IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT: 19/22

In the matter between:

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

RTMC'S WRITTEN ARGUMENT PURSUANT TO PARAGRAPH 5(b) OF THE CHIEF JUSTICE'S DIRECTIONS DATED 28 JULY 2022

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INTRODUCTION

Synopsis

1. This is an application in which the Organisation Undoing Tax Abuse ("**OUTA**") – the applicant in this application, and the successful party in the court of first instance ("**the High Court**") – seeks this Court's confirmation of an order declaring the Administrative Adjudication of Road Traffic Offences Act 46 of 1998 ("**the AARTO Act**"), as well as the Administrative Adjudication of Road Traffic Offences Amendment Act 4 of 2019 ("**the Amendment Act**"), as being unconstitutional and invalid.[1] At the level of remedy, OUTA asks that both pieces of legislation should be set aside with immediate effect.

2. OUTA's central complaint in this application (to which we shall refer as "**the application**" and "**the confirmation application**", interchangeably) concerns what OUTA contends is an unconstitutional violation of the Constitution's allocation of powers between national, provincial and local spheres of government. This Court has admitted the RTMC as a party to these proceedings, and a respondent to OUTA's application. The reason why the RTMC was required to seek leave to intervene was because, in the High Court, OUTA elected not to cite the RTMC as a party.

3. OUTA's attack on the AARTO- and Amendment Acts is two-pronged:

    3.1. OUTA contends that the AARTO Act is unconstitutional and invalid on the basis that Parliament had no entitlement to enact it from the outset, Because the subject matter which the AARTO Act seeks to regulate falls within the exclusive competence either of provincial legislatures contained in Schedule 5 of the Constitution ("**Schedule 5**"), or alternatively falls within the exclusive competence

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1 *Organisation Undoing Tax Abuse v Minister of Transport and Others* 2022 (2) SA 566 (GP) at para 51.

of municipalities. In this way, OUTA characterises the AARTO Act as being an unconstitutional take-over.

3.2. OUTA contends that the Amendment Act is unconstitutional and invalid on the basis that the provision made in the Amendment Act vesting the third respondent to this application ("**the RTIA**") with a discretion to effect service of documents electronically – to a phone number or an email address, of a road user's own most recent choosing – is "*patently [constitutionally] inadequate*",[2] on the basis that the regime which pre-dates the Amendment Act permits for service by way of postage. OUTA contends that allowing the RTIA the additional option to exercise its discretion to effect electronic service in a given circumstance creates an increased risk that the document so served will not come to the knowledge of its intended recipient.[3]

4. The RTMC submits among other things that –

4.1. the AARTO Act is not unconstitutional and invalid, because it falls within the category of powers which are concerned with, or reasonably incidental to, powers to legislate in the context of "*road traffic regulation*", which the Constitution entrusts to national, provincial and local government, concurrently, under Schedule 4 to the Constitution ("**Schedule 4**"); and

4.2. OUTA's challenge to the Amendment Act is stillborn and need not detain the Court for two reasons, namely (*a*) OUTA has failed to raise a constitutional challenge to the legislation to which the Amendment Act refers in defining "*electronic service*", with the result that the unchallenged legislation must be presumed to be

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2 OUTA's HoA at para 44.

3 OUTA's HoA at para 44.

constitutionally valid; and (*b*) OUTA's arguments regarding the risk of non-effective service which is posed by electronic mail when compared with mail by post are unsubstantiated and illusory.

4.3. In the event that the Court differs with the RTMC on the merits, the RTMC submits in the alternative that (*a*) with respect to OUTA's challenge to the AARTO Act, suspensive relief is appropriate; and (*b*) with respect to OUTA's challenge to the provisions of the Amendment Act concerning the issue of service of documents. The RTMC makes this submission *inter alia* because the AARTO Act constitutes but one component of an interlocking regulatory scheme – it is the adjudicative spoke in the larger 'wheel' of regulation, designed for the enhancement of road traffic regulation in South Africa, pursuant to Parliament's powers concurrent legislative powers under Schedule 4 – and its absence, in the event that the AARTO Act is set aside as OUTA asks, would create an unnecessary legislative *lacuna*.

5. In OUTA's heads of argument in this Court, OUTA persists in its contention that the constitutional invalidity it contends for is established. In support of this proposition, OUTA argues among other things that its key arguments have gone entirely unanswered, by any of the respondents.[4] This is demonstrably incorrect. The Road Traffic Management Corporation ("**the RTMC**"), we submit, has answered every one of OUTA's purported grounds of constitutional invalidity comprehensively, and the RTMC has explained why the position advanced by OUTA has no merit.

6. In advancing its arguments to the contrary, OUTA's heads of argument do not engage

[4] For example, in OUTA's Heads of Argument ("**OUTA's HoA**"), OUTA contends that constitutional invalidity has been established on the basis that "*[t]he respondents do not make any attempt on the papers to justify why the Acts would fall within the scope of section 44(2) of the Constitution*".

with any of the RTMC's contentions, at all. OUTA's heads of argument appear assiduously to avoid doing so, which is peculiar, given that (*a*) this Court has ordered that the RTMC has been admitted as a party to these proceedings, as the fifth respondent; and (*b*) this Court, on 28 July 2022, furnished the parties with Directions from the Chief Justice ("**the CJ's Directions**"), in which OUTA was directed to furnish the Court with written argument.

7. On a proper interpretation of the CJ's Directions, we submit that the CJ's Directions called for written argument including an explanation from OUTA regarding (a) whether and why OUTA submitted the RTMC's contentions were wrong, if indeed they were incorrect; or (b) whether the RTMC's contentions were conceded by OUTA.

8. OUTA elected to do neither. We shall submit that this has important consequences for OUTA's prospects of successfully obtaining the order confirming the constitutional invalidity granted by the High Court, and the confirmation of the remedy setting aside the AARTO- and the Amendment Acts.

Structure of these submissions

9. We shall expand on why we respectfully submit that the confirmation application should be dismissed in the paragraphs that follow. In doing so, we shall address six substantive topics, in turn:

    9.1. First, we attempt to place the enactment of the AARTO Act in its proper context, and to summarise its intended purpose.

    9.2. Secondly, we summarise what we submit is the legal import of the AARTO Act, and the regulatory system which it actually introduces.

    9.3. Thirdly, we explain the different reasons why we respectfully submit that the

AARTO Act is consistent with the Constitution, and thus lawful and valid.

9.4. Fourthly, we explain the reasons why each one of OUTA's contentions to the contrary are without merit.

9.5. Fifthly, we set out why we submit that OUTA's secondary option for the purposes of challenging the AARTO Act, respectfully, is either stillborn or meritless.

9.6. Sixthly, we explain why we submit that, even if this Court were to differ with the entirety of our submission on the merits, we would submit that, at the level of remedy, an immediate setting aside of the AARTO Act would not be appropriate.

10. We summarise the relief that the RTMC seeks in the final section.

THE AARTO ACT: CONTEXT AND PURPOSE

11. In order to arrive at the "*true interpretation*" of the AARTO Act for the purposes of this application, it is well established that the Court will conduct the inquiry in accordance with the rule formulated in *Heydon's Case*, the well-known English decision.[5] Adapted to our post-constitutional framework, the case impels an inquiry in four stages,[6] namely:

11.1. What was the law before the making of the Act?

11.2. What was the mischief and defect for which the law did not previously provide?

11.3. What remedy has Parliament designed in order to remedy the mischief or remedy?

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5 *Heydon's Case* (1584) 76 ER 637.

6 *Hleka v Johannesburg City Council* 1949 (1) SA 842 (A) at 852. Also see *R v Venter* 1907 TS 910 at 914 to 915 and 921; *Lister v Incorporated Law Society, Natal* 1969 (1) SA 431 (N) at 434; *R v Sachs* 1953 (1) SA 392 (A) at 399; and *S v Mhlungu and Others* 1995 (3) SA 867 (CC) at para 36.

11.4. For what purpose was the remedy provided?

12. We organise our submissions below, accordingly. The answers to each question, we submit, favour the rejection of OUTA's constitutional challenge, and they emerge from our submissions below.

The practical challenges that Parliament sought to reverse by the enactment of the AARTO Act and its related legislation

13. For a number of decades, South Africa has struggled to come to grips with the challenge of efficient and effective road safety, and the high rate of road accidents and fatalities on the Republic's roads.[7]

14. Various causes were identified for the Republic's problems around road safety.[8] Some were the following:

14.1. 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**").[9]

14.2. The problem with the CPA insofar as the effective regulation of road traffic was concerned was that its system of adjudication and prosecution of road traffic infringements and offences – designed as it was to flow through the courts of the Republic – suffered from major deficiencies":[10]

14.2.1. Since each and every infringement and offence, no matter its severity, fell

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7 RTMC's Founding Affidavit ("**RTMC's FA**") at para 44, RTMC's Bundle, vol 1, page 27.

8 RTMC's FA at para 103, RTMC's Bundle, vol 1, page 45.

9 Criminal Procedure Act 51 of 1977.

10 RTMC's FA at para 54 *et seq*, at page 30.

to be dealt with by the courts, the CPA regime unduly burdened an already overburdened criminal justice system;[11]

14.2.2. 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.

14.2.3. As a result, a substantial number of road traffic infringements and offences were either never adjudicated and prosecuted at all, or otherwise, it took too long to do so.

14.3. Another major cause of the problems identified, as the RTMC explains in its affidavit, was the road users in the country, themselves. Among the South African public, it was observed that –

14.3.1. there was a culture of disobedient driver behaviour; [12]

14.3.2. there was a high rate of road traffic infringements; and

14.3.3. there was a "*scourge of nonchalance and impunity*", in respect of violations of road traffic laws.[13]

15. Feeding and facilitating this culture of impunity was another systemic regulatory shortcoming with the CPA:

15.1. However non-discriminatory the pre-existing framework may have appeared on its face, a loophole in the framework of the CPA permitted for the law to be applied

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11 RTMC's FA at para 54.1, RTMC's Bundle, vol 1, at page 30.

12 Ibid.

13 RTMC's FA at para 45, RTMC's Bundle, vol 1, at page 27

in an unequal manner. It allowed for wealthy offenders – due to their relative wealth – to act unlawfully, without being made to experience any serious consequence.

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

15.3. Poor offenders, by comparison, 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.

15.4. The practical effect of this system was thus that it was inherently unequal.

16. The inequality of the system under the CPA regime had further knock-on effects for road safety. That was so because permitting offenders to pay their way out of the consequences for endangering other road users, and thereby expunge their wrongdoing completely, meant that there was no mechanism to rid the Republic's roads of either offender in the event of repeated transgressions.

17. The CPA regime therefore ultimately failed to protect the safety of road users from the dangerous and potentially fatal practices of repeat offenders of road traffic laws. This led the government to address the problems in the CPA regime by introducing a legislative overhaul for the regulation of road traffic.

The regulatory scheme

The legislative 'spokes' in the regulatory 'wheel'

18. After the enactment of the Constitution, Parliament ushered in a new, post-constitutional

regulatory framework for the adjudication and prosecution of road traffic infringements and offences in the Republic. The raft of legislation introduced by Parliament to this end was designed to "*transform the Republic's road safety and road traffic regulatory regime*",[14] and was as follows:

18.1. The National Road Traffic Act ("**the NRTA**"),[15] the various amendments thereto introduced over the years, and the comprehensive regulations promulgated pursuant to the NRTA (as amended);

18.2. The Cross Border Road Transport Act ("**the CBRTA**");[16]

18.3. The National Land Transport Act ("**the NLTA**");[17]

18.4. The RTMC Act, which requires the RTMC *inter alia* 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*";[18] and

18.5. the AARTO Act.

19. The AARTO Act is thus but one component of the scheme that the Legislature has implemented. All the spokes in the regulatory wheel are premised on the same fundamental principle, namely that, traffic on roads in South Africa could permissibly be regulated at the national level, as a concurrent legislative competence.

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14 RTMC's FA at para 51, RTMC's Bundle, vol 1, at page 29.

15 National Road Traffic Act 93 of 1996.

16 Cross-Border Road Transport Act 4 of 1998.

17 National Land Transport Act 5 of 2009.

18 Meaning that the 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.

The purpose of the system introduced by the AARTO Act

20. 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. The AARTO Act seeks to enhance road safety and promote road traffic quality through the establishment of a scheme to –

    20.1. discourage road traffic contraventions;

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

    20.3. provide for the establishment of an agency to administer the scheme.[19]

21. As the RTMC describes in its affidavit:

> "*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.*
>
> *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*".[20]
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> (Our emphasis).

22. The RTMC's description of this change in approach echoes a judgment of the Full Bench of the Pretoria High Court, per Tuchten J, in which a different constitutional challenge to the AARTO Act was dismissed. In *Dembovsky*, the Court opined that "*the AARTO*

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19 See the Preamble of the AARTO Act.

20 RTMC's FA at para 64, RTMC's Bundle, vol 1, at page 34.

legislation ... represented a shift in executive and legislative policy". [21]

23. The way the AARTO Act seeks to achieve these and other goals is by the imposition of a points demerit system. Under the points demerit system, road safety is sought to be enhanced by more effectively targeting the Republic's roads of serial road traffic offenders:

    23.1. Under the prior regime, each and every road traffic infringement engaged the judicial system through the provisions of the CPA. While relatively wealthy offenders could purge themselves from the Court system, those who could not afford to pay would ineluctably be a burden on the court system.

    23.2. Contrastingly, the AARTO Act (*a*) decriminalises certain offences under the CPA (such as failing to indicate, crossing a solid barrier line and speeding); and (*b*) vests the adjudicative function with respect to such traffic infringements – which was formerly the sole duty of the judiciary – in specialist statutory functionaries, charged with the duty to make quasi-judicial decisions.

24. The rationale for introducing the system that the AARTO Act creates was the following:[22]

    24.1. As each infringement will accumulate demerit points, repeat offenders would carry the risk real consequences, including the consequence of having their driving licences suspended or cancelled, regardless of whether they are wealthy or poor;

    24.2. The equality of consequence for road traffic infringers in analogous circumstances regardless of their socio-economic status would better protect and promote the

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21 *Dembovsky v Minister of Transport and Others* (unreported judgment of a Full Bench of the Pretoria High Court, under case number 24245/2018) at para 33, which will be furnished to the Court for convenience together with these written submissions.

22 RTMC's FA at paras 60 to 70, RTMC's Bundle, vol 1, pages 33 to 70.

constitutional rights of all road users to be "*equal before the law*" and to the "*equal protection and benefit of the law*";[23]

24.3. A points demerit system would permit the authorities more effectively to target the Republic's roads of serial road traffic offenders; and

24.4. The legal certainty of uniformity in the regulation of road safety, we submit, is a worthy regulatory end in itself.[24]

25. The provisions of the Act embody a legitimate 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 concurrent legislative function with respect to "*road traffic regulation*", pursuant to Schedule 4.

26. We explain why we submit that the AARTO Act does so in a manner that is constitutionally valid after we summarise its effect, below.

THE EFFECT OF THE AARTO ACT IN SUMMARY

27. It is necessary to explain what the AARTO Act does do and what it does not, because, respectfully, the argument advanced by OUTA distorts it.

What the AARTO Act does do

28. In its heads of argument,[25] we submit that OUTA summarises the system which the AARTO Act introduces adequately, and correctly. The divergence between OUTA and

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23 RTMC's FA at para 28.3.1.1, RTMC's Bundle, vol 1, page 20.

24 RTMC's FA at para 28.3.1, RTMC's Bundle, vol 1, page 20.

25 OUTA's HoA at paras 34 to 36.2.

the RTMC lies elsewhere. To avoid unnecessary duplication, we shall attempt to make our submissions on this score as briefly as possible.

29. What the AARTO Act is essentially about is the administrative outsourcing of the judicial decision-making function, and its replacement with a system of quasi-judicial adjudication.

30. The practical effect of the AARTO Act, in summary, is to migrate the prosecution of road traffic offences for which an admission of guilt fine may be paid from the CPA to an administrative, process-driven scheme, which is overseen by a specialist regulator. The adjudicative process it introduces may be summarised as follows:

    30.1. The AARTO Act and its related legislation now operates in parallel to a regulatory scheme which includes the NRTA and the CPA. The AARTO Act was brought into force in certain geographical jurisdictions within South Africa. The NRTA legislation would then be enforced through the country, save for where the AARTO Act was in operation.[26]

    30.2. Persons who fall foul of the AARTO Act are no longer criminal offenders. They become infringers, or alleged infringers, and in doing so, they become parties to administrative processes. The latter processes could culminate in what Tuchten J described in *Dembovsky* as –

> "*administrative decisions by which such infringers would become liable to pay penalties levied by and payable to organs of state established for that express purpose*".[27]

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26 *Dembovsky v Minister of Transport and Others* (unreported judgment of a Full Bench of the Pretoria High Court, under case number 24245/2018) at para 29.

27 Ibid at para 34.

(Our emphasis).

30.3. The dispute-resolution process is engaged by an infringement notice, which might be issued, in the form of a fine, by a competent provincial or municipal traffic- or law enforcement officer, in a given province in the Republic. The same municipal traffic- or law enforcement officer might instead issue a parking fine, which would be administered through the same framework. Alternatively, a fine will be issued and served personally or by way of mail, within 60 days.

30.4. Where an alleged infringer wishes to dispute an infringement, the AARTO Act creates a two-tiered, quasi-judicial framework for decision-making, comprising –

30.4.1. the RTIA, is the decision maker of first instance, to whom an alleged infringer may furnish written representations, for the purpose of the RTIA's decision; and

30.4.2. the Appeals Tribunal.

30.5. In doing so, in the words of the Full Bench in *Dembovsky*, the AARTO Act –[28]

> "*requires no more of the RTIA than is required of any functionary who sits in administrative reconsideration or administrative appeal from another functionary in his department, ie honestly, lawfully, reasonably and in a procedurally fair manner*".[29]

30.6. In the context of a constitutional challenge to the AARTO Act, the lawfulness of the RTIA's future conduct in discharging this mandate will be presumed.[30]

30.7. Should an alleged infringer remain aggrieved after the decision of the Appeals

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28 Ibid at para 102.

29 Ibid at para 102.

30 *S and Others v Van Rooyen and others (Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), which we return to further below.

Tribunal, the 'ordinary' rights of all persons to approach the courts on review and / or appeal will then avail the alleged infringer.

30.8. Where infringers do not pay the penalty imposed, they "*become liable to have execution levied upon their goods by civil or quasi-civil processes to enable the relevant organ of state to recover what had, by then, become owing to it*".[31]

What the AARTO Act does <u>not</u> do

31. OUTA's contentions depict the AARTO Act as having the effect of eviscerating the legislative, executive and enforcement powers allocated to provincial and local governments, exclusively.[32]

32. This is a mischaracterisation which appears to inform the entirety of OUTA's constitutional complaint. It therefore bears emphasising four things that the AARTO Act does <u>not</u> do:

32.1. First, the AARTO Act does not establish a separate police force, or any form of law enforcement officers to patrol the streets of a given province or municipality,

32.2. Secondly, the AARTO Act does not in any way render an alleged infringer an "*accused person*" for the purposes of the CPA or for the purposes of the alleged infringers fair-trial rights, under the Constitution. Nor does the AARTO Act purport to repose in any official any powers of search and seizure, or arrest, whatsoever.[33]

32.3. Thirdly and relatedly, as far as RTIA's powers to visit adverse consequences on an alleged infringer are concerned, the worst-case scenario for an alleged

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31 Ibid at para 34.

32 See, for example, OUTA's HoA at paras 16 to 23.

33 *Dembovsky v Minister of Transport and Others* (unreported judgment of a Full Bench of the Pretoria High Court, under case number 24245/2018) at para 115.

infringer is that the alleged infringer will (*a*) be issued with an "*enforcement order*", with "*enforcement*" going no further than for the RTIA to apply the corresponding demerit points to the alleged infringers driving licence; (*b*) payment of a fine; and (*c*) if the alleged infringer does not abate from infringing, and it establishes a pattern of infringements, suspension and/or cancellation of an alleged infringer's driving licence.

32.4. Fourthly, the AARTO Act does not purport to vest in the RTIA powers of executive oversight or enforcement over a given city's parking or policing. In fact, throughout the AARTO Act, the issue of parking is not once mentioned, and the AARTO Act does not place the RTIA in the business of taking over <u>any</u> functions of local law enforcement officers, at all. In the present application, these facts appear to have been overlooked by the Court of first instance.

THE AARTO ACT IS CONSISTENT WITH THE CONSTITUTION

33. The RTMC has submitted that the purposes which the AARTO Act is intended to achieve are legitimate, and that the AARTO Act is clearly congruent with the Constitution.

34. Albeit that it is OUTA which bears the burden of demonstrating constitutional <u>in</u>validity, as opposed to *vice versa*, we submit that the RTMC is clearly correct. Below, we explain why we submit that the AARTO Act is properly categorised under Schedule 4, and thus that it is indeed constitutionally valid, before explaining in the next section why we submit that OUTA's contentions fall short of the required mark.

The Constitution's distribution of national, provincial and local governmental powers

35. At the time that South Africa transitioned to democracy, and after the adoption of the

Interim Constitution of the Republic of South Africa ("**the Interim Constitution**"),[34] a number of principled choices pertaining to South Africa's future governance were required to be made:

> "*An interim government, established and functioning under an interim constitution agreed to by the parties, would govern the country on a coalition basis while a final constitution was being drafted. A national legislature, elected (directly and indirectly) by universal adult suffrage, would double as the constitution-making body and would draft the new constitution within a given time. <u>But – and herein lies the key to the resolution of the deadlock – that text would have to comply with certain guidelines agreed upon in advance by the negotiating parties. What is more, an independent arbiter would have to ascertain and declare whether the new constitution indeed complied with the guidelines before it could come into force</u>*".[35]
>
> (Our emphasis).

36. Among the legislative choices required to be made included a question of whether the Constitution would enshrine a unitary system of government, or whether the Republic would instead be democratically reconstructed as a federalist state.

37. The "*guidelines*" to which reference is made in this Court's *dictum above* are the "*solemn pact*"[36] embodied in 34 "**Constitutional Principles**", or "**the CPs**".[37] At Constitutional XXI,[38] among others, the drafters of the Interim Constitution chose a hybridised version of the former. That is to say, fundamentally, it was determined that the government of the Republic of South Africa would be structured as a unitary state, and that legislation would be of a fundamentally national-level competence:

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34 Interim Constitution of the Republic of South Africa, Act 200 of 1993.

35 *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at para 12.

36 See Chapter 5 of the Interim Constitution.

37 *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at paras 14 to 15.

38 See *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at Annexure 2.

"*Where uniformity across the nation is required for a particular function, the legislative power over that function should be allocated predominantly, if not wholly, to the national government.*

The determination of national economic policies, and the power to promote interprovincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government".[39]

(Our emphasis).

38. The same choice was carried through into the final text of the Final Constitution. This Court, as the "*independent arbiter*" to which reference is made in the *dictum* further above, carefully explained the basic structure of the Constitution, the unitary nature of South Africa's system of governance and the limited powers of provincial and local government, in the following terms:

"*The CPs do not contemplate the creation of sovereign and independent provinces; **on the contrary, they contemplate the creation of one sovereign state** in which the provinces will have only those powers and functions allocated to them by the [Constitution]. They also contemplate that the CA will define the constitutional framework within the limits set and that the national level of government will have powers which transcend provincial boundaries and competences. Legitimate provincial autonomy does not mean that the provinces can ignore that framework or demand to be insulated from the exercise of such power.*

....

[Section] 147(1) [of the Constitution] deals with conflicts between national legislation and provisions of a provincial constitution. Preference is given to national legislation which is specifically required or envisaged by the Constitution and to national legislative intervention made in terms of [section] 44(2) [of the Constitution]. Conflicts between national legislation and provisions of a provincial constitution in the field of the concurrent legislative competences set out in sch[edule] 4 [of the

[39] Constitutional Principle XXI at sub-paragraphs 4 and 5.

Constitution] are to be dealt with in the same manner as conflicts in respect of such matters between national legislation and provincial legislation.

....

The continued existence of the provinces as well as their power to adopt provincial constitutions is recognised by CP XVIII. ***The provinces are not sovereign states. They were established by the IC and derive their powers from it.*** *One of these powers is to enable a provincial legislature to adopt a constitution for its province subject to the proviso that such a constitution should not be inconsistent with the IC or the CPs.*

....

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

....

Inter-governmental cooperation is implicit in any system where powers have been allocated concurrently to different levels of government and is consistent with the requirement of CP XX that national unity be recognised and promoted*. The mere fact that the [Constitution] has made explicit what would otherwise have been implicit cannot in itself be said to constitute a failure to promote or recognise the need for legitimate provincial autonomy.*

....

In the result, what is contemplated by [sections] 142 and 143 [of the Constitution] is not a provincial constitution suitable to an independent or confederal state but one dealing with the governance of a province whose powers are derived from the Constitution. On that analysis there is no real departure from the power of

constitution making which a provincial government enjoys in terms of IC 160. That power, properly analysed, is a power subject to the same limitations and the same potential which we have identified in [sections] 142 and 143 [of the Constitution]".[40]

(Our emphasis).

39. This is why –

39.1. pursuant to section 40 of the Constitution, all "*organs of state*" and "*spheres of government*", while they remain "*distinctive*" with respect to one another, are "*interdependent and interrelated*";[41] and

39.2. pursuant to section 41 of the Constitution, all "*organs of state*" and "*spheres of government*" must among other things "*provide effective, transparent, accountable and coherent government for the Republic as a whole*" and "*co-operate with one another in mutual trust and good faith*".[42]

40. For the reasons below, we submit that the AARTO Act is consistent with these and all other relevant provisions of the Constitution.

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40 *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at paras 259, 269, 270, 287, 290 and 350

41 Our emphasis.

42 Sections 41(1)

The AARTO Act is constitutionally compliant

The standard to be applied in determining the functional competence with respect to the AARTO Act

41. The approach to be followed in characterising the AARTO Act was expounded by this Court in *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature*.[43] There, the Court held that the exercise of determining the character of legislation for purposes of the Schedules in the Constitution must be done with reference to*, inter alia*, the substance, purpose and goals of the legislation:

> "*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*".[44]
>
> (Our emphasis).

42. In *Liquor Bill*,[45] this Court glossed the same principle as follows:

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

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43 *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).

44 *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.

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

(Our emphasis).[46]

43. In *Municipal Employees Pension Fund*,[47] this Court held relevantly that –

> "*It is imperative to consider the legislative history and purpose of the enactment of the ordinances and the Provident Fund Act because they are necessary tools in the interpretation of relevant provisions and the context of the legislative scheme*".
>
> (Our emphasis).

44. We proceed on this basis. We set out our submissions regarding the relevant history, context to and purpose of the AARTO Act further above, together with the salient features of the road traffic regulatory scheme.

The AARTO Act should be characterised as Schedule 4 legislation

45. We submit that the facts in the RTMC's affidavit show that the provisions of the AARTO Act pursue regulatory objectives that are clearly of a national breadth and character, in that they are aimed at –

    45.1. enhancing the safety and security of all drivers and passengers on the roads of the Republic;

    45.2. securing the efficient and speedy adjudication and prosecution of road traffic infringements and offences; and

    45.3. guaranteeing all road users equal application and protection of the law.[48]

46. The provisions of the AARTO Act are thus concerned with purely national regulatory

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46 *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC) at para 63.

47 *Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) and Others* [2017] ZACC 43.

48 RTMC's FA at para 64, RTMC's Bundle, vol 1, page 36.

objectives and fall neatly within the national legislature's function of "*road traffic regulation*" as contemplated in Part A of Schedule 4. This is consistent with this Court's well-established jurisprudence with respect to the purposive interpretation of statutes, having regard to their text and structure.

47. It is clear, we submit, that a uniform national regulatory regime is necessary in order to govern the matters with which the AARTO Act deals.

48. 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.

49. In our respectful submission, the RTMC is clearly correct. If so, that is an end of the matter, and the Court need not proceed further.

The AARTO Act additionally meets the requirements under sections 44(2) and 44(3) of the Constitution

50. Even if the AARTO Act did not fall neatly into Part A of Schedule 4 of the Constitution, we submit the result is the same, as the AARTO Act comfortably clears the bar for constitutional validity pursuant to the provisions of section 44(3) of the Constitution.

51. On the basis of the facts we have set out above, we submit that 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.

52. Alternatively, we submit that even if this were not so, and if there were some provisions of the AARTO Act which this Court holds do indeed trench on the exclusive powers of provinces and municipalities, the AARTO Act would remain constitutionally valid, because

it falls under at least two of the exceptions set out in section 44(2) of the Constitution:

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

52.2. 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.

53. For the AARTO Act to fall under one of the exceptions is sufficient. In light of our submissions concerning the purpose and effect of the AARTO Act, we submit that the availability of both exceptions is established.

OUTA'S CHALLENGE TO THE AARTO ACT HAS NO MERIT

Summary of OUTA's primary constitutional challenge

54. Whether the AARTO Act falls within the national legislature's concurrent competence in Schedule 4, to enact legislation for the purposes of "*road traffic regulation*", is the core issue before this Court.[49]

55. OUTA contends that the answer is 'no'. It contends instead that the AARTO Act stands to be interpreted as falling within the exclusive executive and legislative competence of provinces and municipalities as contemplated in Schedule 5.

56. Below, we begin by summarising some of the principles of statutory interpretation which we submit are germane. We shall thereafter proceed to explain, in turn, why we submit that each of OUTA's contentions are incorrect.

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[49] RTMC's FA at para 154, RTMC's Bundle, vol 1, page 61

Salient principles of statutory interpretation

57. That the inquiry into whether or not the AARTO Act is constitutionally valid is an objective one is well established.[50] This Court has held that "*[t]he fact that a dispute concerning inconsistency may only be decided years afterwards does not affect the objective nature of the invalidity*".[51]

58. In the inquiry into whether OUTA has established a case for the constitutional invalidity of the AARTO Act, six further principles of statutory interpretation, in submission, are particularly important:

    58.1. First, the proper approach to the interpretation of the AARTO Act "*begins with the text and its structure*",[52] albeit that the language to be interpreted must always be "*properly contextualised*".[53] A court will interpret 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]

    58.2. Second, where a court is called on to interpret a document, it must do so in such a manner that it gives meaning to each and every word used, and it should be slow to conclude that words in a single document are tautologous or superfluous.[55]

    58.3. Third, when scrutinising an Act of Parliament, a court will "*always*" interpret the

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50 *Ferreira v Levin and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at para 26.

51 Ibid at para 27.

52 *Capitec Bank Holdings and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] 3 All SA 647 (SCA) at para 51.

53 *Cool Ideas 1186 CC v Hubbard* 2014 (8) BCLR 869 (CC) at para 28.

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

55 *African Products (Pty) Ltd v AIG South Africa Ltd* 2009 (3) SA 473 (SCA) at para 13.

provisions "*purposively*",[56] and it must proceed from the charitable presumption that the legislation in question – as the product of the work of Parliament and a co-equal branch of government, consistently with the doctrine of the separation of powers – that Parliament always legislates in good faith:

> "*We cannot assume that the Legislator tilted at windmills; <u>if he made regulations to amend an evil, we must take it that the evil existed</u>*".
>
> (Our emphasis).

58.4. Fourth and related to this latter presumption of interpretation is the principle that, in the words of this Court in *Independent Institute of Education*[57] –

58.4.1. "*every part of a statute should be construed so as to be consistent, so far as possible, with every other part of that statute, and with every other unrepealed statute enacted by the Legislature*";[58] and

58.4.2. *"[s]tatutes relating to the same subject matter should be read together because they should be seen as part of a single harmonious legal system*".[59]

58.5. Fifth, this Court has held that "*all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity*",[60] and, furthermore –

58.5.1. if a provision or statute is capable of two different meanings – one of which

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56 *Cool Ideas 1186 CC v Hubbard* 2014 (8) BCLR 869 (CC) at para 28.

57 *Hleka v Johannesburg City Council* 1949 (1) SA 842 (A) at 853.

58 *Chotabhai v Union Government (Minister of Justice)* 1911 AD 13 at 24.

59 *Independent Institute of Education (Pty) Limited v Kwazulu-Natal Law Society and Others* [2019] ZACC 47 at para 38 and 40.

60 *Cool Ideas 1186 CC v Hubbard* 2014 (8) BCLR 869 (CC) at para 28.

is constitutionally valid and one which is not – it must be interpreted in a manner that would be constitutionally valid provided that to do so would not unduly strain the language concerned;[61] and

58.5.2. an interpretation which is consistent with the Constitution must be preferred over one that is not consistent therewith,[62] provided that the text and structure of the language in question is reasonably capable of bearing such a constitutionally consistent meaning.[63]

58.6. Sixth and finally, and notwithstanding the principles above, this Court has cautioned that "*text is not everything*":[64]

"*Unless there is no other tenable meaning, words in a statute are not given their ordinary grammatical meaning if, to do so, would lead to absurdity*".[65]

(Our emphasis).

OUTA's argument collapses as its contentions attack a straw man

59. The premise of the entirety of OUTA's argument in this Court is premised on what we respectfully submit is a misconception. OUTA argues that the AARTO Act has an effect of robbing the provincial- and municipal spheres of government of their exclusive legislative and executive powers. On OUTA's conception, the effect of the AARTO Act, and thus the source of the alleged constitutional invalidity of the legislation, may be

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61 *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.

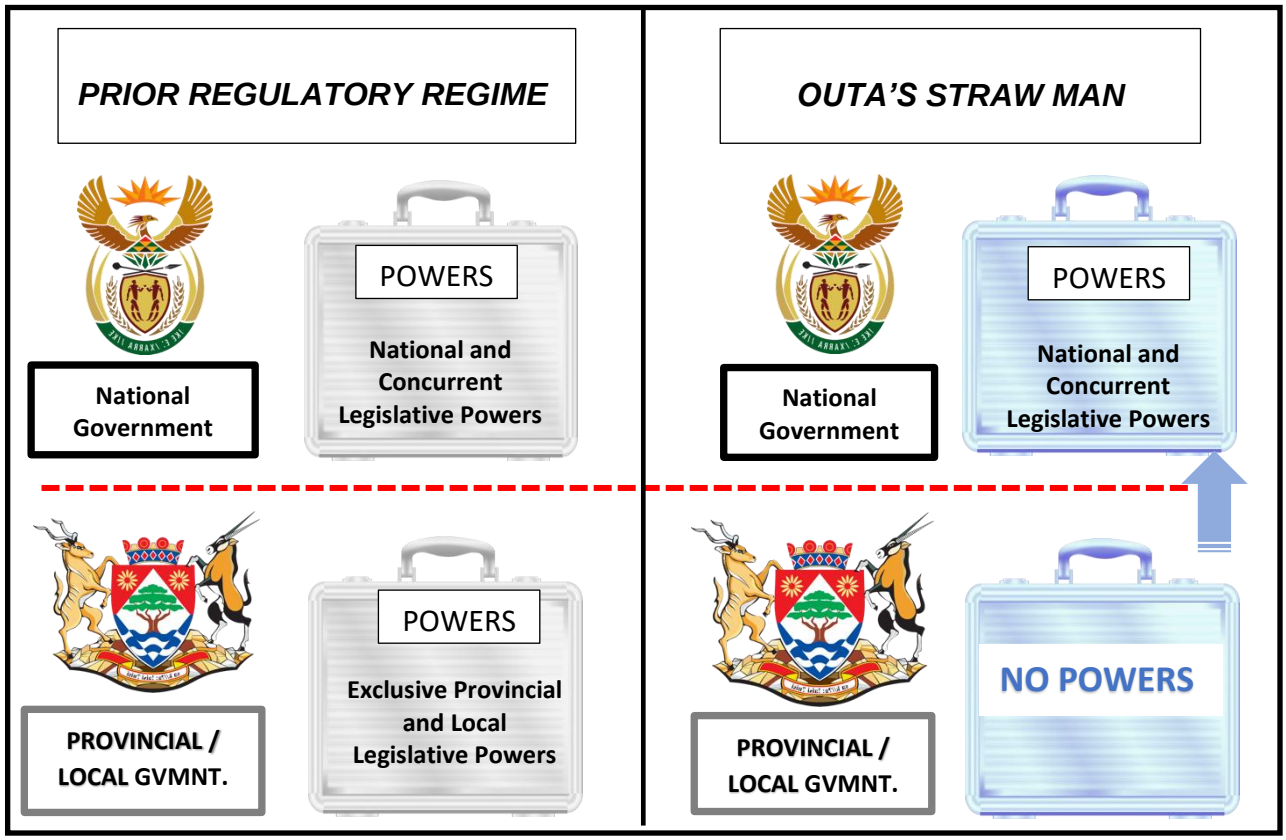
62 *Cool Ideas 1186 CC v Hubbard* 2014 (8) BCLR 869 (CC).

63 *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In Re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) at para 23.

64 *Saidi v Minister of Home Affairs* [2018] ZACC 9; 2018 (4) SA 333 (CC); 2018 (7) BCLR 856 (CC) at para 36.

65 Ibid.

represented as follows:



60. In truth – as we submit we have shown further above – the AARTO Act has no such effect. OUTA's contentions fatally overlook the AARTO Act's co-operative and supportive purpose,[66] as well as to overlook that the only relevant functionary which has been unburdened of some of its responsibilities is the judiciary, and the courts:

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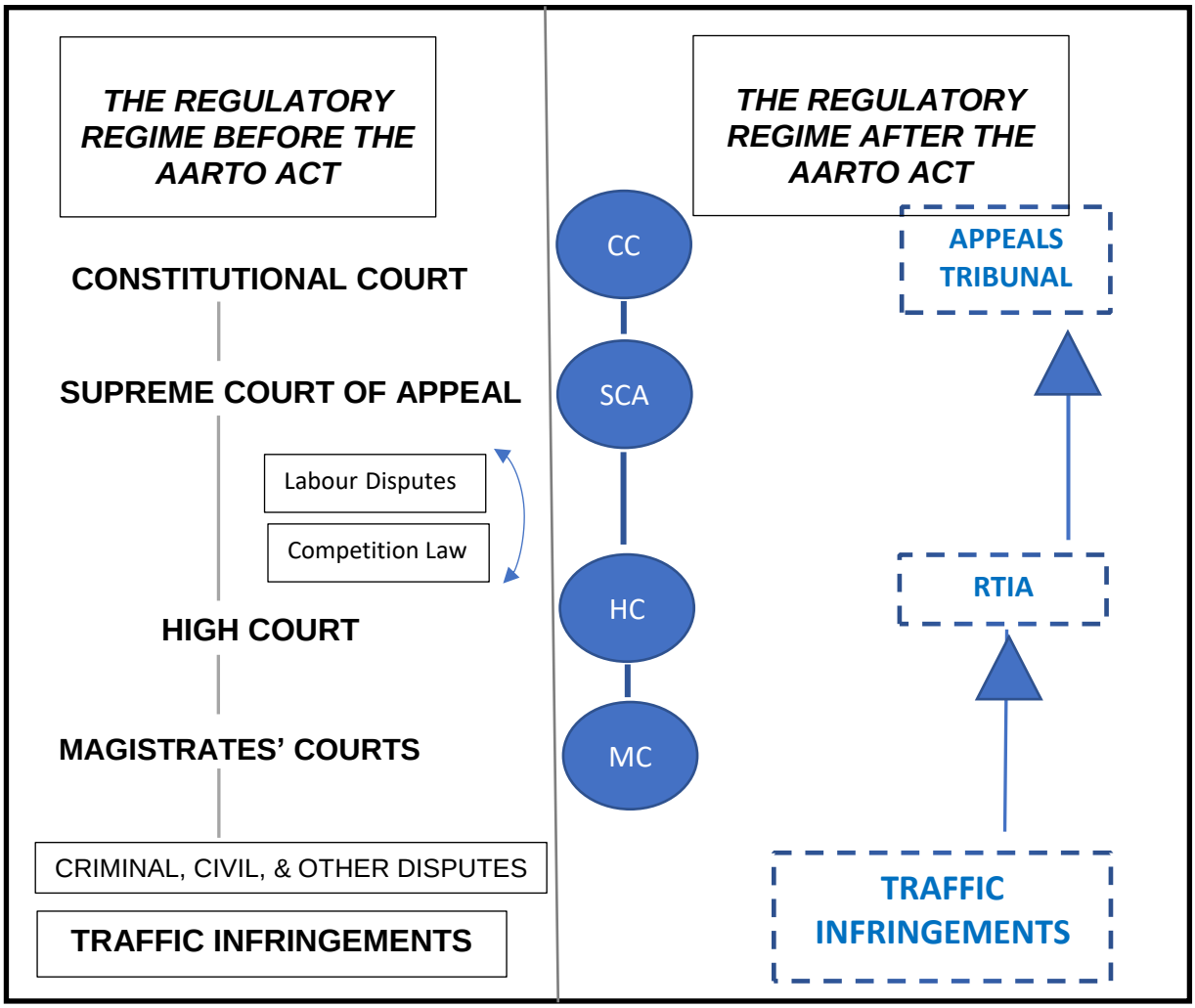
66 Indeed, the Preamble to the AARTO Act states that one of the Act's purposes is "*to support the prosecution of offences in terms of the national and provincial laws relating to road traffic*"; section 2(a) of the AARTO Act says that the "*encourage[ment] of compliance with the national and provincial laws and municipal by-laws relating to road traffic*"[66] shall be included among the eight listed "*[o]bjects*" of the legislation; section 2(g) provides for the objective which the RTIA is mandated to achieve, which is "*to support the law enforcement and judicial authorities and to undertake the administrative adjudication process*"; section 2(h) provides that an object of the AARTO Act is "*to strengthen co-operation between the prosecuting and law enforcement authorities by establishing a board to govern the agency*" (all the emphasis is our own). These are but a few of the provisions of the AARTO Act which undercut what we submit is OUTA's mischaracterisation.



61. The powers of provincial- and local governments thus not only remain fully intact, their efficacy is fortified by the co-operative and supportive provisions of the AARTO Act, and the related legislation in the regulatory scheme.

62. OUTA's confusion as to the true effect of the AARTO Act is fatal to its constitutional challenge to it, because, in challenging the AARTO Act for having an effect that it does, OUTA commits the straw man fallacy.[67] We submit that its constitutional complaints miss

[67] Or in other words, OUTA argues against an incorrect and distorted version of the content and effect of the AARTO Act.

the mark because it aim for the wrong target.

OUTA's confirmation application proceeds from the incorrect premise that a "bottom-up" approach is applicable

63. Another fundamental premise of OUTA's argument that the AARTO Act should be characterised as a power which falls within Schedule 5 is its "*bottom-up*" approach to the manner in which the distinction between spheres of government stands to be interpreted under the Constitution.[68]

64. The interpretive approach commended by OUTA gives primacy to the powers of municipalities and provinces over the powers of national government.[69] It does so by 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. [70] The result is that the national sphere of government enjoys only the scraps of what is left, after the powers conferred on the lower tiers have been carved out.[71]

65. This interpretive approach embodies precisely the conception of "*competitive federalism*"[72] which this Court eschewed when it held that our Constitution, unlike that of the United States of America for example, *do[es] not contemplate the creation of sovereign and independent provinces*".[73]

66. We submit that the AARTO Act gives effect to the Constitutional Principles, in that it

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68 See OUTA's HoA at paras 8 to 12.4.

69 RTMC's FA at para 146.4, RTMC's Bundle, vol 1, page 56.

70 RTMC's FA at para 146.1, RTMC's Bundle, vol 1, page 56.

71 RTMC's FA at para 146.4, RTMC's Bundle, vol 1, page 56.

72 *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at paras 259.

73 Ibid.

facilitates the unburdening of our judicial system, whilst at the same time ensuring "*uniformity across the nation ... for a particular function"*.[74]

67. A central premise of OUTA's constitutional challenge thus stands to be rejected on the principles established in the same judgment to the effect that South Africa was entitled to make its own choice, that the Constitution has made the choice for the country, to "*creat[e] ... one sovereign state*" with a "*constitutional system of cooperative government*". The power to enact the AARTO Act is an incident of the "*power to promote interprovincial commerce"* allocated by the Constitution to the national government.[75] OUTA's approach to the interpretation of the AART Act fatally misconstrues and inverts this hierarchy.

The AARTO Act does nothing to intrude upon municipal executive competences

68. OUTA contends that the administrative and adjudicative functionaries introduced in the AARTO Act render the Act unconstitutional and invalid because, by doing so, the AARTO Act intrudes upon the "*exclusive executive competence of municipalities to enforce road traffic laws within their area of jurisdiction*".[76]

69. It is not clear how this could ever be so, and we submit that OUTA does not adequately explain it. All OUTA says of relevance in this regard is the following:

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

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74 Constitutional Principle XXI at para 4.

75 See Constitutional Principle XXI at para 5.

76 OUTA's HoA at para 16.

....

In relation to municipal roads, traffic and parking these features of the AARTO Act and Amendment Act are unconstitutional in exactly the same way".

(Our emphasis).

70. The final submission immediately above, relating to "*municipal roads, traffic and parking*", is inapposite to the purpose and effect of the AARTO Act, for reasons we have already explained.

71. As regards what remains, what OUTA concedes in the portion of its argument we have underlined is that the AARTO Act does not divest municipalities of any powers that they had prior to the enactment of the Act. We submit that OUTA's concession is correct.

72. This being so, we submit that OUTA's concluding assertion that "*it is only municipal organs of state*" that can be vested with the requisite quasi-judicial administrative powers does not follow from its prior premises: without demonstrating that municipalities have been divested of any legislative powers, the argument that the AARTO Act is unconstitutional for doing so falls away.

There is no intrusion upon the exclusive provincial legislative competence

73. Under this heading, OUTA advances a bald assertion, in two paragraphs, with no substantiation, explanation or argument to support it:

"*The Acts set out to create a single, national system for the enforcement of all road traffic infringements. The Minister himself acknowledges that 'the AARTO Act aims to regulate every aspect of road traffic.* ***This plainly intrudes upon the exclusive legislative competence of provinces (under Schedule 5, Parts A and B) in relation to provincial roads and traffic, and municipal roads and traffic. By purporting to enact both the AARTO Act and the Amendment Act, Parliament***

has acted beyond the legislative powers conferred on it in the Constitution. *Thus, both Acts are independently unconstitutional and invalid on this ground*".[77]

(Our emphasis).

74. OUTA fails to address or meet the RTMC's submissions in its affidavit that the AARTO Act in fact supports the legislative competence of provincial- and local government explicitly, so much so that the AARTO Act makes explicit reference to the RTIA's adjudicative function, and the powers of provincial and local governments to make laws.

75. We submit that OUTA's contentions are incorrect, and that they stand to be rejected, on the basis of our prior submissions together with the submissions immediately below.

OUTA's contentions regarding the exception under section 44(2) of the Constitution are demonstrably incorrect

76. OUTA contends that the AARTO Act does not fall within the exception set out under section 44(2) of the Constitution. OUTA argues that its case is completely unchallenged, in any way, by any of "*[t]he respondents*" before the Court:[78]

"*The respondents do not make any attempt on the papers to justify why the Acts would fall within the scope of section 44(2) of the Constitution*".[79]

(Our emphasis).

77. OUTA's contention is incorrect. The RTMC has explained in detail in its affidavit, why, having regard to the history, context and purpose of the AARTO Act (*a*) the Act is necessary in order to maintain national standards with respect to road traffic regulation, those national standards including the expeditious resolution of disputes with respect to

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77 OUTA's HoA at para 23.

78 OUTA's HoA at para 27.

79 OUTA's HoA at para 27.

road traffic infringements and reversing South Africa's challenges in the context of road safety; and (*b*) 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.[80]

OUTA fails to address the RTMC's contentions to the congruency of the AARTO Act with the requirements of section 44(3) Constitution

78. OUTA fails to address any of the RTMC's contentions regarding why the exception under section 44(3) of the Constitution is sufficient on a self-standing basis for OUTA's confirmation application to be dismissed. Section 44(3) provides as follows:

> "*Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4*".
>
> (Our emphasis).

79. In our respectful submission, OUTA does not address the reasons why the AARTO Act, with the purpose and effect we have described further above because it cannot do so.

80. In any event, we reiterate our submission that the AARTO Act meets the requirements of section 44(3) of the Constitution, without difficulty.

OUTA effectively concedes that its interpretation of the AARTO Act leads to absurdities

81. In the RTMC's affidavit before this Court, the RTMC drew OUTA's attention to the fact that the interpretation OUTA contended for, stood to be rejected on account of the fact

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80 See RTMC's FA at paras 140 to 142, RTMC's Bundle, vol 1, page 43, read together with RTMC's FA at paras 44 to 70, pages 28 to 35.

that it led inescapably to a number of absurdities, such that they were fatal to OUTA's case:

81.1. 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.[81]

81.2. 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.[82]

81.3. 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.[83]

81.4. 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. [84]

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81 RTMC's FA at para 96, RTMC's Bundle, vol 1, page 43.

82 RTMC's FA at para 130.1, RTMC's Bundle, vol 1, page 52.

83 RTMC's FA at para 130.2, RTMC's Bundle, vol 1, page 52.

84 RTMC's FA at para 130.3, RTMC's Bundle, vol 1, page 52.

81.5. Under OUTA's construction of the statute, 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. [85]

81.6. Even more absurd, 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. [86]

81.7. These incomprehensible results could never ever have been what the Constitution sought to achieve. [87]

82. OUTA has not addressed these absurdities in its heads of argument, in any way or at all. As a bare minimum for OUTA's case is to have any prospects of success, we submit that it was necessary for the existence of any absurdity at all to be firmly dispelled.

83. OUTA has not done so. In any event, we submit that the absurdities the RTMC identifies are accurate, sound and established. We submit that OUTA's confirmation application stands to be dismissed for this reason, alone.

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85 RTMC's FA at para 108, RTMC's Bundle, vol 1, page 46.

86 RTMC's FA at para 109, RTMC's Bundle, vol 1, page 46.

87 Ibid.

OUTA fatally fails to explain why the RTMC's interpretation is not the interpretation that best-promotes constitutional rights

84. To the extent that there is any doubt about the correctness of this interpretation of the AARTO Act, the RTMC argues in its affidavit that the interpretation it advances should be preferred, as the RTMC's interpretation is the one which, when compared with the interpretation OUTA contends for, best promotes the "*spirit*", "*purport*" and "*object[s]*" of the Bill of Rights:

> "*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. ... 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. ... Accordingly, the AARTO Act is constitutional*".[88]
>
> (Our emphasis).

85. OUTA elected not to answer the RTMC in its answering affidavit, and it has made the same election in its heads of argument. We submit that the RTMC is correct. If so, we submit that this alone should be lethal to the confirmation application's success.

Conclusion on OUTA's primary challenge to the AARTO Act

86. It follows from what we have set out above that OUTA's primary constitutional challenge to the AARTO Act is without merit, and it stands to be rejected.

87. We proceed to explain why we submit that OUTA's secondary challenge should suffer

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[88] RTMC's FA at paras 134 to 136, RTMC's Bundle, vol 1, page 46.

the same fate.

OUTA'S CHALLENGE TO THE AMENDMENT ACT IS STILLBORN OR MERITLESS

88. OUTA's backstop argument, in the event that its primary challenge to the validity of the AARTO Act fails, is to ask the Court for an order, in OUTA's words –

> "*declaring section 30 of the AARTO Act (and section 17 of the Amendment Act, to the extent necessary)*".[89]
>
> (Our emphasis).

89. We shall refer to sections 30 and 17 of the Amendment Act is "**the impugned provisions**". We shall return to the reasons why we have underlined the language of OUTA's secondary challenge further below.

90. The reasons OUTA seeks this relief, as expressed in OUTA's heads of argument, are based on an allegation that the provision made for the service of documents on infringers is "*patently inadequate*":

> "*OUTA's argument is that section 17 [of the Amendment Act] removes the requirement that service must be personal or by registered mail*".[90]
>
> (OUTA's own emphasis).

91. OUTA does not contend that the impugned provisions are irrational. Instead, OUTA appears to contend that the Amendment Act is unconstitutional is that it introduces a system of service which is procedurally unfair.[91] This alleged unfairness, OUTA contends, is gravely prejudicial to road users.[92] This is contended to be so because unsuccessful

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89 OUTA's HoA at para 32.

90 OUTA's HoA at para 48.2

91 See OUTA's HoA at paras 46.1 to 46.2.

92 OUTA's HoA at para 39.

delivery of a document to an infringer may trigger the following series of potential consequences:

91.1. The impugned provisions put an infringer at a "*significant risk*"[93] that the infringer concerned will not receive the document sought to be served on her or him;

91.2. If the infringer does not receive the document sought to be served, the infringer will incur demerit points, which will be added to the infringer's existing points;[94]

91.3. If the infringer wishes to obtain a professional driving permit or to renew a licence disc, the infringer will not be permitted to do so unless and until the infringers' indebtedness is either expunged by payment, or revoked by the RTIA;[95]

91.4. If the infringer continues to receive demerit points thereafter, the infringer may be disqualified from driving for a certain period of time; [96]

91.5. After the period of disqualification, if the infringer subsequently incurs enough demerit points to earn second and third disqualifications from driving, the infringer's licence will be cancelled and destroyed; [97]

92. We submit that OUTA's secondary challenge is (*a*) stillborn; and, additionally, (*b*) without any merit. Below, we shall set out the terms of each of the provisions, before we proceed to explain the reasons which support each of our two substantive submissions on the merits.

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93 OUTA's HoA at para 44.

94 OUTA's HoA at para 36.1.

95 OUTA's HoA at para 36.2.

96 OUTA's HoA at para 36.1.

97 OUTA's HoA at para 36.1.

The impugned provisions

93. OUTA's characterisation of the content of section 17 of the Amendment Act, and of the change it will introduce to section 30 of the AARTO Act, is correct:

    93.1. The current regime for service is contained in section 30 of the AARTO Act. Section 30(1) of the AARTO Act grants the RTIA a statutory discretion to choose between one of two alternative modes of service:

    > "*[a]ny document required to be served on an infringer in terms of this Act, must be served on the infringer personally **or** sent by registered mail to his or her last known address*".
    >
    > (Our emphasis).

    93.2. To emphasise: pursuant to section 30 of the AARTO Act, the law as it currently stands is that whenever the need for a document to served on an infringer arises, the RTIA will have an election, which it will be required to exercise in the context of all relevant circumstances.

    93.3. Section 17 of the Amendment Act adds one additional option to the personal and postal modes of service that the AARTO Act places at the RTIA's operational disposal. It permits the RTIA a discretion to effect service of documents by the additional mode of what the Amendment Act refers to as "*electronic service*".

94. For reasons we shall shortly explain, the definition of "*electronic service*" for the purposes of the AARTO Framework is equally important for the purposes of OUTA's secondary challenge as the fact that the existing framework grants a discretion. "*[E]lectronic service*" is defined in the Amendment Act by reference to two separate pieces of legislation which stand outside of the road-traffic regulatory structure:

"*electronic service*" means "*service as defined by electronic communication as defined in the Electronic Communications Act, 2005 and as contemplated in section 19(4) of the Electronic Communication and Transactions Act, 2002*".

(Our emphasis).

95. No less important than the definition of "*electronic service*" is the fact that neither of the Electronic Communications Act 36 of 2005 ("**the EC Act**") nor the Electronic Communication Transactions Act 25 of 2002 ("**the ECT Act**") form the subject matter of OUTA's secondary challenge in this confirmation application.

OUTA's secondary constitutional challenge is stillborn

96. A consequence of OUTA's election to leave the EC Act and the ECT Act unchallenged in this application is that the application will be determined on the basis that both statutes are presumptively valid.[98]

97. Because section 17 of the Amendment Act defines "*electronic service*" with express reference to definitions that are contained in presumptively valid statutes, we submit that it necessarily follows that OUTA's secondary constitutional challenge falters at the starting blocks. We submit that it need not detain the Court.

98. We address the merits of the challenge below, out of caution.

OUTA's secondary constitutional challenge has no merit

99. OUTA makes clear in its heads of argument that its attack in substance is not, in fact, directed at the discretion vested in the RTIA by section 30 of the AARTO Act. To the

[98] See, for example, *Minister of Water and Environmental Affairs v Kloof Conservancy* [2016] 1 All SA 676 (SCA) at para 15.

contrary, OUTA's argument explicitly supports it:

> "*... The argument is not that section 17 removes the option of personal service by registered mail. Rather OUTA's argument is that section 17 removes the requirement that service* ***must be*** *personal or by registered mail. Thus, instead of serving an infringer personally or by registered mail, the relevant authority may now simply send an SMS or leave a voicemail. By introducing* ***less effective*** *service options, section 17 dilutes the standard of service and increases the likelihood of non-delivery*.".[99]
>
> (Our emphasis (in part)).

100. OUTA attempts to use the principle that proper service is critical as a springboard towards its concluding contention that service may only ever be effected in two ways, namely, either personally, or, alternatively, by way of registered mail.

101. If section 17 of the Amendment Act is OUTA's true constitutional target, then it necessarily follows that OUTA's true gripe under this heading is that, having permitted the RTIA to make an administrative decision to effect service by way of registered mail (under section 30 of the AARTO Act), the broadening of the RTIA's discretion to permit an administrative decision, to effect service by way of "*electronic service*" as opposed to registered mail.

102. We submit that OUTA's argument immediately falters irremediably because it is self-contradictory by nature. Every one of the complaints OUTA advances against the new mode of service in section 17 applies in equal measure with respect to the existing regime which OUTA seeks to protect. That is to say, at best for OUTA, there is as much of a practical risk that an infringer will not receive registered mail as there is that an infringer will not receive an SMS or e-mail at the phone number or e-mail address that the infringer has selected.

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99 OUTA's HoA at paras 43, 44 and 48.2.

103. We submit that there are a number of further reasons why OUTA's contentions stand to be rejected:

103.1. The first is that OUTA fails to explain how and why service by way of registered mail is necessarily a "*less effective*" option for the purposes of service than service by way of electronic mail, and we submit that there is no reason in fact to make the assumption OUTA does in advancing the argument. Parliament, as the branch of government designated to make laws for the Republic, has made its choice. As a result, we submit that any assumption must operate in the opposite direction.

103.2. While OUTA's contentions may have borne consideration in a bygone era, in South Africa, judicial recognition has long since been given to the fact that they are inapposite in the modern age. Indeed, some 10 years ago, in the Durban High Court, Steyn J opined pertinently as follows:

> "*In 1947 courts considered it appropriate to order that substituted service be effected by affixing a notice on the door of a court building. Much, however, has happened since 1947. World War II came to an end and wireless and telephone technology developed to the extent that the telex was introduced. The fax machine followed thereafter as well as cell phone communication. Computers entered every house and office to the extent that most courts depend on electronic equipment. For example proceedings are no longer manually recorded but by a trained stenographer who records them digitally.*
>
> *Changes in the technology of communication have increased exponentially and it is <u>therefore not unreasonable to expect the law to recognise such changes and accommodate [them]</u>*".[100]
>
> (Our emphasis).

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100 *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* 2012 (5) SA 604 (KZD) at paras 1 to 2.

103.3. Even if one were to assume that OUTA's disagreement with Parliament's policy choice could indeed establish grounds to vitiate legislation on constitutional grounds (which we submit is clearly not the case), OUTA would fall well short of establishing any such grounds, in the present case. On OUTA's own version, any prejudice that might arise is entirely hypothetical. The question of whether service has been properly effected in a given case, should the infringer choose to dispute its infringement, the infringer will be entitled to have his or her case considered and determined by a long series of quasi-judicial and judicial decision-makers, namely (*a*) the RTIA; (*b*) the Appeals Tribunal; (*c*) a reviewing court of law; (*d*) a court of appeal (should the reviewing court's decision be challenged); and, even, (*e*) this Court.

103.4. Viewed in this light, OUTA's complaint in its secondary challenge cannot rise any higher, we submit, than an argument that the impugned provisions permit the RTIA to exercise a power that is capable of abuse. That this constitutes no basis at all for OUTA's assertion was confirmed in *Van Rooyen*:[101]

> "*Any power vested in a functionary by the law (or indeed by the Constitution itself) is capable of being abused. That possibility has no bearing on the constitutionality of the law concerned. The exercise of the power is subject to constitutional control and should the power be abused the remedy lies there and not in invalidating the empowering statute*".[102]
>
> (Our emphasis).

104. For these reasons, we submit that OUTA's secondary constitutional challenge to the AARTO Act stands to be dismissed on its merits as well, in the event that the Court

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101 *S and Others v Van Rooyen and others (Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC).

102 Ibid at para 37.

reaches the issue.

APPROPRIATE RELIEF IN THE ALTERNATIVE

105. We have explained why we submit that the AARTO Act is consistent with the Constitution. However, in the event that this Court reaches a different conclusion, this will not be an end of the matter. The Court will have to decide on an appropriate remedy that is just and equitable in the circumstances.

106. The question of what is just and equitable is a question that will always be informed by the circumstances of each case.[103] Factors that have been considered by courts include the following:

106.1. the principle of the separation of powers and deference due to the polycentric decision-making functions of organs of state;[104]

106.2. whether the reversal and remittal of a decision is practicable due to effluxion of time and intervening events;[105]

106.3. considerations of pragmatism and practicality;[106]

106.4. public policy considerations;[107] and

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103 *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province* [2008] 2 All SA 145 at para 22.

104 *Legal Aid Board v S and Others* 2010 (12) BCLR 1285 (SCA).

105 *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) **at** paras 25 to 29.

106 *Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another* 2010 (4) SA 359 (SCA) at para 15.

107 *Eskom Holdings Limited and Another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) at para 16.

106.5. the possible inevitability of a similar outcome.[108]

107. We submit that these factors impel a conclusion that, in respect of the AARTO Act, a suspensive order would be appropriate. In respect of the Amendment Act, we submit that severance would be the appropriate remedy. We explain the reasons for our submissions with respect to each, in turn, below.

A suspensive remedial order would be appropriate with respect to OUTA's challenge to the AARTO Act

108. If the AARTO Act is declared to be invalid, OUTA contends that the AARTO Act must be set aside as an ineluctable consequence, because "*what would remain of this process of notional severance would not give effect to the main objective of the statute*".[109]

109. In making this submission, OUTA's heads of argument wholly fail to address any of the RTMC's contentions commending that suspensive relief would be the appropriate course. Similarly, OUTA seemingly deliberately omits to explain why relief by way of suspension would <u>not</u> be appropriate.

110. We submit that it plainly would be:

110.1. By enacting the AARTO Act and its related legislation, Parliament has discharged a function, even if in a manner which this Court may have deemed to be constitutionally invalid, within the bounds of its "*legitimate and constitutionally-ordained province*", a fact which this Court has held it must be "*judicial[ly]*

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108 *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC) at para 56.

109 OUTA's HoA at para 30.

willing…" to "*appreciate*".[110] This appreciation is borne of the importance of the principle of separation of powers:

> "*Courts have traditionally resisted intrusions into the internal procedures of other branches of government. They have done this out of comity and, in particular, out of respect for the principle of separation of powers*".[111]
>
> (Our emphasis).

110.2. In *OUTA*,[112] the Constitutional Court echoed the importance of the separation of powers in the following terms:

> "*Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the executive and the legislative branches of government unless the intrusion is mandated by the Constitution itself*".[113]
>
> (Our emphasis).

111. This Court has recognised that considerations relevant to the inquiry into whether or not suspensive relief of this nature is appropriate include the following:

> "*The suspension of an order is appropriate in cases where the striking down of a statute would, in the absence of a suspension order, leave a lacuna. In such cases, the 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. If the Court is persuaded upon a consideration of these conflicting concerns that it is appropriate*

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110 *Bato Star (supra)* at para 48. Also see *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* 2015 (5) SA 245 (CC) at para 44.

111 *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at para 68.

112 *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC).

113 Ibid at para 44.

to suspend the order made, it will do so in order to afford the Legislature an opportunity 'to correct the defect'. It will also seek to tailor relief in the interim to provide temporary constitutional relief to successful litigants".[114]

(Our emphasis).

112. The reasons that an order suspending the effect of a declaration of invalidity would be appropriate in this case arise among other things from the integrated nature of the regulatory scheme:

112.1. An immediate order of invalidity would create a lacuna in the law that would create uncertainty, administrative confusion and potential hardship.[115] It would result in a fragmented and disaggregated system which would give rise to uncertainty and would be prejudicial to the public purse.

112.2. There may be multiple legislative cures to the constitutional defect that exist.[116] Suspension would accordingly service the purpose of the doctrine of the separation of powers to leave the matter to Parliament to determine.[117]

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114 *J and Another v Director General, Department of Home Affairs and Others* 2003 (5) SA 621 (CC) at para 20.

115 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; and *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.

116 *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 (where the Court gave an 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 to126 (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).

117 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.

113. In *Estate Agency Affairs Board*,[118] a case in which this Court granted suspensive relief, it opined as follows:

> "*Suspension is not an exceptional remedy. It is an obvious use of this Court's remedial power under the Constitution to ensure that just and equitable constitutional relief is afforded to litigants, while ensuring that there is no disruption of the regulatory aspects of the statutory provision that is invalidated*".[119]
>
> (Our emphasis).

114. In the latter decision, Cameron J was required to consider the confirmation of a declaration of invalidity in the Western Cape High Court of wide and unconstitutional powers of search and seizure that had been conferred on, *inter alia*, the Estate Agency Affairs Board, and the learned judge granted a suspensive order among other things because, if he declined to grant the remedy of suspension, this would "*hamstring the Board in carrying out its functions of implementing the regulatory regimes*" imposed by the relevant legislation.[120]

115. In the present application, we submit that similar considerations apply, for even stronger reasons. Accordingly, in the event that this Court finds that AARTO Act is constitutionally invalid, we respectfully submit that suspensive relief would be just and equitable, and that a suspensive period of at least 18 months would be the most appropriate course.[121]

Severance would be the appropriate remedy with respect to the Amendment Act

116. As regards OUTA's secondary challenge, in the event that the Court differs with our submissions that it is stillborn and meritless, we submit that the appropriate remedy in all

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118 *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* 2014 (3) SA 106 (CC).

119 Ibid at para 55.

120 Ibid at para 56.

121 RTMC's FA at para 154, RTMC's Bundle, vol 1, page 61.

the circumstances would be to excise what the Court deems to be "*the bad*" in the Amendment Act from "*the good*", by way of the remedy of severance.[122]

117. That the remedy of excision would be the appropriate course is apparent, in submission, for similar reasons to those we in respect of the suspensive relief the RTMC would seek from the Court:

    117.1. The Amendment Act addresses itself to various subject matter which goes well beyond the isolated question of effecting service.[123]

118. That it is possible for a court to do so in respect of the impugned provisions of the Amendment Act's provisions is clear. We respectfully submit that the exercise of doing so would be a relatively straightforward. All that would be required would be an excision of the RTIA's discretion to effect service by way of the third option of "*electronic service*". The remaining options "*personal service*" and "*postage*" would be left intact.

119. We submit that there is no serious countervailing prejudice of which OUTA can legitimately complain, in all the relevant circumstances of the case. Even on OUTA's own version, it would have no interest which would be prejudicially affected.

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

123 The Preamble to the Amendment Act provides that its purpose is "*[t]o amend the [AARTO Act] so as to substitute and insert certain definitions; to improve the manner of service documents to infringers; to add to the functions of the [RTIA]; to repeal certain obsolete provisions; to establish and administer rehabilitation programmes; to provide for the apportionment of penalties; to provide for the establishment of the Appeals Tribunal and matters related thereto; to effect textual corrections; and to provide for matters connected therewith*".

RELIEF SOUGHT

120. For the reasons set out above, the RTMC prays for an order in the following terms:

> "*The application for confirmation of the order of constitutional validity handed down by the Gauteng High Court, Pretoria, on 13 January 2022, declaring the Administrative Adjudication of Road Traffic Offences Act 46 of 1998 and the Administrative Adjudication of Road Traffic Offences Amendment Act 4 of 2019 to be unconstitutional and invalid is dismissed*".

121. Alternatively:

121.1. In the event that the Court concludes that the constitutional invalidity contended for in respect of the AARTO Act is established, the RTMC prays for an order suspending the invalidity for a period of 18 months.

121.2. In the event that the Court concludes that the constitutional invalidity contended for in respect of the Amendment Act is established, the RTMC prays for an order severing the option of "*electronic service*" (together with the definition of "*electronic service*" from section 17(a).

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28 September 2022