assumed the truth of its conclusion, or in other words, the Court committed the fallacy of begging the question (*petitio principii*).

80. Indeed, the High Court's formulation of the question simply assumed, without analysis, that the AARTO Act is concerned with matters relating to "*provincial roads or traffic*", "*parking*" and "*municipal roads*" as contemplated in Schedule 5. But is it? The RTMC submits "no". The AARTO Act is instead concerned with "*road traffic regulation*" as contemplated in Schedule 4.

81. It is trite that "*a Court determining compliance by a legislative scheme with the competences enumerated in Schedules 4 and 5 must at some stage determine the character of the legislation*" (emphasis added).[31]

82. This Honourable Court has held that determining the character of legislation for purposes of the Schedules in the Constitution is done with reference to, *inter alia*, the substance, purpose and goals of the legislation.[32]

83. In *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature*, Chaskalson P held as follows:

> "*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.*"

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31 *Liquor* Bill at para 61.

32 *Ex Parte* Speaker *of the KwaZulu-Natal Provincial Legislature* (above n17) at para 19.

(Emphasis added).

84. In *Liquor Bill*, this Court similarly held that "*[t]he 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*" (emphasis added).[33] The Court then went on to conduct an extensive analysis of the provisions of the Liquor Bill and its objects.

85. Contrary to the above jurisprudence of this Honourable Court, the High Court failed to conduct an analysis of the substance, purpose and goals of the provisions of the AARTO Act.

86. The majority of the High Court's only account of the substance and purpose of the AARTO Act, which appears under the heading "*The purpose of the AARTO Act and the Amendment Act*",[34] is based not on the substantive provisions of the impugned AARTO Act and their purpose, but on the Minister's understanding of what the Act is about in his affidavit. The High Court states that the Minister's affidavit "*confirms that the AARTO Act creates a single national system of road traffic regulation and seeks to regulate "every aspect of road traffic""*.[35]

87. With respect, the High Court abdicated its interpretive function impermissibly. It is trite that legal interpretation to be ascribed to an instrument is strictly a matter for the court, and that an instrument's meaning must be determined on an

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33 *Liquor Bill* at para 63.

34 High Court judgment at para 11.

35 Ibid.

objective basis. The parties' respective subjective interpretations or conduct cannot displace a meaning that is clear and objective.[36]

88. Had the Court been minded to conduct its own analysis of the provisions of the AARTO Act, it would have noted that the Act *does not* in fact regulate "*every aspect of road traffic*", but regulates the adjudication and prosecution of road traffic infringements.

89. The High Court's failure to conduct an analysis of the substance, purpose and goals of the AARTO Act led to the Court dismissing summarily and without meaningful engagement the contention by the Minister and the RTIA that the AARTO Act falls within the national legislature's concurrent competence of "*road traffic regulation*" in terms of Part A of Schedule 4.

90. To this end, the High Court made a series of inexplicable findings in relation to the power of "*road traffic regulation*" in Part A of Schedule 4:

90.1 It held that the power grants —

> "*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*".
>
> (Emphasis added).

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[36] *Capitec* Bank *Holdings and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] 3 All SA 647 (SCA).

90.2 The Court then rejected the Minister and the RTIA's contention that the AARTO Act regulated matters falling under "*road traffic regulation*" in Part A of Schedule 4 on the basis that:

90.2.1 "*this approach cannot be correct and is an approach that was rejected by the Constitutional Court in Gauteng Development Tribunal*";

90.2.2 "*this approach inverts the bottom-up approach*";

90.2.3 "*this approach interprets the functionalities conferred by Schedule 4 in isolation*";

90.2.4 "*this approach ignores the exclusive functionalities conferred upon provinces and local government*";

90.2.5 "*this approach effectively deprives provincial and local government of legislative competence over a functional area which was reserved exclusively to those two government spheres*"; and

90.2.6 "*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.*"[37]

(Emphasis added).

91. With respect, the above findings have no merit whatsoever.

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[37] High Court judgment at para 39.

92. First, the so-called "*bottom-up*" approach, with which I deal in more detail below, is not supported by the jurisprudence of this Honourable Court on which the High Court purported to rely as authority for the approach. As I demonstrate below, the approach is wholly inappropriate in our constitutional dispensation for a number of reasons and must be rejected.

93. Second, it is plainly incorrect that the national legislature's concurrent power of "*road traffic regulation*" in Part A of Schedule 4 gives competence to the national legislature only in respect of national roads.

94. That interpretation of Part A of Schedule 4 is not borne out by the language of the provision, which is "*the inevitable point of departure*".[38] Had the construction given by the High Court been the case, then one would have expected the use of words such as "*national roads and traffic*" or "*national road traffic regulation*".

95. To the contrary, unlike in the case of the exclusive powers of provinces and municipalities where "*provincial roads*" and "*municipal roads*" are accompanied by an internally limiting prefix, the power of "*road traffic regulation*" is not preceded by the prefix "*national*", which suggests that the power is not limited to national roads. It is trite that the wording of the exclusive provincial and municipal competencies in schedule 5 is part of the context which ought to be taken into account when interpreting the words "*road traffic regulation*" in Schedule 4.[39]

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[38] *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) at para 64; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18.

[39] See *Liquor Bill* at paras 38 and 52 for the principle that the competencies in the various schedules have to be read in the context of, and with reference to, one another.

96. Third, the High Court's disaggregated construction of the Constitution leads to absurd practical consequences, of which the High Court respectfully appears to have been unmindful. On the interpretation ascribed to the Constitution by the High Court, a driver can drive from Johannesburg to Midrand and, whilst on the highway, be subject to a nationally regulated system, and yet, the moment that the driver hits the offramp to Midrand, she or he passes into a locally regulated space, with a potentially drastically different regulatory system.

97. It is a settled principle of interpretation that a construction of the Constitution which leads to absurdity must be avoided.[40]

98. Fourth, it is not correct that the construction of the AARTO Act as regulating matters falling under "*road traffic regulation*" in Part A of Schedule 4 interprets the functional areas of competence set out in Schedule 4 in isolation. To the contrary, I show below that it is the so-called "bottom-up" approach taken by the High Court which impermissibly and in defiance of this Court's jurisprudence, interprets the functional areas of exclusive provincial and municipal competence in Schedule 5 in isolation.

99. Fifth, absent a coherent analysis by the High Court of the provisions of the AARTO Act and their purpose and goals, as this Court's jurisprudence mandate, the High Court's reasoning makes it difficult to comprehend why interpreting the Act as falling within Part A of Schedule 4 trenches on the legislative competence of provinces over "*provincial roads and traffic*" and the legislative and executive competence of municipalities over their alleged "*exclusive traffic law*

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[40] *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) at para 28.

enforcement powers in respect of traffic on municipal level and in respect of municipal roads".

100. OUTA attempts to crystallise the High Court's findings in its founding affidavit in the main application in a specious manner. It says that:

100.1 The AARTO Act usurps the executive authority of municipalities over municipal roads under Part B of Schedule 5 of the Constitution because it purports to vest executive authority in national organs of state to enforce road traffic and parking laws at a municipal level by creating a system in terms of which all road traffic and parking laws and by-laws are, by default, enforced through a national system of administrative tribunals, administrative fines and demerit points. This, OUTA says the High Court found, "*moves the enforcement of all road traffic and parking laws to the national level*";[41] and

100.2 The AARTO Act usurps the exclusive legislative authority of the provincial legislatures under Schedule 5 of the Constitution over provincial roads and traffic, municipal roads and municipal traffic and parking, in that the Act purports to legislate on road traffic and parking at all levels of government by creating a single, national system to enforce road traffic and parking laws.

101. There are a number of misconceptions of the AARTO Act in these findings, which the RTMC respectfully submits were precipitated by the High Court's failure to conduct an analysis of the substance, purpose and goals of the AARTO Act, as

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41 OUTA's founding affidavit at para 5.1.

it was required to do in terms of this Court's jurisprudence. Even a basic analysis of the substance, purpose and goals of the AARTO Act would have dispelled these misconceptions, which I set out schematically below.

102. Firstly, the basic flaw in the High Court's findings is that the enforcement functions which the AARTO Act vests in specialised and purpose-built administrative bodies were never performed by municipalities and provinces, and never formed part of the exclusive powers of provinces and municipalities in Schedule 5. The functions were performed by courts and other actors in the criminal justice system, under the CPA regime.

103. I have provided sufficient facts which show that the functions with which the AARTO Act is concerned are about the adjudication of road traffic infringements and offences. Prior to the AARTO Act, those were always court functions in terms of the CPA. The Act shifts all of the functions in relation to the determination of road traffic non-compliances and sanctions for "*infringements*" from the judicial and penal system, where they would previously be determined, to administrative bodies, in order to advance the legitimate legislative objectives which I have set forth above.[42]

104. Regrettably, since the High Court did not engage with the substantive provisions, purpose and goals of the AARTO Act, its judgment does not state which specific provisions of the Act transfer municipal and provincial functions to national administrative bodies, and does not spell out what those precise functions are.

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[42] Non-compliance under the road traffic regulatory scheme is split into three categories, namely: offences (such as, for example, drunk driving, which remain in the judicial and penal system and regulated by the CPA); and "major" and "minor" infringements (which are regulated under the administrative system contemplated by the AARTO Act).

105. I submit, however, that it is clear from its provisions, purpose and goals that the adjudicative functions which the AARTO Act vests in administrative bodies have never been performed by or been part of the powers of municipalities and provinces. Plainly, those adjudicative functions have nothing to do with the exclusive powers of municipalities and provinces.

106. Secondly, and relatedly, it is in any event both factually and legally incorrect that municipalities enjoy or have ever enjoyed exclusive traffic law enforcement powers in respect of municipal roads.

107. The enforcement of road traffic laws in the Republic is conferred on multiple actors, including the RTMC and various officers of the law. These enforcement functions do not depend on the type of road in question. Like other laws, road traffic laws are laws of the Republic and can be enforced throughout the Republic by officers of the law who are authorised to do so. It would be incongruous to suggest otherwise.

108. Yet, under the High Court's construction, it would be unconstitutional for a member of the South African Police Service ("**SAPS**") to apprehend an offender of a road traffic law on a municipal road because the enforcement function is purportedly exclusive to municipalities. With respect, the absurdity in this proposition is palpable.

109. Even more absurd, however, is that a member of the SAPS could be perfectly authorised to chase a road traffic offender on a national road, and then have to abruptly abandon the chase as soon as the offender drives into a municipal road because the SAPS officer has no power to enforce road traffic laws on municipal roads, notwithstanding that it is indisputable that the SAPS is vested with national

jurisdiction. These incomprehensible results could never ever have been what the Constitution sought to achieve.

110. Thirdly, even if it were true that municipalities enjoy exclusive competence in relation to the enforcement of road traffic laws on municipal roads, it would still have to be established that *the provisions of the AARTO Act* violate that exclusive municipal competence in that the *specific functions* which the Act moves from courts to administrative agencies fall into the exclusive municipal competence. This is simply not the case.

111. Fourthly, and relatedly, because there was no exclusive provincial or municipal function which the AARTO Act could be said to have transferred to the administrative bodies it establishes, the High Court's reliance on this Court's decision in *Gauteng Development Tribunal* was misplaced.

112. In that case, the function of approving the rezoning of land and the establishment of townships which the Development Facilitation Act[43] purported to vest in provincial tribunals was quite clearly a municipal function. In fact, despite the purported conferral of the function to provincial tribunals, many municipalities continued to perform the function in parallel under their by-laws (leading to much public confusion) precisely because this was a function that had always vested in them.

113. The present matter is quite clearly distinguishable from *Gauteng Development Tribunal*. There is simply no municipal or provincial function which the AARTO Act can be said to have transferred to the tribunals which it creates. This should

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[43] Development Facilitation Act 67 of 1995.

have been the end of the matter. The AARTO Act cannot possibly usurp the powers of municipalities and provinces by transferring to administrative bodies a function which those spheres of government never enjoyed exclusively and/or performed to begin with.

114. Fifthly, it is incorrect that by legislating to transfer the adjudicative function in road traffic matters from courts to national administrative bodies, the AARTO Act usurps the exclusive power of provinces and municipalities to legislate in respect of "*provincial roads and traffic*", "*municipal roads*" and "*traffic and parking*". Again, the High Court would not have so hastily moved to this conclusion had it had regard to the substance of the AARTO Act.

115. In fact, the provisions of the AARTO Act are clear that provinces and municipalities will continue to enjoy their constitutional powers to pass road traffic legislation in their functional areas. The Act in fact considers provincial and municipal road traffic legislation to be an important cog to the working of the regulatory regime which it establishes.

116. To this end:

116.1 the preamble to the AATO Act states that one of the Act's purposes is "*to support the prosecution of offences in terms of the national and provincial laws relating to road traffic*"; and

116.2 section 2 of the Act states that one of the objects of the Act is "*to encourage compliance with the national and provincial laws and municipal by-laws relating to road traffic*".

(Emphasis added).

117. It is thus trite that infringements and offences adjudicated via the AARTO scheme may flow from breaches of either national legislation, or provincial and/or municipal legislation concerning "*provincial roads and traffic*", "*municipal roads*" and "*traffic and parking*".

118. Far from usurping the legislative powers of provinces and municipalities, therefore, the ARRTO Act explicitly affirms them.

119. Accordingly, the only basis upon which the ARRTO Act can be said to trench upon the exclusive powers of provinces and municipalities is if the national legislature has no power to establish a national road traffic regulatory framework that has any implications for road traffic on provincial and municipal roads.

120. I have already shown the absurdity of an approach which determines the powers of each sphere of government based on the type of road concerned. I have also shown that the words "*road traffic regulation*" do not support a road-based framework because the regulatory power in Part A of Schedule 4 is not limited to national roads, as the High Court found.

121. Moreover, a road-based framework would render the entire road safety and road traffic regulatory scheme in the Republic vulnerable to constitutional challenge since, as I have shown above, the government's reforms regarding the Republic's road safety and road traffic regulatory framework have been pursued through several pieces of national legislation.

122. The RTMC submits that the proper approach in cases like the present one, where there is a dispute as to whether a piece of national road traffic legislation falls under "*road traffic regulation*" under Part A of Schedule 4 or deals with matters

falling under the exclusive provincial and municipal competencies in Schedule 5, is not simply to embark on an inquiry into the type of road with which the legislation is concerned and thereafter reach an answer, as the High Court did.

123. The correct approach is to do what this Honourable Court in *Liquor Bill* said must be done in such cases. The Court must characterise the legislation in question, which it must do by conducting an analysis of the substance, purpose and goals of the legislation.

124. In characterising the legislation, this Court must give meaning and content to each of the legislative competences involved. In line with *Liquor Bill*, this Court must determine "*the scope of the exclusive provincial [and municipal] legislative competence within the functional area[s] of "[provincial roads and traffic", "municipal roads" and "traffic and parking]*"" with reference to "*the national and provincial context against which [this] exclusive competence is afforded*".[44]

125. The relevant context to be considered will include "*the express concurrency of national and provincial legislative power in respect of the functional area of "[road traffic regulation]" created by Schedule 4*".[45] Accordingly, this Court must reject the so-called "bottom-up" approach applied by the High Court because, as I show below, it entailed ascertaining and "*carving out*" the municipal and provincial competencies in isolation, without considering and giving meaning to the national legislature's concurrent competence in terms of Part A of Schedule 4 to legislate in respect of "*road traffic regulation*".

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44 *Liquor Bill* at para 38.

45 Ibid at para 52.

126. The RTMC submits that in giving content to the respective Schedule 4 and 5 competencies involved, this Court must be guided by the words used, which are the inevitable point of departure. The words "*road traffic regulation*" suggest that, in contrast to the exclusive powers of provinces and municipalities, this power is concerned with "*regulation*". Thus, as in the case of the AARTO Act, where the road traffic legislation concerned establishes a national regulatory regime and/or pursues national regulatory objectives, such legislation falls within Part A of Schedule 4.

127. Moreover, this Court must follow the approach in *Liquor Bill* and characterise the AARTO Act by asking whether the matters with which it deals are intra-provincial and thus appropriate for intra-provincial legislation, or whether the matters are inter-provincial and thus appropriate for national regulation.[46]

128. It is common cause that far from being hermetically sealed, the provincial and municipal boundaries of the Republic allow road traffic to flow across many different provinces and municipalities. Many roads in fact seamlessly cover cross-provincial and cross-municipal ground and are an important (and often the sole) mode of travel between provinces and municipalities.

129. Moreover, many people commute to work via road everyday across provincial and municipal borders. It is therefore plain that the road safety and road traffic matters with which the AARTO Act deals are incapable of purely intra-provincial and intra-municipal regulation.

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[46] Ibid at paras 71-3.

130. Were the matters regulated by the AARTO Act left to be regulated by each province and each municipality as propounded by the High Court, multiple absurd consequences would follow, some of which I have already dealt with. On the High Court approach:

130.1 The regulatory regime could differ not only from province to province but also from municipality to municipality depending on whether the road in question is provincial or municipal. Some provinces and municipalities could adopt the AARTO regime on their roads, while some could continue with the CPA regime. The uncertainty and chaos which this would cause on the Republic's roads is innumerable.

130.2 Depending on the applicable regime in a province or municipality, an offender could for the *same infringement* acquire demerit points; have to pay a fine; or face incarceration depending on which side of the provincial or municipal boundary they are for the time being driving.

130.3 Moreover, a serial offender who has contravened road traffic laws so much that they are no longer allowed to drive in an AARTO province or municipality could still be allowed to drive in a CPA province or municipality.

131. These are extraordinary consequences. It is clear, I submit, that a uniform national regulatory regime is necessary in order to govern the matters with which the AARTO Act deals.

132. Under the circumstances, the RTMC submits that the correct interpretation and characterisation of the AARTO Act is that it falls under the national legislature's

concurrent competence to legislate in respect of "*road traffic regulation*" in Part A of Schedule 4.

133. To the extent that there is any doubt about the correctness of this interpretation of the AARTO Act, it is clearly the interpretation which, when compared to the judgment of the court below, best promotes the "*spirit*", "*purport*" and "*object[s]*" of the Bill of Rights.

134. It is trite that, where different interpretations are available – even in circumstances where each interpretation would be constitutionally unobjectionable – a court or tribunal must prefer an interpretation of a given provision that is not only consistent with the Constitution, but which best promotes its "*spirit*", "*purport*" and "*object[s]*".[47]

135. I have shown that the provisions of the AARTO Act pursue legitimate governmental objectives to enhance the safety and security of all drivers and passengers on the roads of the Republic; secure the efficient and speedy adjudication and prosecution of road traffic infringements and offences; and guarantee all road users equal application and protection of the law.

136. An interpretation which upholds the AARTO Act therefore best gives effect to the rights to equality and freedom and security of the person enshrined in the Bill of Rights.

137. Accordingly, the AARTO Act is constitutional.

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[47] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* 2000 (10) BCLR 1079 (CC) at paras 22 to 23; *Phumelela Gaming & Leisure Ltd v Grundlingh* 2006 (8) BCLR 883 (CC) at paras 26 to 27; *Arse v Minister of Home Affairs* 2010 (7) BCLR 640 (SCA).

The AARTO Act is constitutional on the basis of section 44(3), alternatively 44(2) of the Constitution

138. The RTMC submits that even if the AARTO Act did not fall neatly into Part A of Schedule 4 of the Constitution, which it does, the Act is constitutional in terms of section 44(3) of the Constitution.

139. On the basis of the facts I have provided above, it is clear that the national legislature's ability to establish a uniform regulatory regime of adjudicating road traffic offences throughout the Republic is reasonably necessary for or incidental to its power of "*road traffic regulation*" in Part A of Schedule 4.

140. *Alternatively*, the RTMC submits that even if some of the provisions of the AARTO Act trench on the exclusive powers of provinces and municipalities, the Act is constitutional because it falls under one or more of the exceptions in section 44(2) of the Constitution:

140.1 the Act is necessary in order to maintain national standards; and

140.2 the Act is further necessary to prevent unreasonable action by provinces in relation to road safety and road traffic, which may prejudice other provinces and the Republic as a whole.

141. The High Court concluded otherwise, however, I am advised and submit that it was incorrect to do so. Were the reasoning of the High Court correct, and were it and applied to the entirety of the road traffic regulatory scheme, I am advised that there would be a considerable risk that not only the AARTO Act, but also four other pieces of primary legislation, namely, the RTMC Act, the NRTA, the CBRTA and the NLTA would all go by the board.

142. I have provided facts which show that the legitimate governmental objectives of the AARTO Act can only be achieved by uniform national standards.

THE GLARING ERRORS OF FACT AND LAW MADE BY THE HIGH COURT

143. The RTMC submits that the judgment of the High Court is vitiated by a number of fatal errors of fact and law. I have already referred to many of these errors, and expand upon them in this part only to the extent necessary.

144. I address each of the errors schematically and in turn.

145. Firstly, as I have already shown, the Court incorrectly formulated the question which was before it. The Court therefore simply answered the wrong constitutional question, and its judgment falls to be overturned on this basis alone.

146. Secondly:

146.1 The Court erred in applying what it referred to as the "*bottom-up approach*". According to the Court, this approach required "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".[48]

146.2 The "*bottom-up*" approach as espoused by the Court is fatally flawed, in that the powers of each legislative sphere in terms of Schedules 4 and 5 are given meaning and 'carved out' individually and in isolation.

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[48] High Court judgment at para 25.

146.3 This fragmented approach to Schedules 4 and 5 is at odds with the established principle that constitutional provisions (*a*) cannot be construed in isolation; (*b*) are to be interpreted in the context of and with reference to other constitutional provisions; and (*c*) must be read together as a whole.[49]

146.4 The Court's "*bottom-up*" approach gives primacy to the powers of municipalities and provinces in the "lower tiers" of the hierarchy, with the result that national government enjoys only the scraps of what is "left" after the powers conferred on the lower tiers have been carved out. This approach is not borne out by the provisions of Schedules 4 and 5, as those provisions do not give the exclusive competences of provinces and municipalities any superior constitutional status.

146.5 The "*bottom-up*" approach applied by the High Court was consistent with a federal system of government akin to the United States, whereas, at the outset of our constitutional dispensation, this Honourable Court held that the system chosen by the Constitutional Assembly was expressly not a federal system:

> "*The constitutional system chosen by the CA is one of cooperative government in which powers in a number of important functional areas are allocated concurrently to the national and provincial levels of government. This choice, instead of one of "competitive federalism" which some political parties may have favoured, was a choice which the CA was entitled to make in terms of the CPs. Having made that*

[49] See, *inter alia*, cases such as *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2007 (1) BCLR 47 (CC) at para 36-7 and *S v Mhlungu and Others* 1995 (3) SA 867 (CC) at para 15.

choice, it was entitled to make provision in the NT for the way in which cooperative government is to function. It does this in NT 40 and 41".[50]

(Our emphasis).

146.6 The High Court misinterpreted the legal import of the *Liquor Bill*[51] and *Gauteng Development Tribunal*[52]cases upon which it relied for its "bottom-up" approach. Those judgments are no authority for the Court's description of the approach it applied immediately above. I have already shown that these cases are at odds with the approach followed by the Court.

147. Thirdly, the Court erred in considering the AARTO Act in isolation. It is trite that it was required to be interpreted "*in the context of the [applicable] legislative scheme*",[53] which I have submitted includes a number of statutory enactments. I have furnished facts which show that the purpose of the legislative scheme of which AARTO is part is to regulate road safety and road traffic matters in a uniform manner, in the interests of the safety and security of all people in the Republic.

148. Fourthly:

148.1 The High Court erred in fact and in law in concluding that the "*historical*", presumably pre-constitutional, treatment of the enforcement power of traffic laws, pre-AARTO, was treated as a local or provincial power, and that this

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50 *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at para 286.

51 *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC).

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

53 *Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) and* Others [2017] ZACC 43 at para 30; and *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) at para 28.

"*historical*" treatment of the enforcement power of traffic laws weighed in favour of ascribing the same interpretation to the words used in the Constitution.

148.2 It is incorrect in fact because the AARTO Act does not regulate matters such as parking and traffic. It is instead a component of a regulatory scheme designed to achieve the legitimate constitutional objectives of safe road regulation.

148.3 It is incorrect in law for two reasons:

148.3.1 Firstly, to use pre-constitutional legislation to read down a provision of the Constitution is to do things the wrong way around. It inverts the hierarchy, as it is the Constitution which is supreme.

148.3.2 Secondly, even if there were any interpretive weight that could permissibly be attached to the history of traffic regulation pre-AARTO, that history ought to have yielded to information that goes to show the objectives sought to be achieved by Parliament's enactment of the AARTO Act (as opposed to repealed legislation), and it ought to have yielded to the "*language used [in the AARTO Act and the Constitution], understood in the context in which it is used, and having regard to the purpose of the provision*",[54] which make clear that the purpose of the AARTO Act goes far beyond traffic enforcement and issues of parking.

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[54] *Capitec Bank Holdings and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] 3 All SA 647 (SCA) at para 25.

149. Fifthly:

149.1 The Court interpreted the Constitution in a manner that leads to absurd practical consequences, which I have already ventilated above.

149.2 Far from the AARTO Act being a usurpation of local and provincial powers, the Court's interpretation constitutes a usurpation of national government's concurrent powers of "*[r]oad traffic regulation*", specifically referred to in Part A of Schedule 4 to the Constitution.

150. Sixthly, and in the alternative to the reasons set out above, the Court erred in failing to give any consideration whatsoever to whether suspensive relief should be granted, notwithstanding the express acceptance that the Minister sought such relief.[55] Given the clear prejudice that would arise from the invalidation of the AARTO Act, suspensive relief was clearly the appropriate course.

SUSPENSION IS THE APPROPRIATE REMEDY IF THE AARTO ACT IS UNCONSTITUTIONAL

151. Even in the event that all of the RTMC's submissions are rejected, the RTMC submits that suspended relief – which the High Court did not address at all, save to state that the Minister argued for suspended relief[56] – is clearly more appropriate than the immediate invalidation of the AARTO Act that was ordered by the court below.

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55 High Court judgment at para 48.

56 High Court judgment at para 48.

152. Although this Honourable Court operates on a case-by-case basis, one can divine some common features in its suspension jurisprudence. In *J & Another v Director General*, Goldstone J articulated the primary components of the Court's inquiry as follows:

> "*[T]he Court must consider, on the one hand, the interests of the successful litigant in obtaining immediate constitutional relief and, on the other, the potential disruption of the administration of justice that would be caused by the lacuna*".

153. The reasons that suspension would be appropriate are as follows:

153.1 An immediate order of invalidity would create a lacuna in the law that would create uncertainty, administrative confusion and potential hardship.[57] It would result in a fragmented and disaggregated system which would give rise to uncertainty and would be prejudicial to the public purse.

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[57] See, for example, *Prince v President, Cape Law Society & Others* 2002 (2) SA 794 (CC) at para 86; *Van Rooyen & Others v the State & Others (General Council of the bar of South Africa Intervening)* 2002 (5) SA 246 (CC) at para 272; *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development & Another; Executive Council, KwaZulu-Natal v President of the Republic of* South *Africa & Others* 2000 (1) SA 661 (CC) at para 135; *South African National Defence union v Minister of Justice* 1999 (4) SA 469 (CC) at para 42; *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC) at paras 49 to 50; and *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2007 (1) BCLR 47 (CC) at para 92.

153.2 There are multiple legislative cures to the constitutional defect that exist.[58] Suspension would accordingly service the purpose of the doctrine of the separation of powers to leave the matter to Parliament to determine.[59]

154. Accordingly, in the event that this Honourable Court confirms that the ARRTO Act and the Amendment Act are unconstitutional and invalid, the RTMC requests that the operation of the order of invalidity be suspended for a period of **18 months** in order to allow the correct functionary to cure the defect.

THE RTMC'S STATUTORY ROLE AND DIRECT AND SUBSTANTIAL INTEREST IN THE RELIEF SOUGHT IN THE MAIN APPLICATION

155. I am advised that it is well established that a court will refrain from deciding a dispute unless all persons with a direct and substantial interest in the subject matter and outcome of proceedings have been joined as parties.

156. I am advised also that a direct interest is a legal interest in the outcome of the litigation, and that this Honourable Court has held that where an applicant for

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58 *Mashavha v The President of the Republic of South Africa & Others* 2005 (2) SA 476 (CC), 2004 (12) BCLR 1243 (CC) at para 69 (Van der Westhuizen J suspended an order invalidating the assignment of the payment of social grants to the provinces because the whole social payment grant needed to be 'unified' which was a 'Herculean task' requiring legislative action); *South African Defence Union v Minister of Defence & Others* 2007 (5) SA 400 (CC), 2007 (8) BCLR 863 (CC) at para 103 (Order invalidating legislation regulating membership of Military Arbitration Boards who determine union disputes suspended because there were so many ways that the legislation could be constitutionally constituted); *S v Jordan & Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC) at paras 125–126 (O'Regan and Sachs JJ, in dissent, would have found that a law criminalizing only the prostitute and not her client was unfairly discriminatory. Because the constitutional defect was not based on the right to privacy, decriminalization was not the only option available to the legislature. It could also choose to criminalize prostitution without discriminating. They therefore would have suspended the invalidity).

59 See generally S Seedorf & S Sibanda 'Separation of Powers' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 12.

intervention shows it has some right which may be affected by the order sought, permission to intervene must be granted.

157. I am advised further that this Honourable Court has also made clear that an entity may, by virtue of its status in relation to a particular statutory framework, have an interest in the interpretation and application of that framework, and that intervention should be granted to a party where a court's determination will have a material effect on that party's core functions.

158. This affidavit has set out the factual basis on which the RTMC grounds its direct interest in the subject matter of the main application, as well as legal standing to intervene. I have submitted that the RTMC's statutory functions include:

158.1 First: in terms of the RTMC Act, the RTMC is conferred statutory powers and obliged to establish functional units in respect of the functional areas of, among others, "*administrative adjudication of road traffic offences*" and "*road traffic law enforcement*".[60] The subject matter of the AARTO Act is thus at the core of the RTMC's statutory mandate;

158.2 Second: the AARTO Act itself confers the RTMC with the statutory function of being an issuing authority under that Act;[61] and

158.3 Third: the RTMC Act establishes the RTMC expressly "*as a partnership between national, provincial and local spheres of government*", in the interest of "*enhanced co-operative and co-ordinated road traffic strategic planning, regulation, facilitation and law enforcement*" and with the aim "*to*

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60 See section 18 of the RTMC Act.

61 See the definition of "*issuing authority*" in section 1 of the AARTO Act.

regulate, strengthen and monitor intergovernmental contact and co-operation in road traffic matters".[62] The RTMC therefore:

158.3.1 performs a unique statutory role as the glue between national, provincial and local spheres of government in relation to road traffic regulation and the enforcement of road traffic laws. It is mandated to enhance co-operation and co-ordination among the spheres. It therefore has an interest in any proceedings where one sphere is alleged to have trenched upon the powers of another, as this has implications for co-operation and co-ordination; and

158.3.2 possesses specialist knowledge regarding the intersection and boundaries of the powers demarcated to each of the spheres of government in relation to road traffic, and how these powers are to be understood in light of the broader national, provincial and municipal road traffic regulatory framework in the Republic. This knowledge is pivotal, and should be before any court deciding whether any piece of road traffic legislation is unconstitutional on the bases advanced in the main application.

159. Accordingly, by virtue of its statutory status, I respectfully submit that the RTMC has the requisite direct and substantial interest in the main application, that it would be in the interests of justice to grant the intervention application, and on that basis that the RTMC must be granted leave to intervene.

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62 Section 2(a) of the RTMC Act.

CONDONATION

160. Rule 8(1) of this Honourable Court's Rules provides that a party entitled to join as a party in proceedings may, on notice to all parties, apply for leave to intervene "*at any stage of the proceedings*".

161. On the other hand, Rule 16 requires an appeal to be lodged within 15 days of the date of the order of constitutional invalidity. To this extent, I am advised that, once joined to these proceedings (should the Court grant such an order), there is a risk that this application may be seen in a certain sense to be out of time, because the RTMC may, pursuant to being granted leave to intervene as a co-appellant, be held to be non-compliant with the applicable time period (notwithstanding that it would only apply to the RTMC once it becomes a party), because, like all the other respondents who were cited by OUTA in the court below, the RTMC seeks to challenge the order of the High Court by way of appeal.

162. Therefore, to the extent that there has been any non-compliance with the Court Rules, the RTMC hereby applies for condonation.

163. It is trite that this Court will grant condonation for non-compliance with its Rules where it is in the interests of justice to do so, which in turn will depend on factors such as the prospects of success, the extent and reason for the non-compliance, and the effect on the administration of justice and other litigants.[63]

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[63] *Mphephu-Ramabulana and Another v Mphephu and Others* [2021] ZACC 43 at para 33; *Mankayi v AngloGold Ashanti Ltd* 2011 (3) SA 237 (CC) at para 8; and *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) at para 20.

164. The RTMC has provided extensive facts which show that it is in the interests of justice for this Court to allow the RTMC to advance the submissions and information which it intends to advance should it be granted leave to intervene. Those facts, I submit, are equally supportive of the granting of condonation.

165. Given that the submissions and information to be advanced by the RTMC are of direct relevance to, and will assist this Court to determine, the core constitutional issues in the main application, there are reasonable prospects that the RTMC's contentions will succeed in both this intervention application and the main application. It is trite that reasonable prospects of success "*carry more weight than other factors*" in the interests of justice inquiry and thus favour the granting of condonation.[64]

166. Moreover, the RTMC has not unduly delayed its intervention, and there would be no prejudice to the respondents should condonation be granted. They will have a fair opportunity to file answering affidavits on the intervention application and contest the RTMC's submissions on the merits of the confirmation application, should they be advised to do so. Given the importance of the information and submissions which the RTMC intends to advance to the determination of the constitutional issues in the main application, the administration of justice would evidently be served if condonation is granted.

167. In the premises, the RTMC submits that it is in the interests of justice for this Court to condone any non-compliance by this application for leave to intervene with the Court's Rules.

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64 *S v* Ramabele 2020 (2) SACR 604 (CC) at para 35.

LEAVE TO ADMIT NEW EVIDENCE SHOULD BE GRANTED TO THE EXTENT DEEMED NECESSARY

168. I foreshadowed in the introductory section of this affidavit that I may make certain submissions which were not placed before the High Court. While I am advised that this constitutes a necessary condition to qualifying as 'new' or further evidence, it is not a sufficient condition. I am advised and submit that, as a bare-minimum condition, information brought before an appellate court for the first time will not constitute new or further evidence unless it constitutes information of which the relevant court may not permissibly take judicial notice. If the information is such that a court may permissibly take judicial notice thereof, then there is no need to apply for admission of further 'evidence'.

169. In my respectful submission, any information that may be deemed to be 'new' consists of context and background material of which this Court may comfortably take judicial notice. It is information that is relevant to the proper determination of the substance and purpose of the AARTO Act.

170. However, out of caution, in case this Court differs with the RTMC, I respectfully seek the leave of the Court to adduce any information that may be deemed to be new or further evidence admitted on appeal. I do so not least because whatever new facts may be advanced are incontrovertible, as envisaged in Rule 31 of the Constitutional Court Rules.

171. Alternatively, I am advised and respectfully submit that this is an exceptional case in which the new facts must be admitted into the record. Had the RTMC been joined in the High Court proceedings, the new facts would have been placed before the High Court. It is the omission to join RTMC as a party in the

High Court proceedings that has resulted in the facts not being placed before the High Court. It would not be in the interests of justice to determine the constitutionality of the AARTO Act without regard to the material new facts. It may even be contrary to the rule of law to do so.

CONCLUSION

172. In the circumstances, I ask that the RTMC be granted the orders in the notice of motion. For the reasons set out above, I respectfully submit that the main application is without merit, and it should be dismissed.

173. Wherefore I pray for an order in terms of the notice of motion in this intervention application, to which this affidavit is attached.

DEPONENT

The deponent has acknowledged that the deponent knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at CENTURION on 8th March **2022**, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

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