IN THE CONSTITUTIONAL COURT

Case nr: CCT 19/12

In the matter between:

ORGANISATION UNDOING TAX ABUSE	Applicant
and	
MINISTER OF TRANSPORT	1st Respondent
MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	2nd Respondent
ROAD TRAFFIC INFRINGEMENT AUTHORITY	3rd Respondent
APPEALS TRIBUNAL	4th Respondent
ROAD TRAFFIC MANAGEMENT CORPORATION	5th Respondent

THIRD RESPONDENT'S HEADS OF ARGUMENT

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I. INTRODUCTION

1 This matter concerns the constitutionality of the Administrative Adjudication of Road Traffic Offences Act 46 of 1998 (**"AARTO Act"**) and the Administrative Adjudication of Road Traffic Offences Amendment Act 4 of 2019 (**"Amendment Act"**).

2 The High Court declared both Acts unconstitutional and invalid. The applicant asks the Court to confirm the High Court's order, and the respondents appeal against it.

3 In the High Court, Basson J correctly stated the following principle.

> *"Where the Constitution thus confers functional areas regarding the same issue to different spheres of government, the functional areas should be interpreted based on what is appropriate in the different spheres."*[1] *(our emphasis)*

4 However, Basson J then purported, erroneously, to interpret the exclusive provincial legislative competencies in isolation. The learned judge then wrongly held that the national legislature is only entitled to legislate in respect of national roads.

5 Having made that erroneous finding, Basson J proceeded to hold that both Acts *"unlawfully intrude upon the exclusive executive and legislative competence of the local and provincial governments"*.[2]

6 Instead, the High Court ought to have found that:

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1 Judgment of the High Court, para 28, Appeal Record, Volume 3, page 250

2 Judgment of the High Court, para 45, Appeal Record, Volume 3, page 257

6.1 Section 104(1)*(b)* of the Constitution, read with Schedule 5, empowers provinces to pass legislation, for their province, with regard to provincial roads and traffic, and municipal roads.

6.2 Section 44(1) and 44(3) of the Constitution, read with Schedule 4, empower the National Assembly to legislate in respect of all other matters, of inter-provincial concern, relating to and incidental to road traffic regulation.

6.3 The question of who is authorised to drive on South Africa's roads is a matter of inter-provincial concern and a matter of national safety, which cannot be properly regulated intra-provincially.

6.4 The adjudication and penalisation of traffic offenders must bear on who is authorised to drive, and who is disqualified from driving, on South Africa's roads.

6.5 The AARTO Act and the Amendment Act are legislation concerned with the appropriate adjudication of road traffic offences, and the removal of dangerous drivers from South Africa's roads, which is a matter of inter-provincial concern.

6.6 Accordingly, the Acts fall squarely within the national legislature's concurrent legislative capacity.

6.7 Section 156(1)*(a)* of the Constitution, read with Part B of Schedule 5, grants municipalities the executive authority in respect of, and the right to administer, municipal roads.

6.8 The executive functions mandated by the AARTO Act and the Amendment Act are functions that fall outside the scope of municipal executive authority over municipal roads. On the contrary, by regulating the national system of adjudicating and penalising road offences, they ensure the effectiveness of the performance of those municipal executive functions, as contemplated in section 155(7) of the Constitution.

6.9 Accordingly, the AARTO Act and the Amendment Act pass constitutional muster.

7 These submissions proceed as follows:

7.1 In **Part II**, we highlight what AARTO is designed to achieve.

7.2 In **Part III**, we show the proper approach to reconciling the provincial legislative competence over provincial and municipal roads, with the joint competence of the national and provincial legislatures over road traffic regulation.

7.3 In **Part IV**, we demonstrate the errors in the High Court's reasoning, and show that the AARTO Act and Amendment Act fall squarely within the National Assembly's law making powers.

7.4 In **Part V**, we examine the executive authority of municipalities in respect of municipal roads, and show that the AARTO Act leaves those functions intact.

7.5 In **Part VI**, we show that the service provisions introduced by the Amendment Act are constitutionally sound.

II. THE ESSENCE OF THE AARTO ACT

8 The applicant, in its written submissions, says that the AARTO Act legislates in respect of provincial and municipal road and traffic laws. It does not. Instead, the overall aim and effect of the Act is to create a national administrative adjudication system designed to overcome the deficiencies in the prevailing criminal system for adjudicating road traffic infringements.

9 Prior to the enactment of the AARTO Act, the function of prosecuting and adjudicating the infringement of traffic rules was a matter of national legislation, administered in accordance with the criminal procedure set out in the Criminal Procedure Act 51 of 1977 (**"CPA"**).

10 A number of systemic problems persisted in the pre-AARTO system.[3]

10.1 With every infringement prosecuted through the courts, the already strained criminal justice system was unduly burdened.

10.2 Given the prevalence of crime, including serious crime, in South Africa, actors within the criminal justice system failed to prioritise road traffic infringements, meaning the majority[4] were never finally adjudicated or prosecuted.

10.3 Wealthy traffic offenders could simply avoid consequence by paying admission of guilt fines, meaning that even repeat offenders could

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[3] Founding affidavit on behalf of the Fifth Respondent in the application for leave to intervene in terms of Rule 8 of this Court's Rules, page 24-25 para 54; See also answering affidavit of the First Respondent in the High Court, para 36, Appeal Record Vol 2, page 133-134

[4] The First Respondent says only 20% of traffic cases are finalised through the Courts, at answering affidavit of the First Respondent in the High Court, para 36, Appeal Record Vol 2, page 133-134

continue to endanger other road users and pedestrians, and poor offenders were unfairly discriminated against.

10.4 The CPA was essentially then unable to address the need to ensure safety on our roads.

11 The AARTO Act thus sought to move the bulk of the role of adjudicating and prosecuting road traffic offences from one system, already within the national legislative competence, to another.

12 The express objects of the AARTO Act are notable.[5] They are:

> *"(a) to encourage compliance with the national and provincial laws and municipal by-laws relating to road traffic and to promote road traffic safety;*
>
> *(b) to encourage the payment of penalties imposed for infringements and to allow alleged minor infringers to make representations;*
>
> *(c) to establish a procedure for the effective and expeditious adjudication of infringements;*
>
> *(d) to alleviate the burden on the courts of trying offenders for infringements;*
>
> *(e) to penalise drivers and operators who are guilty of infringements or offences through the imposition of demerit points leading to the suspension and cancellation of driving licences, professional driving permits or operator cards;*
>
> *(f) to reward law-abiding behaviour by reducing demerit points where they have been incurred if infringements or offences are not committed over specified periods;*

[5] AARTO Act, section 2

(g) to establish an agency to support the law enforcement and judicial authorities and to undertake the administrative adjudication process; and

(h) to strengthen co-operation between the prosecuting and law enforcement authorities by establishing a board to govern the agency."

(our emphasis)

13 For our purposes, two salient features of these legislative objectives emerge.

13.1 First, the AARTO Act is geared towards creating an administrative system of adjudicating and penalising traffic violations, to combat the deficiencies in the criminal justice orientated approach and to promote safety on our roads.

13.2 Second, the AARTO Act is calculated to support and to encourage compliance with, and clearly not to displace, national and provincial laws and municipal by-laws.

14 In pursuance of these goals, the AARTO Act does two major things.

15 First, the Act creates an administrative adjudicative system, which displaced the criminal justice system as the first port of call for the adjudication of traffic violations.

15.1 So, section 17(1) of the AARTO Act says:

"If a person is alleged to have committed an infringement, an authorised officer or a person duly authorised by an issuing authority, must instead of a notice contemplated in section 56 or 341 of the

Criminal Procedure Act…, and subject to section 23, serve or cause to be served on that person an infringement notice.." (our emphasis)

15.2 Notices in terms of section 56 and section 351 are effectively notices calling upon an alleged offender to appear in court or admit guilt or pay a fine.

16 Accordingly, the Act, in its express terms, replaces the criminal adjudicative mechanisms in the CPA with new administrative mechanisms.

17 As the fifth respondent puts it, the AARTO Act is the "adjudicative spoke in the larger wheel" of South Africa's road traffic regulatory framework.[6]

18 Second, the Act creates a system of demerits designed to ensure that serial traffic offenders are removed from South Africa's roads, and therefore to protect road users throughout the country.

18.1 Section 24 of the AARTO Act establishes a system in terms of which a traffic rules violator incurs points demerits on the date of paying or making arrangements to pay a penalty or fee, or the date of an enforcement order being issues, or the date on which the infringer is convicted.

18.2 In terms of section 25 read with section 29*(d)*, a person who accumulates demerit points in excess of a prescribed number faces a disqualification from driving for a particular period.

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[6] Founding affidavit in application for leave to intervene in terms of Rule 8 of this Court's Rules, page 8 para 19

18.3 The Act also rewards drivers by removing demerits over time,[7] meaning drivers are incentivised to improve their conduct on the roads.

18.4 So, under the AARTO Act, unlike the previously prevailing default to the criminal justice system, serial traffic offenders will ultimately be removed from our roads. Admitting guilt and paying fines will provide no basis on which to avoid consequences that are designed to render the country's roads safer.

19 In addition, the Amendment Act creates the fourth respondent, the Appeals Tribunal, a body tasked with adjudicating matters brought to it by aggrieved infringers, and with hearing and making rulings on appeals or reviews of the decisions of representation officers under the AARTO Act.

20 Notable in this analysis is what the AARTO Act and the Amendment Act do <u>not</u> do.

20.1 First, the Acts do not purport to legislate over the rules relating to provincial and municipal roads and traffic. While the impact of the AARTO Act is to shift the adjudicative process from a criminal justice based system to a system that imposes administrative processes, in the first place, it does not purport to legislate other aspects relating to roads and traffic.

20.2 Second, the Acts do not seek to oust the executive authority of municipalities to enforce the rules on municipal roads. On the contrary,

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7 AARTO Act, section 28

and as we later demonstrate, they encourage the effectiveness of that authority.

III. THE NATIONAL LEGISLATURE'S COMPETENCIES

21 The National Assembly is entitled to enact legislation that goes to the regulation of road traffic at an inter-provincial level.

22 The starting point in assessing the law making power of the National Assembly is section 44 of the Constitution.

22.1 Section 44(1)*(a)*(ii) provides that the National Assembly has the power to "pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5".

22.2 Section 44(3) provides that 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".

22.3 Section 44(2) sets out an exception to the prohibition against the national legislature enacting laws with regard to functional areas set out in Schedule 5. It provides that Parliament may intervene, by passing legislation in accordance with section 76(1) of the Constitution (that is, the process for adoption ordinary bills affecting provinces), with regard to a matter falling within a functional area listed in Schedule 5, where it is necessary, *inter alia*, to maintain essential national standards.

23 So, the national legislature may legislate any matter, including those over which it has joint competency, but excluding those where a province has exclusive legislative authority under Schedule 5 (unless it is necessary to legislate such a matter for purposes that include the maintenance of essential national standards).

The proper approach to determining the content of a functional area

24 It is not uncommon for the functional areas set out in Schedules 4 and Schedules 5 to appear to overlap. While the competencies under Schedule 4 must be interpreted as being distinct from and exclusive of those in Schedule 5, the division can never be absolute.[8]

25 In *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill*, this Court was tasked in part with resolving the apparent overlap between the concurrent competencies over "trade" and "industrial promotion", on the one hand, and the exclusive provincial competence over "liquor licenses", on the other.

25.1 Writing for a unanimous Court, Cameron AJ, as he then was, emphasised that the drafters of the Constitution allocated powers to the national and provincial spheres in accordance with *a functional vision of what was appropriate to each sphere..".*[9] The Court went on to say that it *"is thus clear… that the Schedule 5 competences must be interpreted as*

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[8] *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC) *("Liquor Bill* case*")* at para 49

[9] *Liquor Bill* case para 50

conferring power on each province to legislate in the exclusive domain only "for its province"".[10] (our emphasis)

25.2 Having established these foundational principles, the Court then set out the following rule of interpretation.

> *"[I]t is evident that where a matter required regulation inter-provincially, as opposed to intra-provincially, the Constitution ensures that national government has been accorded the necessary power, whether exclusively or concurrently under Schedule 4, or through the powers of intervention accorded by section 44(2). The corollary is that where provinces are accorded exclusive powers these should be interpreted as applying primarily to matters which may appropriately be regulated intra-provincially."*[11] (our emphasis)

26 Having held that the provincial competence to legislate in respect of liquor licenses must be given meaning, and that the issue of liquor licenses is sensibly an intra-provincial one, this Court in the *Liquor Bill* decision found that the structure of the Constitution suggests that the national government enjoys the power to legislate all other aspects of the liquor trade.

27 So, the meaning of each functional area is determined with reference to what is appropriate for the particular sphere to legislate on, and with emphasis on the distinction between functions which are properly inter-provincial, and those which are not.

28 This Court has held that there is no presumption in favour of either the national legislature or the provincial legislatures. Instead, the functional areas must be

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[10] Ibid

[11] *Liquor Bill case* para 51

interpreted purposively and in a manner that enables both the National Assembly and the provincial legislatures to exercise their legislative powers fully and effectively.[12]

29 For this reason, it is constitutionally incorrect to determine the meaning of the functional areas in Schedule 5 in a vacuum, or in isolation from an assessment of the functional areas in Schedule 4.[13] Any interpretation of the meaning of a constitutional provision must be undertaken with a holistic view of the Constitution.

30 Accordingly, the appropriate interpretative exercise must account for the overall structure of the Constitution, and account for the foundational principle that its drafters designed a functional vision of what is appropriate to each sphere.

31 As to whether a piece of legislation falls within a particular functional area, the Court in the *Liquor Bill* decision held that it is not only the legislation's form, but also its purpose and effect, that are relevant.[14]

32 Accordingly, the Court must examine the essence of the legislation. That is, the Court must ask what the legislation is about, at its core.[15]

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[12] *DVB Behuising* para 17

[13] This Court has rightly cautioned against reading constitutional provisions in isolation from its very earliest judgments. See: *S v Makwanyane and another* 1995 (3) SA 391 (CC) para 10

[14] *Liquor Bill* case para 62-63

[15] *Tongoane and others v Minister of Agriculture and Land Affairs and others* 2010 (6) SA 214 (CC) para 58, with reference to *Western Cape Provincial Government and others: In Re DVB Behuising (Pty) Limited v North West Provincial Government and another* 2001 (1) SA 500 (CC) *("DVB Behuising")* para 36, *Liquor Bill* case para 63-64, and *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995* 1996 (4) SA 653 (CC) para 19;

The meaning of the relevant functional areas in Schedules 4 and 5

33 Schedule 4 includes the functional area of "road traffic regulation". Schedule 5, Part A, includes "provincial roads and traffic", and Schedule 5, Part B, includes "municipal roads".

34 Meaningful content must be given to all of these functional areas.

35 The interpretative starting point is the wording used to in the functional areas. The wording has two notable features.

35.1 First, the functional areas in Schedule 5 are qualified by the "provincial" and "municipal". The joint competency expressed in Schedule 4 has no such qualification, and is also not qualified by "national" or any similar wording.

35.2 Second, the functional areas in Schedule 5 make no reference to the "regulation" of road traffic, whereas the joint competency expressed in Schedule 4 superficially relates to that "regulation".

36 Meaning must be ascribed also to the particular choice to include the word road traffic "regulation" in the concurrent competencies in Schedule 4, but to omit it from the exclusive competencies in Schedule 5.[16]

36.1 Guidance can be ascertained from dictionary definitions of the word "regulate". Many of those definitions relate to general rule making and

[16] This accords with the rule of interpretation against constructions that would render words chosen meaningless. See *Member of the Executive Council for Development Planning and Local Government, Gauteng, v Democratic Party and Others* 1998 (4) SA 1157 (CC) para 53; *National Credit Regulator v Opperman And Others* 2013 (2) SA 1 (CC) at para 99.

control, the likes of which are implied in any legislative power. However, the definitions in Merriam-Webster defines “regulate” as “to bring order, method or uniformity to”.

36.2 Since national competence is concerned, as this Court has made clear, with matters of inter-provincial import, this definition is the most contextually sensible. It means that the national government is given concurrent competence to enact laws that go to providing necessary order, method and uniformity across the country’s road traffic system at large.

36.3 In juxtaposition, provincial legislative competence could never have been designed so that provinces could exclusively decide the processes for prosecuting roads traffic offences, which have serious consequences for the safety of South Africans on an inter-provincial level.

36.4 Instead, the functional areas of “provincial roads and traffic” and “municipal roads” and “traffic and parking”, identified in Schedule 5, must relate to the operation, and not adjudication, of traffic and parking on those roads.[17]

36.5 If this submissions was incorrect, and the national legislature could never legislate over national norms for driving and for the adjudication of failures to adhere to those norms, an absurdity, would result. A driver might end up prohibited from driving in one province, but allowed to drive in another.

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[17] As Victoria Bronstein puts it in Woolman et, al ‘Constitutional Law of South Africa’, 2nd Ed, Vol 1, at 15-4 “Schedule 5 of the Constitution contains a list of discreet and (it is fair to say) relatively minor functional areas of exclusive provincial legislative competence”

It would rob the inclusion of "road traffic regulation" in Schedule 4 of any meaningful content.

36.6 In this light, the choice of the word "regulation" in the concurrent competencies makes complete sense. Provinces are given exclusive license to make laws about their roads, but the regulation of road users, a patently inter-provincial concern, remains within the national legislature's law making powers.

IV. AARTO IS SCHEDULE 4 LEGISLATION

The High Court's errors

37 In finding that the AARTO Act falls within a Schedule 5 legislative functional area, the High Court erred in two main respects.

37.1 First, it erred in its method of interpreting the relevant functional areas themselves, and in holding that the concurrent legislative powers in Schedule 4 relate only to national roads.[18]

37.2 Second, it erred in its characterisation of the AARTO Act, and in particular its finding that the AARTO Act regulates "every aspect of road traffic".[19]

38 We deal with these errors in turn.

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[18] Judgment of the High Court, para 36, Appeal Record, Vol 3, page 253

[19] Judgment of the High Court, para 11, Appeal Record, Vol 3, page 241 (In doing so, the High Court appears to have relied on an erroneous characterization of the Act by the first respondent in his answering papers)

Schedule 4's "Road traffic regulation" cannot be limited to national roads

39 The notion, favoured by the High Court, that the power to make laws in relation to the "road traffic regulation" functional area in Schedule 4 is limited to national roads is unsustainable for two reasons.

40 First, Schedule 4, properly interpreted, indicates otherwise.

40.1 The High Court erred by seeking first to interpret the meaning of the functional areas in Schedule 5, and only then to examine what might be left to schedule 4. That is not the approach taken in *Liquor Bill*.

40.2 As the applicant's written submissions rightly acknowledge, the interpretation of the Constitution is not an exercise in isolating provisions, but one which construes the Constitution as a whole.[20]

40.3 In the interpretation of ordinary statutes too, this Court has said that it is inappropriate to isolate statutory provisions as a mechanism for understanding meaning.[21]

40.4 Despite this, in its interpretation of the functional areas in Schedule 4, the High Court applied a "bottom-up" approach, which is not part of our law. That approach purports to interpret the exclusive provincial functional areas first, and in isolation, and then excludes their meaning from the ambit of the joint legislative competence over "road traffic regulation".[22]

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[20] Applicant's written submissions, para 10.1, with reference to *Matatiele Municipality and others v President of the Republic of South Africa and others (no 2)* 2007 (6) SA 477 (CC) para 36, and *United Democratic Movement v Speaker, National Assembly and others* 2017 (5) SA 300 (CC) para 31

[21] *Sebola and another v Standard Bank of South Africa Limited and another* 2012 (5) SA 142 (CC) para 56

[22] Judgment of the High Court, para 33-36, Appeal Record, Vol 3, page 252-253

So, in Basson J's view, *"the functional areas granted exclusively to provinces and local government can only be given meaningful content if they are carved out first".*[23]

40.5 To support the "bottom-up" approach, Basson J quoted the following dictum from the *Liquor Bill* decision:

> *"It follows that, in order to give effect to the constitutional scheme, which allows for exclusivity subject to the intervention justifiable under s 44(2), and possibly to incidental intrusion only under s 44(3), the Schedule 4 functional competences should be interpreted as being distinct from, and as excluding, Schedule 5 competences. That the division could never have been contemplated as being absolute is a point to which I return in due course."*[24]

40.6 With respect, there is nothing in that dictum that suggests a bottom-up approach. Nor did this Court suggest that the meaning of Schedule 5 functional areas must be determined without a holistic and contextual approach to the other spheres' competencies.

40.7 Basson J was also incorrect in finding that this Court had endorsed a "bottom-up" approach in *Gauteng Development Tribunal*.[25] Instead, the Court simply endorsed a purposive construction of the functional areas set out in the Schedules.[26]

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[23] Judgment of the High Court, para 39, Appeal Record, Vol 3, page 254-255

[24] *Liquor Bill* case para 50

[25] Judgment of the High Court, para 34, Appeal Record, Vol 3, page 252

[26] *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others* 2010 (6) SA 182 (CC) *("Gauteng Development Tribunal")* para 62

40.8 There, this Court said that functional areas remain distinct from one another, and expanded as follows:

> *"This is the position even in respect of functional areas that share the same wording like roads, planning sport and others. The distinctiveness lies in the level at which a particular power is exercised. For example, the provinces exercise powers relating to "provincial roads" whereas municipalities have authority over "municipal roads". The prefix attached to each functional area identifies the sphere to which it belongs and distinguishes it from the functional areas allocated to the other spheres. In the example just given, the functional area of "provincial roads" does not include "municipal roads". In the same vein, "provincial planning" and "regional planning and development" do not include "municipal planning"".*[27] (our emphasis)

40.9 So, in *Gauteng Development Tribunal*, this Court found that the prefix "provincial" to qualify roads in Schedule 5A, and the prefix "municipal" to qualify roads in Schedule 5B, meant that the former cannot include the latter.[28]

40.10 The words "road traffic regulation" in Schedule 4 suggest no limitation to national roads. It was open to the drafters of the Constitution to include "national" as the prefix to those words, as they had done in respect of provincial and municipal roads in Schedule 5. They did not do so.

40.11 The import is clear. The Schedules to the constitution say what the mean. The absence of a specification that the concurrent competence over

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[27] *Gauteng Development Tribunal* para 55

[28] Ibid. See Judgment of the High Court, para 30, Appeal Record, Vol 3, page 251

"Road Traffic Regulation" is "national" is dispositive of the High Court's finding that it in fact is.

40.12 The more sensible interpretative approach is that the Constitution grants both the national and provincial legislatures the power to legislate over matters relating to provincial road traffic regulation of an inter-provincial nature, subject to the Constitution's provisions regarding the approach to conflicts in section 146.

41 Second, the adjudication and penalisation of road traffic rules are inter-provincial matters.

41.1 In the *Liquor Bill* decision, this Court reasoned that laws governing liquor licenses were sensibly in the exclusive provincial purview because those licenses *"take place within or can be regulated in a manner that has a direct effect upon the inhabitants of the province alone"*. The Court found that, with the exception of a negligible minority of cross border sales, *"retail sale of liquor will.. occur solely within the Province"*.[29]

41.2 In the case of road traffic violations, the opposite is true.

41.3 Persons may violate traffic laws in any number if municipalities, or provinces, even on the same day. The notion that they cannot be subject to a national system of prosecution and adjudication runs contrary not only to common practice, but to sensibility and effectiveness.

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[29] *Liquor Bill* case para 70

41.4 The system of prosecuting traffic violations, like the system of issuing and revoking drivers' licenses in the Republic, is manifestly an inter-provincial issue. It is concerned with ensuring that people are incentivised to drive safely, and that serial incidents of dangerous driving results in removal from the roads.

41.5 If that goal, which is the essence of the Act, were intra-provincial in nature, it would result in an absurdity to which we have already alluded.

41.5.1 It would mean that a driver who has offended repeatedly in one province might be prohibited from driving in that province, but may be free to drive, and to endanger others, in the remaining eight provinces in the Republic.

41.5.2 Equally, since provinces would be entitled to design their own penalty systems and adjudication processes, a person who has offended more in one province, might nonetheless be eligible to drive in that province, but disqualified from driving in some other province, simply because the design of the system in the latter province is less stringent.

41.6 This is an absurdity that the Constitution cannot permit. It is for this reason that national government has legislation making powers over "road traffic regulation" throughout the country.

The AARTO Act's scope does not cover every matter on roads

42 The learned Judge in the High Court erred in finding that AARTO purported to legislate in respect of every matter on roads throughout the Republic.[30]

43 The essence of the AARTO Act, as we have seen, has nothing to do with the regulation of provincial roads and traffic, nor with the regulation of municipal roads and traffic and parking.

44 Instead, it represents merely a change in the rules relating to the already existing national adjudication of traffic violations.

45 By way of an analogy, the provincial legislature has exclusive legislative competence in respect of municipal parks and recreation and noise pollution. That would not be to say that, if a province adopted a certain statutory offense relating to conduct in a municipal park, or to noise pollution, the adjudication of that offense would fall outside the national prosecuting system.

46 The true essence and purpose of the AARTO Act is to regulate the adjudication of road traffic violations, so that road safety is properly promoted and impunity for violations is eroded. These goals are of a limited nature, and have a national and an inter-provincial concern.

[30] We note that the first respondent, in his answering affidavit, said that the AARTO Act regulates "every aspect of road traffic", but we concur with the submission of the fifth respondent that this is objectively not the case. See Founding affidavit of the Fifth Respondent in the application for leave to intervene in terms of Rule 8 of this Court's Rules, page 33-34 para 87-88

The AARTO Act is road traffic regulation

47 The next task then is to ask whether AARTO is legislation that deals with the functional area of “provincial roads and traffic” and “municipal roads”, or “road traffic regulation”.

48 That question must be answered with regard to the true purpose and effect of the legislation.[31]

49 As we have shown, AARTO and the Amendment Act simply create a new mechanism of prosecuting issues that have always been enforced at a national level.

50 Put differently, it falls to the provinces to decide the speed limits, and other conditions associated with their “provincial roads and traffic”, but it falls within the national competence, as it always had, to legislate for the system of enforcing violations of those limits and conditions. [32]

51 For the reasons set out above, the national legislature is empowered to enact legislation to protect and enhance safety and security of road users on a national basis.

52 It is for that reason that the legislation dealing with the requirements of drivers licenses, the revocation of those licenses, the registration of vehicles and the historical prosecution of road infringements, have all been dealt with by way of legislation spearheaded by the national legislature.

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[31] *DVB Behuising* para 36

[32] See *Singh and another v Mount Edgecombe Country Club Estate Management Association Two (RF) (NPC) and others* [2018] 1 All SA 279 (KZP) para 16.1, where the High Court takes a similar approach to the provisions of the National Road Traffic Act 93 of 1996

53 It would, of course, create an untenable situation, on all the roads in the Republic, if the requirements for the licensing of a driver were different from one province to the next.

54 Similarly, the AARTO Act, which is in essence about the adjudication of traffic violations, and the implementation of a system of demerits designed to exclude dangerous road users over time, could never be provincially legislated. These matters are squarely inter-provincial, and not matters to be legislated by each province “for its province”.

55 Once again, if this were not correct, and the essence of the AARTO Act fell within the exclusive legislative competency of provinces, an absurdity would result.

55.1 Each province might set entirely different standards and processed for adjudicating and penalising traffic offenders.

55.2 Similarly, each province would be able to determine different systems for demeriting drivers who violate traffic rules, and different points thresholds for excluding persons from road use.

55.3 The result would be chaotic. Some drivers would be entitled to drive in some provinces, but not others, effectively rendering our national system of road usage entirely defunct and chaotic.

56 That, with respect, could never have been the intention of the Constitution’s drafters. That is why they provided the National Assembly with law making powers over road traffic “regulation”, and without any qualification or limitation to “national” roads.

57 If the Court disagrees with these submissions, and is of the view that the High Court was correct that the Schedule 4 functional area of “Road traffic regulation” relates only to the national roads, then we submit that the power to legislate in respect of the adjudication of road traffic violations, across the country, must in any event lie with the National Assembly, either by virtue of:

57.1 The National Assembly’s residual power to pass legislation regarding “any matter” under section 44(1)(a)(ii). We say so because, even if Schedule 4 only provides the National Assembly with concurrent competence to regulate national roads, the provincial power to legislate “provincial roads and traffic” and “municipal roads” cannot extend to the national function of adjudicating violations and attending ultimately to criminal penalties or the sanction of disenabling driving licenses; or

57.2 Parliament’s power, in terms of section 44(2), to legislate in respect of Schedule 5 matters, when it is necessary to maintain essential national standards. For the reasons set out above, the standards for adjudicating road infringement, and ultimately ensuring that serial infringers are prohibited from endangering roads users, must be national. Any other approach would yield dysfunctional results.

V. NO EXECUTIVE MUNICIPAL FUNCTIONS ARE USURPED

Local government's exclusive executive functions

58 Municipalities have original constitutional powers, rights and duties, that may only be constrained in terms of the Constitution.[33]

59 Section 156(1)(a) of the Constitution provides that a municipality has executive authority in respect of, and has the right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5.

60 Part B of Schedule 5 includes "municipal roads".

61 Accordingly, though the National Assembly is empowered to legislate in respect of inter-provincial matters relating to the use of South Africa's roads, it may not arrogate to the national government the executive powers which the Constitution vests in the local sphere.[34]

62 Section 155(7) of the Constitution says "The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by the municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1)."

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[33] *City of Cape Town v Robertson and another* 2005 (2) SA 323 (CC) para 60; *City of Johannesburg Metropolitan Municipality v Chairman of the National Building Regulations Review Board and Others* 2018 (5) SA 1 (CC) (*"Review Board* case*"*) para 21

[34] *Review Board* case para 35

63 So, the national government is entitled to legislate in a manner that regulates the municipal exercise of executive authority over municipal roads, if that regulation renders the exercise of that authority effective.

The executive authority over municipal roads

64 The question that arises is squarely this: What is the content of the executive authority which the Constitution vests in local government over "municipal roads"?

65 The answer, we submit, must relate to the planning, construction, maintenance, and policing of those roads. This is because these executive functions falls squarely within the realm of what the municipal executives are most suited to do.

66 In *Minister of Local Government v Habitat Council*,[35] this Court had occasion to consider its earlier decision in the *Gauteng Development Tribunal* matter. There, this Court had held that a piece of provincial legislation which sought to permit a provincial organ of state to consider township planning applications unconstitutionally intruded on the municipal executive function with regard to "municipal planning". Writing for a unanimous Court, Cameron J held that the earlier decision:

> *"makes sense, given that municipalities are best suited to make those [township planning] decisions. Municipalities face citizens insistent on delivery of governmental services, since they are the frontiers of service delivery. It is appropriate that they should be responsible for zoning and subdivision. For these entail localised decisions, and should be based*

[35] *Minister of Local Government, Environmental Affairs & Development Planning, WC v Habitat Council* 2014 (4) SA 437 (CC) *("Habitat Council")*

> *on information that is readily accessible to municipalities. The decision-maker must consider whether services — that are provided primarily by municipalities — will be available for the proposed development. And it must consider matters like building density and wall heights. These are best left for municipal determination."*[36]

67 Similarly, it is manifestly appropriate that municipalities exercise the functions of planning and approving road construction, and policing roads. They are ideally placed to perform these functions, as they have done and as the AARTO Act envisaged them continuing to do.

68 In contrast, municipalities are not well placed to perform the functions that lie at the core of the AARTO Act (and the Amendment Act). The information required to properly adjudicate and penalise road traffic infringers, in a manner that addresses serial infringements so as to ensure safety for road users, is not readily accessible to municipalities, nor are municipalities best suited to make those decisions.

The AARTO Act expressly respects municipal executive authority

69 The High Court erred in finding that the AARTO Act deprives municipalities of their *"exclusive traffic law enforcement powers in respect of traffic on municipal level and in respect of municipal roads".*[37]

70 Section 17 of the AARTO Act, which we have highlighted above, provides that if a person is alleged to have committed an infringement, "an authorised officer or

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[36] *Habitat Council* para 14. See also *My Vote Counts NPC v Speaker of the National Assembly and others* 2016 (1) SA 132 (CC) para 49, where this Court (albeit in a minority judgment) remarked, with reference to *Gauteng Development Tribunal*, that *"overlap in functional areas of concurrent constitutional competence should be resolved by assigning the power to the sphere of government where the specific function is most appropriate"*

[37] Judgment of the High Court, para 39, Appeal Record, Vol 3, page 254

a person duly authorised by an issuing authority", must instead of a notice under the CPA, serve or cause to be served an infringement notice under the Act.

71 In terms of section 1, an "authorised officer" means:

> *"(a) a traffic officer or a traffic warden appointed in terms of the laws of any province;*
>
> *(b) a member of the service as defined in section 1 of the South African Police Service Act, 1995 (Act 68 of 1995);*
>
> *(c) a national road transport inspector appointed in terms of section 37(1) of the Cross-Border Road Transport Act, 1998 (Act 4 of 1998), or any duly appointed provincial road transport inspector; or*
>
> *(d) a municipal police officer appointed under any law"*
>
> (our emphasis)

72 "Issuing authority" is in turn defined as:

> *"(a) a local authority contemplated in Chapter 7 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), the Local Government Transition Act, 1993 (Act 209 of 1993), or any other applicable law;*
>
> *(b) a provincial administration; or*
>
> *(c) the Road Traffic Management Corporation, established under section 4 of the Road Traffic Management Corporation Act, 1999,*
>
> *in so far as such authority, administration or Corporation is responsible for traffic matters"*
>
> (our emphasis)

73 So, the AARTO Act expressly retains the municipal executive's role in enforcing traffic rules on municipal roads. Its impact is to mandate the municipal executive

to refer the adjudication of infringements, in the first place, to an administrative body, where they would previously have referred that adjudication to the courts.

74 In other words, to the extent that the AARTO Act impacts on the existing executive functioning of municipalities in respect of municipal roads, it does so not by usurping that function, but by creating norms and guidelines for its exercise.

75 That is precisely within the confines of the national government's powers under section 155(7) of the Constitution.[38] It has adopted legislation which regulates the exercise by municipalities of their existing executive powers, in order to see to it that those powers are effective. It does not impose external traffic enforcement on local roads, but simply ensures that such enforcement becomes effective, by compelling the same local authorities to defer to an administrative body rather that the criminal justice system.

76 That body then deals, in the first place, with the adjudication and penalisation of traffic infringements. Those tasks have been regulated by our law of criminal procedure, and are now regulated, as section 44(1) read with Schedule 4 to the Constitution permits, by the AARTO Act.[39]

77 In these circumstances, there is no municipal executive function which the AARTO Act displaces.

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[38] *Habitat Council* para 22.

[39] Contrast this with the position in *Tronox Kzn Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and others* 2016 (3) SA 160 (CC), where this Court invalidated legislation that sought to establish an appellate authority regarding the management of municipal planning, a function that was historically squarely exercised by municipal executives.

VI. CONCLUSION ON THE MAIN CHALLENGE

78 In light of the submissions just made, we submit that this Court should refuse to confirm the order of invalidity granted by the High Court. There is simply no basis to conclude that the AARTO Act or the AARTO Amendment Act are unconstitutional on the basis contended in the main challenge.

79 In the alternative and in the event that this Court were to find that some or other provision of the AARTO Act was beyond the competence of Parliament, that would still not justify a confirmation of the High Court's order.

79.1 The High Court's order is extraordinary in its reach and effect. It declared the entirety of the AARTO Act and the AARTO Amendment Act unconstitutional.

79.2 There is no basis for this. Even if some of other provision was beyond the competence of Parliament, the principles of severance needed to be applied.

79.3 This Court has made clear that in determining whether to sever unconstitutional provisions, two questions must be asked: first is it possible to sever the invalid provision; and, second, if so, does the remainder give effect to the purpose of the legislative scheme?[40]

79.4 Even if some or other provision of the AARTO Act or AARTO Amendment Act were beyond the competence of Parliament, the core

[40] *Speaker of the National Assembly v Public Protector and Others; Democratic Alliance v Public Protector and Others* 2022 (3) SA 1 (CC) at para 103

and bulk of the legislation is not. Severance should therefore be used to preserve the remainder of the legislation.

80 Lastly, and in any event, if this Court were to find any part of the AARTO Act or AARTO Amendment Act were beyond the competence of Parliament, an order of suspension for two years be appropriate. This would allow the National Assembly to consider whether a differently crafted Act could be passed to achieve the valuable objectives of the AARTO legislation, whilst remedying any constitutional difficulties found by this Court.

VII. THE ALTERNATIVE CHALLENGE – THE SERVICE PROVISIONS

81 In the alternative to its main challenge, the applicant contends that section 17 of the Amendment Act in any event introduces unconstitutional service provisions.

82 On this score the applicant's complaint is that section 17 removes the exclusive requirements that service of notices under the AARTO Act be personal or be registered mail. The applicant says that the Amendment Act's introduction of the possibility of service by non-registered mail, or electronic service, might lead to the infringer not receiving a notice. That possibility, the applicant contends, violates *inter alia* the right to just administrative action.

Should the alternative challenge be decided by this Court?

83 It is to be noted that the High Court declined to consider this alternative challenge because it upheld the main challenge.[41]

[41] Judgment of the High Court, para 45

84 We respectfully submit that it erred in doing so. This Court has made clear that it is desirable, where possible, for a lower court to decide all issues raised in a matter before it and has criticised a failure of lower courts to do so.[42] This is especially important in a case where the constitutionality of a statute is at stake, such that confirmation is required from this Court.[43]

85 In the present case, the alternative challenge has not yet been considered by any court at all. In the circumstances, this Court would be required to decide the matter as a court of first and final instance. That is plainly undesirable.

86 We therefore submit that this Court should remit the alternative challenge to the High Court. Nevertheless, for the sake of completeness, we briefly address the merits of the alternative challenge in what follows.

The merits of the alternative challenge

87 The applicant's complaint is premised on a factual misconception that service by registered mail is more likely to come to an infringer's attention than other more modern forms of service. There is simply no basis to think so.

88 The modernisation of communication is being catered for by our Courts, even where the very serious matter of the service of an interim interdict is concerned. The Pretoria High Court recently held that service of such an interdict by WhatsApp message had been sufficient, though not strictly in compliance with

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[42] *Spilhaus Property Holdings (Pty) Limited and Others v MTN and Another* 2019 (4) SA 406 (CC) at paras 44-45

[43] *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (6) SA 642 (CC) at paras 20-21

Uniform Rule 4(1), because it came to the attention of the majority of respondents and effectively allowed them to oppose a final order.[44]

89 Creative and adaptive methods of service, and scope for discretion, are appropriate for fast-changing times.

90 In *Bushula*, the Eastern Cape High Court noted that the provincial department of welfare could effectively have given notice of the review of disability grants by including notice in recipients' pay-packets.[45]

91 Indeed, even the rules of Court provide the electronic mail, where chosen, is an acceptable form of notification of process once proceedings have been instituted.[46]

92 The key consideration ought to be whether the design of service under the Acts is such that notices can reasonably be expected to come to the attention of infringers.

93 In this regard, section 17 of the Amendment Act must be read together with PAJA. This is a product of the rule, laid down by this Court, that statutes which authorise administrative action must be read together with PAJA.[47]

94 Accordingly, it is incumbent on the third respondent to seek to use a method of service which is most likely to be effective, and so most likely to ensure that an

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[44] *BMW South Africa (Pty) Ltd v Molahloe and others* [2021] ZAGPPHC 481 (22 July 2021) para 18

[45] *Bushula v Permanent Secretary, Department of Welfare, Eastern Cape* 2000 (2) SA 849 (E) 856A

[46] Uniform Rule 4A(1)*(c)*

[47] *Zondi v MEC for Traditional and Local Govt Affairs* 2005 (3) SA 589 (CC) para 101

infringer's right to procedural fairness is promoted. In this regard, In addition, our law presumes that administrators will exercise their powers in a fair manner.[48]

95 Accordingly, in providing for service in accordance with an appropriately modern, practical and diverse scope, and in circumstances where the most effective mode for a particular infringer can be chosen, the Amendment Act strikes an ideal balance between convenience and effectiveness in service.

95.1 Service is convenient, in that it duly caters for the prevalence of electronic communication utilised today.

95.2 Service is effective, in that it allows a wide choice of options as to which method is likely to come to the infringer's notice, and provides flexibility which can be applied towards that purpose.

96 Of course, there may be times where service is not effective, in that a notice has not come to the attention of an infringer. However, the potential of the wide statutory options for service leading to instances of ineffective service is not sufficient to strike down those options.

97 In circumstances were service is not effective, far from violating that infringer's right to just administrative action, that right, and the legislation enacted pursuant to it, will provide the precise remedy necessary to protect that person from adverse consequence.

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[48] This Court has endorsed the presumption that powers will be exercised in a manner which is far, in *Minister of Health and another NO v New Clicks South Africa (Pty) Ltd and others* 2006 (2) SA 311 (CC) para 152. See also: *Van Rooyen and others v The State and others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) para 37

VIII. CONCLUSION

98 For all these reasons, we submit that the AARTO Act and the Amendment Act are constitutional and that the order of the High Court falls to be set aside.

STEVEN BUDLENDER SC
KHELU NONDWANGU
Counsel for the RTIA

Chambers, Sandton
13 October 2022

IN THE CONSTITUTIONAL COURT

Case nr: CCT 19/12

In the matter between:

ORGANISATION UNDOING TAX ABUSE	Applicant
and	
MINISTER OF TRANSPORT	1st Respondent
MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	2nd Respondent
ROAD TRAFFIC INFRINGEMENT AUTHORITY	3rd Respondent
APPEALS TRIBUNAL	4th Respondent
ROAD TRAFFIC MANAGEMENT CORPORATION	5th Respondent

THIRD RESPONDENT'S TABLE OF AUTHORITIES

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1. BMW South Africa (Pty) Ltd v Molahloe and others [2021] ZAGPPHC 481 (22 July 2021)
2. Bushula v Permanent Secretary, Department of Welfare, Eastern Cape 2000 (2) SA 849 (E)
3. City of Cape Town v Robertson and another 2005 (2) SA 323 (CC)
4. City of Johannesburg Metropolitan Municipality v Chairman of the National Building Regulations Review Board and Others 2018 (5) SA 1 (CC)
5. City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others 2010 (6) SA 182 (CC)
6. Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 2000 (1) SA 732 (CC)
7. Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; Ex Parte Speaker of the KwaZulu-

Natal Provincial Legislature: In re Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995 1996 (4) SA 653 (CC)

8. Matatiele Municipality and others v President of the Republic of South Africa and others (no 2) 2007 (6) SA 477 (CC)

9. Member of the Executive Council for Development Planning and Local Government, Gauteng, v Democratic Party and Others 1998 (4) SA 1157 (CC)

10. Minister of Health and another NO v New Clicks South Africa (Pty) Ltd and others 2006 (2) SA 311 (CC)

11. Minister of Local Government, Environmental Affairs & Development Planning, WC v Habitat Council 2014 (4) SA 437 (CC)

12. My Vote Counts NPC v Speaker of the National Assembly and others 2016 (1) SA 132 (CC)

13. National Credit Regulator v Opperman And Others 2013 (2) SA 1 (CC)

14. S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC) at paras 20-21

15. S v Makwanyane and another 1995 (3) SA 391 (CC)

16. Sebola and another v Standard Bank of South Africa Limited and another 2012 (5) SA 142 (CC)

17. Singh and another v Mount Edgecombe Country Club Estate Management Association Two (RF) (NPC) and others [2018] 1 All SA 279 (KZP)

18. Speaker of the National Assembly v Public Protector and Others; Democratic Alliance v Public Protector and Others 2022 (3) SA 1 (CC)

19. Spilhaus Property Holdings (Pty) Limited and Others v MTN and Another 2019 (4) SA 406 (CC)

20. Tongoane and others v Minister of Agriculture and Land Affairs and others 2010 (6) SA 214 (CC)

21. Tronox Kzn Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and others 2016 (3) SA 160 (CC)

22. United Democratic Movement v Speaker, National Assembly and others 2017 (5) SA 300 (CC)

23. Van Rooyen and others v The State and others (General Council of the Bar of South Africa Intervening) 2002 (5) SA 246 (CC)

24. Western Cape Provincial Government and others: In Re DVB Behuising (Pty) Limited v North West Provincial Government and another 2001 (1) SA 500 (CC)

25. Zondi v MEC for Traditional and Local Govt Affairs 2005 (3) SA 589 (CC)