CONSTITUTIONAL COURT OF SOUTH AFRICA

In the matter between:

Case CCT 19/22

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
and	
CITY OF CAPE TOWN	Amicus Curiae

Neutral citation:	*Organisation Undoing Tax Abuse v Minister of Transport and Others* [2023] ZACC 24
Coram:	Zondo CJ, Baqwa AJ, Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mbatha AJ, Mhlantla J, Rogers J and Tshiqi J.
Judgments:	Zondo CJ (unanimous)

Heard on: 15 November 2022

Decided on: 12 July 2023

Summary: Constitutional validity — Concurrent legislative competences — Schedule 4 and Schedule 5 of the Constitution — Road traffic infringement

Administrative Adjudication of Road Traffic Offences Act 46 of 1998 — Administrative Adjudication of Road Traffic Offences Amendment Act 4 of 2019

ORDER

On appeal against, and, application for confirmation of, an order of constitutional invalidity granted by the Gauteng Division of the High Court, Pretoria, the following order is made:

1. The order made by the Gauteng Division of the High Court, Pretoria, 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 inconsistent with the Constitution and invalid is not confirmed.
2. The appeal against the order of the High Court referred to in paragraph 1 above is upheld and the order of the High Court is hereby set aside and replaced with the following:

   "The application is dismissed with no order as to costs."
3. Section 30 of the Administrative Adjudication of Road Traffic Offences Act 46 of 1998, once amended by section 17 of the Administrative Adjudication of Road Traffic Offences Amendment Act 4 of 2019, will not be inconsistent with the Constitution to the extent that it will permit

service of notices and documents by modes of service other than personal service or service by registered mail.

4. There is no order as to costs.

JUDGMENT

ZONDO CJ

Introduction

[1] These are confirmation proceedings arising from a judgment of Basson J of the Gauteng Division of the High Court, Pretoria, (High Court) which concluded that the Administrative Adjudication of Road Traffic Offences Act[2] (AARTO Act) and the Administrative Adjudication of Road Traffic Offences Amendment Act[3] (AARTO Amendment Act) were inconsistent with the Constitution[4] and, therefore, invalid. This was pursuant to an application for such an order brought by the Organisation Undoing Tax Abuse (OUTA). The commencement date of the AARTO Amendment Act has not yet been proclaimed.

[2] Subsequent to the handing down of the judgment, OUTA applied to this Court for an order confirming the order of invalidity of the High Court. The Minister of Transport (Minister) and the Road Traffic Infringement Agency (RTIA) unsuccessfully opposed OUTA's application in the High Court. The Minister and RTIA appeal the order of the High Court and oppose OUTA's application for its confirmation. The RTIA is an entity established by the AARTO Act to give effect to the objects of that Act and to enforce its scheme. The Road Traffic Management Corporation (RTMC), an entity

---

[2] 46 of 1998.

[3] 4 of 2019.

[4] The Constitution of the Republic of South Africa, 1996.

established under section 3 of the Road Traffic Management Corporation Act,[5] was admitted as the fifth respondent in the confirmation proceedings. The City of Cape Town was admitted as an amicus curiae (friend of the court).

High Court

[3] OUTA instituted an application in the High Court in which it challenged the constitutional validity of the AARTO Act and the AARTO Amendment Act and sought an order declaring that those Acts were inconsistent with the Constitution and, therefore, invalid.

[4] There were two bases for OUTA's constitutional challenge in respect of the AARTO Act. The one was that the subject matter of the AARTO Act fell within the functional area of the exclusive legislative competence of the provincial sphere of government. This would mean that the AARTO Act was inconsistent with the Constitution because it would have been passed by Parliament which had no legislative competence to pass it. The other was that the AARTO Act encroached on the exclusive executive competence of the local sphere of government and that this rendered the AARTO Act inconsistent with the Constitution because Parliament had no competence to pass a law that usurped the executive functions of municipalities.

[5] OUTA also contended that, if the AARTO Act was not inconsistent with the Constitution, then at least section 17 of the AARTO Amendment Act, which amends section 30 of the AARTO Act, was inconsistent with the Constitution in so far as it prescribed that the service of documents under the AARTO Act could be effected not only by personal service or registered mail but also by ordinary postage or electronic service. The argument was that the consequences of a failure to comply with, for example, the infringement notice and infringement order under the AARTO Act were so serious that service should be effected only by way of personal service or registered mail.

[5] 20 of 1999.

[6] The Minister and the RTIA opposed OUTA's application in the High Court. They contended that the AARTO Act fell within the concurrent legislative competence shared between Parliament and the provincial sphere of government. They contended, too, that the AARTO Act did not take away any executive function or powers from the local sphere of government nor did it encroach on those powers in any way.

[7] The High Court concluded that the AARTO Act and the AARTO Amendment Act "unlawfully intrude upon the exclusive executive and legislative competence of the local and provincial governments, respectively, and as such the two Acts are unconstitutional". The High Court also stated that the AARTO Act deprived municipalities of their exclusive traffic law enforcement powers in respect of traffic at the municipal level and in respect of municipal roads. Basson J stated that "those exclusive legislative and executive competences are effectively rendered meaningless".

[8] The High Court adopted an approach to the interpretation of Schedules 4 and 5 which was urged upon it by counsel for OUTA and called "bottom up". That approach entailed that, in determining the scope of the functional areas listed in Schedules 4 and 5, referred to later in this judgment, one needed to start with first carving out those functional areas within the exclusive legislative and executive competences and then move up to provincial and, ultimately, national spheres of government. The High Court rejected a contention by the Minister and the RTIA that the AARTO Act dealt with matters which fell under the functional area of "road traffic regulation" in Part A of Schedule 4. In support of its rejection of this contention, the High Court stated that the contention:

(a) could not be correct and had been rejected by this Court in *GDT*;[6]

(b) interpreted the functional competences conferred in Schedule 4 in isolation;

[6] *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC).

(c) ignored the exclusive competences conferred upon provinces and local government;

(d) effectively deprived provincial and local government of legislative competence over a functional area which was reserved exclusively for those two government spheres; and

(e) deprived municipalities of their exclusive executive traffic law enforcement functions and rendered their exclusive legislative and executive competences meaningless.

[9] The High Court adopted an approach referred to as the "bottom-up" approach. This approach, in essence, requires a court confronted with such a matter to determine the functional areas that fall within the exclusive legislative competence of provinces, i.e. Schedule 5. Once those have been determined, then whatever remains is said to fall under concurrent national and provincial legislative competence under Schedule 4. The Court based this approach on the following passage of this Court's judgment in *Liquor Bill*:[7]

> "It follows that, in order to give effect to the constitutional scheme, which allows for exclusivity subject to the intervention justifiable under section 44(2), and possibly to incidental intrusion only under section 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*."[8] (Emphasis added.)

[10] However, *Liquor Bill* is no authority for this "bottom-up" approach. The above passage must be understood in the context of the entire judgment. In particular, it must be understood in the light of the overall reasoning of the Court. In *Liquor Bill* this Court determined the scope of the functional area listed under Schedule 4 (via a process of interpretation of the wording of the functional area), without "carving out" - as the High

[7] *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* [1999] ZACC 15; 2000 (1) SA 732 (CC); 2000 (1) BCLR 1 (CC).

[8] Id at para 49.

Court would have us do - areas of exclusive provincial competence and assigning the remaining areas to the national sphere of government. After reaching its conclusion on the scope of the functional area, this Court remarked:

> "It is sufficient to say that although our Constitution creates exclusive provincial legislative competences, *the separation of the functional areas in Schedules 4 and 5 can never be absolute* . . . That Schedule 4 legislation may impact on a Schedule 5 functional area finds recognition on one reading of section 44(3). Whatever its true reading this provision was not designed to undermine the Schedule 5 competences. They retain their full meaning and effect, except where encroachment by national legislation would in fact be 'reasonably necessary for, or incidental to' the effective exercise of a Schedule 4 power. *Since however no national legislative scheme can ever be entirely water-tight in respecting the excluded provincial competences, and since the possibility of overlaps is inevitable, it will on occasion be necessary to determine the main substance of legislation,* and hence to ascertain in what field of competence its substance falls; and, this having been done, what it incidentally accomplishes."[9] (Emphasis added.)

[11] The above-quoted passage, viewed in the light of what this Court actually did in *Liquor Bill*, makes it plain that the *Liquor Bill* case is not authority for a bottom-up approach. Instead, the case is authority for a holistic approach that considers:

(i) the text of the Schedule,

(ii) the substance and purposes of the legislation, and

(iii) whether the subject matter of the legislation is one which requires intra- or inter-provincial regulation - all the while remaining cognisant of the need not to impair or undermine the competence of the provincial and, where applicable, local sphere of government.

[12] There is nothing in the wording of Schedule 4 that makes it contingent upon or dependent on Schedule 5. The only internal qualifiers or "limiters" of what national government can and cannot do in relation to the functional areas listed under Schedule

[9] Id at paras 61-2.

4 is the introducing sentence to Part B of Schedule 4. That qualifier applies in respect of the functional areas listed under Part B of Schedule 4. Had the drafters of the Constitution intended to assign powers in the manner adopted by the High Court, they would not have had to draft Schedule 4 - they could have simply said "national and provincial spheres of government shall have concurrent competence in respect of the functional areas that are not listed in [the current Schedule 5]". That is, of course, not the case.

[13] The High Court concluded that the AARTO Act and the AARTO Amendment Act were inconsistent with the Constitution and declared them invalid and ordered the Minister and the RTIA to pay the applicants' costs including the costs of two counsel jointly and severally, the one paying the other to be absolved.

In this Court

[14] As already indicated earlier, OUTA applies for the confirmation of the High Court's declaratory order of invalidity and the Minister and RTIA oppose that application and appeal against the High Court order of invalidity and of costs. The RTMC appeals the order of the High Court and opposes the confirmation of that order. The question for determination in this Court is whether Parliament was competent to pass the AARTO Act. OUTA contends that, for two reasons, the AARTO Act fell outside the competence of Parliament. The one reason is that the AARTO Act fell within the exclusive legislative competence of provincial legislatures. The second is that the AARTO Act usurps the exclusive executive functions of the local sphere of government. OUTA's contention is that any one of these two grounds is good enough to justify the dismissal of the appeal and the confirmation of the order of the High Court.

[15] There is another contention that OUTA advances but that would not result in the invalidity of the whole Act, if upheld. It would affect only the service provisions of the AARTO Amendment Act. The contention is that section 17 of the AARTO Amendment Act is inconsistent with the Constitution in so far as it provides for service other than personal service and service by registered mail. This Court will

need to consider this challenge only if it rejects OUTA's contention that the AARTO Act as a whole is inconsistent with the Constitution.

[16] The Minister of Transport, the RTIA and the RTMC dispute OUTA's contentions and submit that a proper reading of the pertinent provisions of the Constitution together with Schedules 4 and 5 of the Constitution reveals that the AARTO Act is legislation that falls within the concurrent legislative competence of Parliament and provincial legislatures. They argue, therefore, that Parliament had the power to pass the AARTO Act. It is now necessary to refer to the relevant constitutional framework.

[17] The amicus delivered written submissions and presented oral argument through Counsel at the hearing of this matter. The amicus elected not to make any submissions on whether or not the AARTO Act fell within the concurrent legislative competence of Parliament and provincial legislatures or whether it fell within exclusive legislative competence of the provincial sphere of government. Indeed, the amicus made no submissions on whether the AARTO Act usurped the exclusive executive functions of the local sphere of government.

[18] The amicus' submissions appear to have been directed mainly at showing that, should this Court engage with the enquiry contemplated in section 44(2)[10] of the Constitution and, more particularly, whether the threshold of necessity prescribed by section 44(2) has been met, the amicus would argue that, even where a demerit point system has been adopted in certain jurisdictions, local government entities continue to play a key role in its enforcement and adjudication. The import of the amicus' argument in this regard was that the threshold of necessity required by section 44(2) of the Constitution to justify Parliament's intervention in passing legislation that otherwise falls within the exclusive legislative competence of the provincial sphere of government was not met.

[10] See para 23.

[19] The amicus' other submission was that, even if it was competent for Parliament to pass the AARTO Act, certain foreign jurisdictions show that national legislation may vest administrative decision-making and enforcement powers in municipalities. The amicus sought to argue that section 44 of the Constitution may not be used to reduce municipal fiscal capacity.

[20] Before I can consider the amicus' submissions, I will need to first consider the submissions made by the various parties because, depending on the conclusion I reach on one or more of the parties' contentions, it may not be necessary to consider the issues in respect of which the amicus made submissions. If I conclude, for example, that the AARTO Act falls under a functional area that is within the concurrent legislative competence of Parliament and the provincial sphere of government, the issues on which the amicus made submissions will fall away. However, should I conclude, for example, that the AARTO Act falls under a functional area that is within the exclusive legislative competence of the provincial sphere of government, I would have to consider whether Parliament's passing of the AARTO Act can be justified on the basis of section 44(2) of the Constitution in which case I would have to consider the amicus' submissions in regard to that provision. Before I can consider the parties' submissions, it is necessary to set out the relevant constitutional provisions.

Relevant constitutional provisions

[21] The Constitution establishes three spheres of government, namely national, provincial and local. Parliament is the country's legislative authority at national level. At provincial level the legislative authority vests in provincial legislatures. At local government level the legislative and executive authority is vested in Municipal Councils. Each one of these three legislative structures has competence to make certain laws, sometimes exclusively, sometimes concurrently with another. The national and provincial spheres enjoy concurrent legislative competence in regard to

certain matters. These are the functional areas listed in Part A of Schedule 4 to the Constitution.

[22] Section 43 of the Constitution deals with the legislative authority of the Republic. It reads:

> "43. In the Republic, the legislative authority—
>
> (a) of the national sphere of government is vested in Parliament, as set out in section 44;
>
> (b) of the provincial sphere of government is vested in the provincial legislatures, as set out in section 104; and
>
> (c) of the local sphere of government is vested in the Municipal Councils, as set out in section 156."

Parliament

[23] In so far as it is relevant to the present matter, section 44(1) to (4) of the Constitution provides as follows:

> "44(1) The national legislative authority as vested in Parliament—
>
> (a) confers on the National Assembly the power—
>
> (i) …
>
> (ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; and
>
> (iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government; and
>
> (b) confers on the National Council of Provinces the power—
>
> (i) …
>
> (ii) to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76; and

(iii) to consider, in accordance with section 75, any other legislation passed by the National Assembly.

(2) Parliament may intervene, by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary—

(a) to maintain national security;

(b) to maintain economic unity;

(c) to maintain essential national standards;

(d) to establish minimum standards required for the rendering of services; or

(e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

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

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

Provinces

[24] In so far as it is relevant to the present matter, section 104 provides:

"104(1) The legislative authority of a province is vested in its provincial legislature, and confers on the provincial legislature the power—

(a) …

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

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

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

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

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

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

…

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

Municipalities

[25] Section 151 of the Constitution provides:

"(1) The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic.

(2) The executive and legislative authority of a municipality is vested in its Municipal Council.

(3) A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.

(4) The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions."

[26] Section 154(1) of the Constitution reads:

"The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions."

[27] Section 156 reads as follows:

"(1) A municipality has executive authority in respect of, and has the right to administer—

(a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and

(b) any other matter assigned to it by national or provincial legislation.

(2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.

(3) Subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a by-law and national or

provincial legislation that is inoperative because of a conflict referred to in section 149, the by-law must be regarded as valid for as long as that legislation is inoperative.

(4) The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if—

(a) that matter would most effectively be administered locally; and

(b) the municipality has the capacity to administer it.

(5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions."

Schedules 4 and 5

[28] It is now necessary to look at the matters allocated to the different spheres of government in Schedules 4 and 5 which may have something to do with traffic or roads which are relevant to the determination of whether the AARTO Act fell within the competence of Parliament or the provincial sphere of government and whether it can be said that, in passing the AARTO Act, Parliament usurped the executive functions of the local sphere of government.

"Schedule 4

Functional Areas of Concurrent National and Provincial Legislative Competence

Part A

…

Road traffic regulation

…

Part B

…

…

…

Schedule 5

Functional Areas of Exclusive Provincial Legislative Competence

Part A

…

Provincial roads and traffic

…

Part B

The following local government matters to the extent set out for provinces in section 155(6)(a) and (7):

…

Municipal roads

…

Traffic and parking"

[29] Section 155(6) and (7) reads as follows:

> "(6) Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must—
>
> (a) provide for the monitoring and support of local government in the province; and
>
> (b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.
>
> (7) The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by 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)."

[30] In this matter we are required to determine whether the AARTO Act falls under "road traffic regulation" which is listed in Part A of Schedule 4 or "provincial roads and traffic" which is listed in Part A of Schedule 5 or "municipal roads" or "traffic and parking" which are listed in Part B of Schedule 5. The items described as "road traffic regulation", "provincial roads and traffic", "municipal roads" and "traffic and parking" are some of the functional areas listed in either Schedule 4 or Schedule 5. In terms of the Constitution the functional areas listed in Part A of Schedule 4 are functional areas

in respect of which Parliament and provincial legislatures have concurrent legislative competence. The functional areas listed in Part A of Schedule 5 fall within the exclusive legislative competence of provincial legislatures. The functional areas listed in Part B of Schedule 4 and Part B of Schedule 5 fall within the executive authority of municipalities which, in terms of the Constitution, municipalities are entitled to administer.

[31] If the AARTO Act falls under the functional area of "road traffic regulation", that will mean that it falls under a functional area in respect of which Parliament shares concurrent legislative competence with provincial legislatures. In such a case the AARTO Act would not be inconsistent with the Constitution. That would mean that OUTA's contention that the AARTO Act falls within the exclusive provincial legislative competence fails and that, therefore, the AARTO Act is not unconstitutional on that ground. If the AARTO Act falls under the functional area of "provincial roads and traffic" as listed in Part A of Schedule 5 then, subject to one qualification, that would mean that the AARTO Act falls within a functional area that is within the exclusive legislative competence of provincial legislatures. The result would be that the AARTO Act is inconsistent with the Constitution and, therefore, invalid. This would be so because the AARTO Act was passed by Parliament and Parliament has no competence to pass legislation relating to a functional area listed in Part A of Schedule 5. Only a provincial legislature has the competence to pass legislation about "provincial roads".

[32] The qualification referred to in the preceding paragraph relates to section 44(1)(a) of the Constitution. In so far as it is relevant, section 44(1)(a) reads:

> "44(1) The national legislative authority as vested in Parliament—
>
> (a) confers on the National Assembly the power—
>
> (i) …
>
> (ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but

excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; and

(iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government."

[33] Section 44(2) of the Constitution, which is referred to in section 44(1)(a)(ii) above, reads as follows:

"(2) Parliament may intervene, by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary—

(a) to maintain national security;

(b) to maintain economic unity;

(c) to maintain essential national standards;

(d) to establish minimum standards required for the rendering of services; or

(e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole."

[34] That only a provincial legislature is competent to pass provincial legislation on any matter within a functional area listed in Schedule 5 is made clear by section 104(1)(b)(ii) of the Constitution read with Schedule 5. Section 104(1)(b) reads:

"104(1) The legislative authority of a province is vested in its provincial legislature, and confers on the provincial legislature the power—

(a) …

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

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

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

[35] 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 is made clear by section 156(1)(a) of the Constitution read with Part B of

Schedule 4 and Part B of Schedule 5. Section 156(1)(a) was quoted earlier. It confers upon a municipality executive authority in respect of, and the right to administer, the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5. The matters of "municipal roads" and "traffic and parking" which are listed in Part B of Schedule 5 fall within the executive authority of a municipality and a municipality has the right to administer those matters.

[36] If the AARTO Act contains provisions that effectively usurp the executive authority of municipalities in respect of, or, infringe their right to administer, matters that municipalities are entitled to administer, or matters over which municipalities have executive authority in terms of section 156 read with Part B of Schedule 5, that will mean that the AARTO Act or such provisions are inconsistent with the Constitution and invalid.

Relevant decisions of this Court

[37] As I have said, the issues for determination in this matter are whether the AARTO Act falls within Parliament's legislative competence or the provincial sphere of government's exclusive legislative competence. If it falls within Parliament's competence, whether the AARTO Act has usurped municipalities' executive functions. There is a number of cases which have come before this Court in which this Court was called upon to determine the sphere of government under whose legislative competence a particular piece of legislation fell. I propose to refer to four of these to see the approach taken by this Court in determining such issue.

Amakhosi decision

[38] In a case to which I refer for convenience simply as *Amakhosi*[11] the issues were whether two Bills presented to the KwaZulu-Natal Provincial Legislature – to which I

[11] *In re: KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995, In re: Payment of Salaries. Allowances and other Privileges to the Ingonyama Bill of 1995* [1996] ZACC 15, 1996 (7) BCLR 903 (CC); 1996 (4) SA 653 (CC).

refer conveniently as the Amakhosi Amendment Bill[12] and Ingonyama Amendment Bill[13] – fell within the legislative competence of the provincial legislature and, if they did, whether their purposes were permissible. The two Bills included provisions which, if enacted, would have prohibited the King of amaZulu, also known as Isilo or Ingonyama and amakhosi from receiving any payment from any source except the source provided for in the Bills and other provincial Acts of the KwaZulu-Natal Provincial Legislature or for their performance of certain functions in terms of the Constitution.

[39] In determining whether the Amakhosi Amendment Bill and the Ingonyama Amendment Bill fell within Schedule 6 of the Constitution – in which case the KwaZulu-Natal Legislature would have had the legislative competence in respect of the two Bills – this Court held that the test is to determine what the subject matter or the substance, purpose and effect of the two Bills was and whether such subject matter fell within Schedule 6 of the Interim Constitution.[14] Schedule 6 dealt with the legislative competences of provinces. One of the subjects of such legislative competence was "traditional authorities". Chaskalson P, writing for a unanimous Court, put it in these terms:

> "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."[15]

[40] This Court concluded, after conducting this inquiry, that the substance of the Amakhosi Amendment Bill and the Ingonyama Amendment Bill fell within Schedule 6 and that, therefore, they fell within the KwaZulu-Natal Provincial Legislature's legislative competence. This Court said:

---

[12] KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill.

[13] Payment of Salaries, Allowances and Other Privileges to the Ingonyama Amendment Bill.

[14] Constitution of the Republic of South Africa Act 200 of 1993.

[15] *Amakhosi* above n 11 at para 19.

> "The substance of the legislation is the appointment of traditional leaders within the province and the prescription of terms according to which they hold office. These are matters within the competence of the provincial legislature."[16]

[41] It also said:

> "If a law dealing with the appointment and powers of traditional leaders is within the competence of the provinces, a law for the payment of salaries and allowances to such leaders must also be within such competence. Such payments are incidental to the appointment, for the salary and allowances attach to the office."[17]

[42] When it was argued that, if the legislation fell within a functional area in Schedule 6 and, therefore, fell within the legislative competence of the KwaZulu-Natal Provincial Legislature, that would be the end of the enquiry and the purpose of the legislation would be irrelevant, this Court said:

> "If the purpose of legislation is clearly within Schedule 6, it is irrelevant whether the court approves its purpose. But purpose is not irrelevant to the Schedule 6 enquiry. 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."[18]

[43] In *Amakhosi* this Court concluded that none of the grounds advanced to challenge the constitutionality of the two Bills had merit and decided that the two Amendment Bills were not unconstitutional on any of the grounds that had been advanced.

---

[16] Id at para 33.

[17] Id at para 22.

[18] Id at para 19.

DVB decision

[44] Another case to consider is *DVB.*[19] The case was about whether the North West Provincial Legislature had the competence to repeal Proclamation R293 of 1962 (Proclamation). At the time of the coming into force of the Interim Constitution on 27 April 1994, the Proclamation was in force. The Proclamation had been issued in terms of the Native Administration Act.[20] The Proclamation made provision for the establishment of a special kind of townships by the so-called Minister of Bantu Administration and Development for African citizens. Such townships would be established in areas held by the "South African Native Trust" which was established by the Native Trust and Land Act.[21] That was the Act that prevented Africans – by far the majority of the South African population – to own land in 87% of the country.

[45] The Interim Constitution conferred on provincial legislatures legislative competence in respect of the functional areas listed in Schedule 6. One of the functional areas in that Schedule was described as "regional planning and development". Although the Interim Constitution did not expressly confer on a provincial legislature the power to repeal legislation, such power was implied in the power to make laws that fell within the term "provincial legislation". Legislation could only constitute provincial legislation if it was provincial legislation as defined in section 239 of the Interim Constitution. Section 239 defined "provincial legislation" as including –

> "(a) subordinate legislation made in terms of a provincial Act; and
> (b) legislation that was in force when the Constitution took effect and that is administered by a provincial government."

[19] *Western Cape Provincial Government In Re: DVB Behuising (Pty) Limited v North West Provincial Government* [2000] ZACC 2; 2001 (1) SA 500 CC; 2000 (4) BCLR 347 (CC).

[20] 38 of 1927.

[21] 18 of 1936.

[46] The North West Provincial Legislature enacted Act 7 of 1998 (Act 7). Section 6 of that Act purported to repeal the Proclamation in its entirety. The constitutional validity of section 6 of Act 7 was challenged on the basis that the North West Provincial Legislature had no competence to repeal the Proclamation. In June 1994, the President acting in terms of section 235(8) of the Interim Constitution, assigned the administration of a number of national laws to the North West Provincial Government. One of those national laws was the Proclamation. This assignment by the President was said to be subject to the functional areas specified in Schedule 6 of the Interim Constitution.

[47] One of the questions with which this Court dealt in *DVB* was whether the Proclamation and the impugned provisions of Act 7 fell within a functional area in Schedule 6. How does one determine whether legislation deals with a matter listed in a Schedule to the Constitution? This Court said:

> "The inquiry into whether the Proclamation dealt with a matter listed in schedule 6 involves the determination of the subject matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the Proclamation is about."[22]

[48] This Court said that in certain jurisdictions "the subject matter of a statute is referred to as its 'pith and substance'". It then pointed out that Indian authors "suggest that the doctrine of 'pith and substance' is one of the interpretive tools which is invoked whenever 'a law dealing with a subject in one list is also touching on a subject in another list'".[23]

---

[22] *DVB* above n 19 at para 36.

[23] Id at fn 53 and, as referred to in the *DVB* case Singh V.N. Shukla's Constitution of India 9 ed (Eastern Book Company, Lucknow 1994) at 656-9. See also Constitutional Law of India (vol 1) 4 ed (N.M. Tripathi Private Ltd, Bombay 1991) at 269-75. It is then pointed out that the authority for this view is to be found in the *Subrahmanyan Chettiar v Muttuswami Goundan* AIR 1941 FC 47 at 51 which was said to have been quoted in *Prafulla Kumar Mukherjee and others v Bank of Commerce Ltd., Khulna* AIR 1947 PC 60 at 65. This Court referred to a statement by Latham CJ in *Bank of Australia in Bank of New South Wales and Others v The Commonwealth and Others* (1948) 76 CLR 1 at 185. That statement was that the phrase "pith and substance" was not of particular use except in so far as it was used "as representing 'primary object and effect' and incidental application". It is reflected in the judgment that Latham CJ also said that "there is no difference between asking: 'What is the pith and substance of a statute?' and asking: 'What is its true nature and character?'" In the footnote this Court also pointed out that in Canada, in characterising the "matter" of a challenged law for the purpose of determining whether it is within its competence, the courts usually describe it as "the pith and substance" of the law. In support of this proposition this Court referred to Hogg *Constitutional Law of Canada* 3 ed (Carswell, Ontario 1992) 377 at para 15.5.

[49] This Court then went on to say:

> "In determining the subject matter of the Proclamation it is necessary to have regard to its purpose and effect. The inquiry should focus beyond the direct legal effect of the Proclamation and be directed at the purpose for which the Proclamation was enacted to achieve. In this inquiry the preamble to the Proclamation and its legislative history are relevant considerations, as they serve to illuminate its subject matter. They place the Proclamation in context, provide an explanation for its provisions and articulate the policy behind them."[24]

[50] The Court referred to the passage in this Court's judgment in *Amakhosi* dealing with the relevance of the purpose of legislation. The Court later pointed out that the determination of the subject matter of the Proclamation required an understanding of its legislative scheme. However, it also said that a law could have more than one subject matter.[25]

[51] After determining that the subject matter of the Proclamation included the establishment of townships for Africans, this Court said:

> "There can be no doubt that the establishment of a township necessarily involves planning where the township will be situated."[26]

[52] The Court referred to the fact that in the pre-transition jurisprudence relating to provincial ordinances, the courts construed the power to establish a township to involve town planning. In this regard it referred to *Broad-acres Investments Pty Ltd*[27] where the Appellate Division of the Supreme Court – then the highest court in this country – said:

---

[24] *DBV* above n 19 at para 37.

[25] Id at para 39.

[26] *DBV* above n 19 at para 50.

[27] *Broad-acres Investment Ltd v Hart* 1979 (2) SA 922 (A).

> "If the power is conferred to establish a township there is implicit a power to do at least elementary town planning, because without such planning there can be no township."[28]

[53] On the Proclamation as a whole, this Court concluded that—

> "its legislative scheme was in substance within the functional areas of regional planning and development, urban and rural development and local government."[29]

These were the functional areas listed in Schedule 6.

[54] The Court then considered whether the impugned provisions of the Proclamation dealt with a matter listed in Schedule 6. The impugned provisions were chapters 1, 2, 3 and 9 of the Proclamation. This Court concluded that these impugned provisions were an integral part of the legislative scheme of the Proclamation and, accordingly, fell within Schedule 6. The Court was satisfied that the "tenure" and deeds registration provisions of the Proclamation were inextricably linked to the other provisions of the Proclamation and were foundational to the planning, regulation and control of the settlements.[30]

Liquor Bill decision

[55] In *Liquor Bill* Parliament had passed a Liquor Bill and sent it to the President for his assent but the President returned it to the National Assembly for reconsideration because he had reservations about its constitutionality. The National Assembly and the National Council of Provinces reconsidered the Bill but did not effect any changes and returned it to the President. At that stage the President referred the Liquor Bill to this Court to determine its constitutionality in the light of certain reservations that he articulated in the referral.

---

[28] Id at 931A-B.

[29] *DVB* above n 19 at para 50.

[30] Id at para 58.

[56] The question that the President wanted determined by this Court was whether the Liquor Bill was necessary for one or more of the purposes set out in section 44(2) of the Constitution. The President's position was that, if the Liquor Bill was not necessary for one or more of the purposes of section 44(2) of the Constitution, Parliament had no competence to pass it. Section 44(2), which I have quoted before but repeat for convenience, reads:

> "Parliament may intervene, by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary—
>
> (a) to maintain national security;
> (b) to maintain economic unity;
> (c) to maintain essential national standards;
> (d) to establish minimum standards required for the rendering of services; or
> (e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole."

[57] This Court pointed out that there could be no doubt that a number of the provisions of the Liquor Bill fell within functional areas listed in Schedule 4, more particularly the concurrent national and provincial legislative competences in regard to "trade" and "industrial promotion". However, the question was whether the Liquor Bill trenched on the provinces' exclusive legislative competence in respect of "liquor licences" in Part A of Schedule 5, which would require the section 44(2) justification in order to be within the competence of the national sphere of government.

[58] The Liquor Bill created a "national and uniform administrative and regulatory framework" for the liquor industry by establishing a National Liquor Authority and National Liquor Appeal Tribunal as national bodies and by requiring provincial legislatures to pass legislation to establish provincial liquor authorities. The decisions of the National Liquor Authority were subject to appeal to the National Liquor Appeal Tribunal. The task of the National Liquor Authority was to approve the "registration" for the manufacture and a wholesale distribution of liquor. The provincial liquor

authorities were to consider the "registration" for retail liquor sale and liquor sales at special events. The decisions of the provincial liquor authorities were subject to appeal to provincial panels of appeal.

[59] The Liquor Bill divided economic activity within the liquor industry into three categories, namely, production (which it called manufacturing), distribution and retail sales. This division meant that an application for registration could only be made in respect of one of the three categories. Multiple registration was not allowed. Subject to two exceptions, no one registered in one category could hold a controlling interest in another person registered in a different category.

[60] The Liquor Bill divided the responsibilities for the three categories of economic activity between national and provincial government by effecting a division between the manufacture and distribution of liquor, on the one hand, and retail sale, on the other. The Bill treated the manufacture and distribution of liquor as national issues and retail sales of liquor (including sales at special events) as provincial issues to be dealt with by provincial liquor authorities and the provincial panels of appeal.

[61] For the establishment of the provincial liquor authorities and provincial panels of appeal, the Liquor Bill imposed an obligation on the provincial legislature of each province to pass legislation. The National Liquor Authority was charged with considering whether the statutorily prescribed requirements for registration as a wholesaler or distributor had been met. It was also charged with considering the "merits" of an application and determining the terms and conditions applicable to the registration that conform with prescribed criteria, norms and standards pertaining, among others, to limiting vertical integration, encouraging diversity of ownership and facilitating the entry of new participants into the industry. Provincial liquor authorities were obliged to consider applications for retail and special event registrations.

[62] The Western Cape Provincial Government attacked the constitutionality of the Bill on two grounds. The one ground was the exclusion of the provincial governments

from any role in the licensing of liquor manufacturers and distributors. The other was the extent of the national intervention permitted by the Bill in the provinces' powers to regulate retail licensing.

[63] In articulating what it was called upon to consider, this Court said in the *Liquor Bill* case:

> "The terms of the President's referral, and the conflicting contentions of the Province and of the Minister, require this Court to consider the ambit of the national and provincial powers conferred by the Constitution and their interrelation where, as here, the national legislature is said to encroach on an exclusive provincial competence. That requires a determination of the scope of the exclusive provincial legislative competence within the functional area of 'liquor licences', which in turn requires consideration of the national and provincial context against which that exclusive competence is afforded. Whether the Bill or parts of it, should properly be characterised as a liquor licensing measure must also be considered."[31] (Emphasis added.)

[64] In *Liquor Bill* this Court pointed out that—

> "in order to give effect to the constitutional scheme, which allows for exclusivity subject to the intervention justifiable under section 44(2), and possibly to incidental intrusion only under section 44(3), the Schedule 4 functional competences should be interpreted as being distinct from, and as excluding, Schedule 5 competences."[32]

[65] This Court also stated:

> "[W]here a matter requires 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 power of intervention accorded by section 44(2). The corollary is that where provinces

[31] *Liquor Bill* above n 7 at para 39.

[32] Id at para 50.

> are accorded exclusive powers these should be interpreted as applying primarily to matters which may appropriately be regulated intra-provincially."[33]

[66] This Court then went on to say that it was in the light of the above provision for the allocation of provincial and national legislative powers that the inclusion of the functional area "liquor licences" in Schedule 5 had to be given meaning. It also mentioned that the backdrop included the express concurrency of national and provincial legislative power in respect of the functional area of "trade" and "industrial promotion" listed in Schedule 4. After referring to the meaning of the word "trade" in the New Shorter Oxford Dictionary – which is "buying and selling or exchange of commodities for profit, *spec*. between nations; commerce, trading, orig. conducted by passage or travel between trading parties" – this Court stated that there was nothing in Schedule 4 which suggested that the term should be restricted in any way. It also pointed out that the Western Cape Government had not contended that Parliament's concurrent competence in regard to "trade" should be limited to cross-border or inter-provincial trade. It followed, this Court continued:

> "[I]n its ordinary signification, the concurrent national legislative power with regard to 'trade' includes the power not only to legislate intra-provincially in respect of the liquor trade, but to do so at all three levels of manufacturing, distribution and sale."[34]

[67] After referring to a submission that a liquor licence is the permission that a competent authority gives to someone to do something with regard to liquor that would otherwise have been unlawful, this Court pointed out that that something would usually be the sale of liquor at specified premises. This Court rejected a contention by the Western Cape government that the drafters of the Constitution must have intended the term "liquor licences" in Part A of Schedule 5 to encompass all legislative means and ends relating to the liquor trade at all levels of manufacture, production and sale and that all these were intended to fall within the provinces' exclusive legislative

[33] Id at para 52.

[34] Id at para 54.

competences. This Court pointed out that the field of "liquor licences" is narrower than the liquor trade and the Schedule did not refer simply to "liquor" or "the liquor trade" or the "liquor industry". It used the phrase "liquor licences". The Court pointed out that there was a range of legislation in South Africa regulating the liquor trade. It went on to say:

> "Production, marketing, export and import of wine and spirits is regulated in terms of two important statutes, the Wine and Spirit Control Act, 47 of 1970 and the Liquor Products Act, 60 of 1989. These are primarily concerned with aspects of the liquor trade and industry, and not with liquor licensing itself. Legislation concerning the production of liquor products, including quality control, marketing and import and export of such products would fall within the concurrent competence of trade and/or industrial promotion, rather than within the exclusive competence of liquor licences."[35]

[68] This Court concluded that the structure of the Constitution suggested that the national government enjoyed the "power to regulate the liquor trade in all respects other than liquor licensing."[36] It said that this included "matters pertaining to the determination of national economic policies, the promotion of inter-provincial commerce and the protection of the common market in respect of goods, services, capital and labour mobility."[37]

[69] This Court also stated that the Schedule 5 competences retain their full meaning and effect, whatever impact Schedule 5 legislation may have on a Schedule 4 functional area.[38] It then said:

> "Since, however, no national legislative scheme can ever be entirely water-tight in respecting the excluded provincial competences, and since the possibility of overlaps is inevitable, it will on occasion be necessary to determine the main substance of legislation, and hence to ascertain in what field of competence its substance falls; and,

[35] Id at para 57.

[36] Id at para 58.

[37] Id at para 57.

[38] Id at para 62.

> this having been done, what it incidentally accomplishes. This entails that a Court determining compliance by a legislative scheme with the competences enumerated in Schedules 4 and 5 must at some stage determine the character of the legislation. It seems apparent that the substance of a particular piece of legislation may not be capable of a single characterization only, and that a single statute may have more than one substantial character. Different parts of the legislation may thus require different assessment in regard to a disputed question of legislative competence."[39]

[70] In *Liquor Bill* this Court followed the test it had adopted in *Amakhosi* and *DVB* for determining whether legislation fell within the competence of one or other sphere of government. In the *Liquor Bill* case this Court said:

> "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."[40]

[71] This Court concluded that the true substance of the Liquor Bill was directed at three objectives. These were:

(a) the prohibition on cross-holdings between the three tiers involved in the liquor trade, namely producers, distributors and retailers;

(b) the establishment of uniform conditions, in a single system, for the national registration of liquor manufacturers and distributors; and in a further attempt at establishing national uniformity within the liquor trade;

(c) the prescription of detailed mechanisms to provincial legislatures for the establishment of retail licensing mechanisms.

[72] With regard to (a), this Court concluded that the Liquor Bill's prohibition of cross-holdings fell "within the national legislature's competence to regulate trade."[41] It said that on any approach the vertical and horizontal regulation of the liquor trade and

[39] Id.

[40] Id at para 64.

[41] Id at para 70.

the promotion of racial equity within the trade were legislative ends which fell within the functional competence that Schedule 4 accorded the national Parliament under the headings of trade and industrial promotion.[42]

[73] With regard to the "three-tier" structure of the Liquor Bill, this Court said that the manufacturing and wholesale trades in liquor had a national and international dimension. It pointed out that manufacturers and wholesalers ordinarily traded across the nation and some traded both nationally and internationally. It said that little, if any, liquor was directed to an intra-provincial market only.

[74] This Court also expressed the view that in general the distribution of liquor was likely to be inter-provincial – as opposed to – intra-provincial. It went on to say:

> "The same considerations in my view apply in general to the distribution of liquor, where the scale of distribution is likely, in almost all cases, to be inter- as opposed to intra-provincial. The regulation and control of liquor distribution, on this approach, therefore falls outside the primary signification of the exclusive competence. If production and distribution of liquor were to be regulated by each province, manufacturers and distributors would require licences from each province for the purpose of conducting national trading and possibly a national licence for export."[43]

[75] The Court concluded that the manufacturing and distribution of liquor fell outside of the functional area of "liquor licences". This meant that legislation dealing with the manufacturing (or production) and distribution would not fall within the exclusive legislative competence of the provincial sphere of government.[44] It went on to say that:

> "…the provincial exclusive power in relation to 'liquor licences' was in the first instance not intended to encompass manufacturing and distribution of liquor. The

[42] Id at para 69.

[43] Id at para 73.

[44] Id.

> exclusive competences in Schedule 5 all point to intra-provincial activities and concerns only, and exclude those with a national dimension. Of the twelve exclusive competences itemised in Schedule 5A, nine contain express terms confining their ambit to provincial or non-national issues. This obviously signifies that 'liquor licences', too, must mean intra-provincial liquor licences."[45]

[76] This Court also pointed out that the Minister had shown at least in regard to the manufacturing and distribution of liquor that the maintenance of economic unity necessitated, for the purposes of section 44(2)(b) of the Constitution, the national Legislature's intervention in requiring a national system of registration in these two areas.[46]

[77] This Court said that the manufacturing and wholesale distribution of liquor (national and international sales) were important industries which provided employment for a substantial number of persons. It stated that they also generated foreign income. It went on:

> "That these trades require control is obvious and the most effective way of doing so is through a national regulatory system. This enables the government to regulate the trade vertically and horizontally, to set common standards for all traders concerned, and enables traders to conduct their activities with a single licence, according to a single regulatory system."[47]

[78] The Court concluded, however, that Parliament had no competence to legislate as it had done in section 30 of the Liquor Bill by imposing certain obligations on the provincial legislatures to pass provincial laws to certain effects dictated in the Liquor Bill. It reached this conclusion on the basis that legislating with regard to the functional area of "liquor licences" fell within the exclusive legislative competence of the provincial sphere of government. It said that it had not been shown that Parliament's

[45] Id at para 43.

[46] Id at para 78.

[47] Id.

encroachment into the exclusive competence of provinces was necessary for any of the purposes listed in section 44(2) of the Constitution in relation to liquor licences. Section 30 dealt with the award of licences and prescribed in some detail to the provincial legislatures what structures should be set up and how those structures had to go about considering and awarding liquor licences. This Court concluded that the Liquor Bill was only unconstitutional to the extent that it sought to place obligations on the provincial sphere of government to legislate for matters which fell within the exclusive legislative competence of the provincial sphere of government.

GDT decision

[79] In *GDT* this Court stated that the question that needed consideration was whether, by conferring on provincial development tribunals the power to determine applications for rezoning and the establishment of townships, Chapters V and VI of the Development Facilitation Act[48] (Act) were consistent with the provisions of the Constitution relating to the allocation of powers and functions to municipalities.[49]

[80] This Court took section 156(1) of the Constitution as the starting point in assessing the powers of local government. This section has been quoted earlier and it is not necessary to quote it again. Part B of Schedule 4 to which the section refers has also been quoted above in so far as it is relevant. This Court pointed out that the effect of sections 156(1), 155(6)(a) and 155(7) read with the matters referred to in Schedules 4 and 5 is that, except to the limited extent referred to in some of the provisions in these sections, the executive authority over, or the power to administer, matters listed in Part B of Schedules 4 and 5 is vested in municipalities.

[81] This Court then turned to a consideration of the meaning of "municipal planning" in Part B of Schedule 4. In this regard it started off by

[48] 67 of 1995.

[49] *GDT* above n 6 at paras 41-2.

acknowledging that the Constitution must be interpreted purposively.[50] It pointed out that, in the context of Schedule 4 and 5 functional areas, this Court had already stated that the purposive interpretation had to be conducted in a manner that would allow the different spheres of government to exercise their powers "fully and effectively".[51]

[82] In considering the meaning of "municipal planning" in Part B of Schedule 4, this Court made a number of points that are important for the construction of provisions of the Constitution in the context of determining the legislative competences of different spheres of government in Schedules 4 and 5 of the Constitution. Below are the points that this Court made:

(a) the purpose of Schedules 4 and 5 is to itemise the powers and functions allocated to each sphere of government.[52]

(b) the Constitution contemplates some degree of autonomy for each sphere.[53]

(c) the autonomy contemplated by the Constitution for each sphere cannot be achieved if the functional areas itemised in the schedules are construed in a manner that fails to give effect to the constitutional vision of distinct spheres of government.[54]

(d) although, as in a statute, there is a presumption that a word that is used more than once in the Constitution is presumed to bear the same meaning, the context in which the word is used in a particular part of the Constitution may indicate that it does not bear the same meaning it bears elsewhere in the Constitution.[55]

(e) the constitutional scheme relating to the different spheres of government, together with the different contexts in which the term "planning" is used,

[50] Id at para 49.

[51] Id.

[52] Id at para 50.

[53] Id.

[54] Id.

[55] Id at para 52.

indicates clearly that the term has different meanings in different parts of the Constitution.[56]

(f) the Constitution confers different planning responsibilities on each sphere of government in accordance with what is appropriate to each sphere.[57] The Constitution confers a "planning" competence on all spheres of government by allocating "regional planning and development" concurrently to the national and provincial spheres, "provincial planning" exclusively to the provincial sphere and executive authority over, and, the right to administer, "municipal planning" to the local sphere. The first of these functional areas also indicates the close link between planning and development. It is difficult to conceive of any development that can take place without planning.[58]

(g) the functional areas allocated to the various spheres of government are not contained in hermetically sealed compartments. However, and that notwithstanding, they remain distinct from one another; this is the position even in regard to those functional areas that share the same wording like roads, planning, sport and others.[59]

(h) 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. 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".[60]

(i) barring functional areas of concurrent competence, each sphere of government is allocated separate and distinct powers which it alone is

[56] Id at para 53.

[57] Id.

[58] Id at para 54.

[59] Id at para 55.

[60] Id.

entitled to exercise. The constitutionally mandated interventions in sections 100 and 139 are exceptions to the principle.[61]

(j) the term "municipal planning" is not defined in the Constitution but the word "planning" in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships. In that context zoning is commonly used to define the control and regulation of the use of land. There is nothing in the Constitution indicating that the word carries a meaning other than its common meaning which includes the control and regulation of the use of land.[62]

(k) it must be assumed that, when the drafters of the Constitution chose to use "planning" in the municipal context, they were aware of its common meaning. Accordingly, in relation to municipal matters the Constitution employs "planning" in its commonly understood sense.[63]

[83] This Court concluded that the contested powers which the Act had conferred on the provincial development tribunals to decide applications for the rezoning of land and the establishment of townships formed part of "municipal planning". After this conclusion, the next question that this Court had to answer, in order to decide whether the provincial or local sphere of government had the competence to decide rezoning applications and applications for the establishment of townships, was whether the Constitution conferred the same powers on the provincial sphere of government.[64]

[84] In seeking to determine the issue of whether the Constitution conferred the same powers on the provincial sphere of government, this Court made, among others, the following points:

[61] Id at para 56.

[62] Id at para 57.

[63] Id.

[64] Id.

(a) the question that arises is whether the same powers are also part of "urban and rural development" which is an item listed in Part A of Schedule 4.[65]

(b) to construe any of the functional areas allocated to provinces as encompassing the contested powers would not only be inconsistent with the constitutional scheme as revealed in the schedules but also with sections 41, 151 and 155 of the Constitution.[66]

(c) the legislative authority in respect of matters listed in Part B of Schedule 4 vests in the national and provincial spheres of government concurrently while the legislative authority over matters listed in Part B of Schedule 5 vests in the provincial sphere of government exclusively.[67]

(d) the national and provincial spheres of government cannot, by legislation, give themselves the power to exercise executive municipal powers or the right to administer municipal matters: the mandate of these two spheres of government is ordinarily limited to regulating the exercise of executive municipal powers and the administration of municipal affairs by municipalities.[68]

(e) it is the duty of this Court and, indeed, other courts as well to construe the sections of the Constitution in a manner that strikes harmony between them and gives effect to each and every section.[69]

[85] This Court then said:

> "[62] The purposive construction of the schedules requires, in the present context, that a restrictive meaning be ascribed to '—development' so as to enable each sphere to exercise its powers without interference by the other spheres. This restrictive approach coheres with the functional scheme of the schedules which vests specific powers in municipalities.

[65] Id at para 58.

[66] Id.

[67] Id at para 59.

[68] Id.

[69] Id at para 61.

> [63] For present purposes it is not necessary, in my view, to define exactly the scope of the functional area of 'urban and rural development'. It is sufficient to say simply that it is not broad enough to include powers forming part of 'municipal planning'. It follows that the expansive interpretation contended for by the respondents must be rejected."[70]

[86] The Court concluded that the Constitution did not confer the same powers on the provincial spheres of government that it confers on municipalities with regard to the rezoning of land and the establishment of townships. This Court also concluded that the impugned provisions giving provincial development tribunals the power that the Constitution confers on municipalities were inconsistent with the Constitution and invalid.

The authorities in summary

[87] It is clear from the jurisprudence of this Court as reflected in the cases discussed above that, in order to determine whether a piece of legislation falls within a particular functional area in either Schedule 4 or Schedule 5 of the Constitution, a court is required to determine the subject matter of that legislation and then see within which sphere of government's functional area it falls. Determining the subject matter of legislation entails considering its substance, purpose and effects. It entails determining what the legislation is about or determining its character. It is now appropriate to turn to the determination of the subject matter of the AARTO Act.

The subject matter of the AARTO Act[71]

[88] The preamble to the AARTO Act reads:

> "To promote road traffic quality by providing for a scheme to discourage road traffic contraventions, to facilitate the adjudication of road traffic infringements, to support

[70] Id at paras 62-3.

[71] Since the AARTO Amendment Act has not been brought into force, I quote the provisions of the main Act as they currently are, that is, prior to the amendment which the AARTO Amendment Act will bring about.

the prosecution of offences in terms of the national and provincial laws relating to road traffic, and implement a point demerit system; to provide for the establishment of an agency to administer the scheme; to provide for the establishment of a board to represent the agency; and to provide for matters connected therewith."

[89] From the preamble it appears that the purpose of the AARTO Act is to promote "road traffic quality". It appears also that the AARTO Act seeks to facilitate the adjudication of road traffic infringements and to implement a points demerit system. Its main structures are the RTIA (the "agency" referred to the preamble) and the Road Traffic Infringement Agency Board (the "board" mentioned in the preamble), the functions of which are set out in the AARTO Act. The AARTO Amendment Act, once brought into force, will add the Appeal Tribunal.

[90] Section 2 of the AARTO Act lists the eight object of the AARTO Act. Section 2 reads:

"The objects of this Act are, despite the Criminal Procedure Act, 1977 (Act No. 51of 1977)—

(a) to encourage compliance with the national and provincial 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 imposed if infringements or offences are not committed over specified periods;
(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."

[91] Let me pause here and consider at least some of these objects of the AARTO Act and see how they could be achieved if they were objects that would be sought to be achieved through legislation passed by provincial legislatures. I do this because part of OUTA's case is that the subject matter of the AARTO Act falls within the functional area of "provincial roads and traffic" in Part A of Schedule 5. This argument means that the subject matter of the AARTO Act falls within the exclusive legislative competence of the provincial sphere of government.

[92] The first objective of the AARTO Act listed in section 2(a) is "to encourage compliance with the national and provincial laws relating to road traffic and to promote road Traffic Safety". If OUTA's contention that the subject matter of the AARTO Act falls within the exclusive legislative competence of provincial legislatures were correct, the question that would arise is: how would the provincial legislature pass legislation the objective of which is to encourage compliance with national and provincial laws? As we have nine provinces and, therefore, nine provincial legislatures, OUTA's contention means that all nine provincial legislatures could each pass provincial legislation aimed at encouraging compliance with national and provincial laws. If that is what the nine provincial legislatures could do, the next question would be: would all the nine provincial legislatures pass the same or similar legislation so that there would be uniformity or would each provincial legislature pass its own legislation with no attempt to try and ensure that, since all these provincial laws would be aimed at achieving the same objective, the provincial pieces of legislation would be the same?

[93] If the nine provincial legislatures sought to pass essentially the same or similar provincial Acts, is this not a clear indication that legislation aimed at a national objective falls within the legislative competence of the national sphere of government? If the nine provincial legislatures were each to pass their own piece of legislation with no regard to the provincial legislation passed by the other provincial legislatures, motorists

would find that they are subjected to different pieces of provincial legislation which could even be in conflict with one another.

[94] There is also something remarkable about the objective of the AARTO Act in section 2(a). That is that it refers to national and provincial laws. That is remarkable because part of what we are called upon to decide in this case is whether the subject matter of the AARTO Act falls within the functional area "road traffic regulation" in Part A of Schedule 4 or the functional area of "provincial roads and traffic" in Part A of Schedule 5. What is remarkable is that the functional area of "road traffic regulation" is a functional area which falls within the concurrent legislative competence of both the national and provincial spheres of government. So, the objective in section 2(a) has a national and provincial feature which Part A of Schedule 4 also has.

[95] The second objective listed in section 2(b) is "to encourage the payment of penalties imposed for infringements and to allow alleged minor infringers to make representations". The determination whether there has been an infringement is currently the responsibility of the courts. Courts are not a provincial competence. So, if OUTA's contention were correct, how would a provincial legislature pass a provincial Act in regard to a matter that falls outside of its competences? Is this not an indication that the subject matter of the AARTO Act is "road traffic regulation" in Part A of Schedule 4, a concurrent national and provincial functional area?

[96] The third objective of the AARTO Act, as given in section 2(c), is "to establish a procedure for the effective and expeditions adjudication of infringements". The adjudication of infringements by way of the judicial system is also a matter that currently falls within the competence of the national sphere of government and not the provincial sphere of government. So, it is difficult to understand how legislation that seeks to establish a procedure connected with a matter that falls within the competence of the national sphere of government would fall within the exclusive legislative competence of a provincial legislature. The fourth objective of the AARTO Act, as given in section 2(d), is "to alleviate the burden on the courts of trying offenders for

infringements". Once again this relates to a competence that falls under the national sphere of government and not the provincial sphere.

[97] Section 3 of the AARTO Act establishes the RTIA which will adjudicate traffic infringements that are not treated as criminal offences under the AARTO Act. The RTIA's objects and functions are provided for in section 4. Section 4(1) reads:

> "(1) The objects of the agency are, despite the Criminal Procedure Act, 1977 (Act 51 of 1977)—
>
> (a) to administer a procedure to discourage the contravention of road traffic laws and to support the adjudication of infringements as set out in subsection (2);
>
> (b) to enforce penalties imposed against persons contravening road traffic laws as set out in subsection (3);
>
> (c) to provide specialised prosecution support services as set out in subsection (4); and
>
> (d) to undertake community education and community awareness programmes in order to ensure that individuals understand their rights and options as set out in subsection (5)."

[98] Section 4(2) lists the RTIA's functions as:

> "(a) receiving notices from any issuing authority if an infringer has failed to comply with an infringement notice issued in terms of section 17;
>
> (b) considering representations from an infringer in terms of section 18 with regard to an infringement notice relating to a minor infringement;
>
> (c) issuing a courtesy letter in terms of section 19 to an infringer who has failed to comply with an infringement notice;
>
> (d) issuing an enforcement order in terms of section 20 against an infringer who has failed to comply with the requirements of a notification contemplated in section 18(7) or a courtesy letter contemplated in section 19 (2) (b), or who has failed to appear in court under the circumstances contemplated in section 22 (3);
>
> (e) issuing a warrant in terms of section 21 against an infringer who has failed to comply with an enforcement order;

(f) revoking an enforcement order in terms of section 20 (9); and

(g) updating the national contraventions register in the prescribed manner."

Road Traffic Infringement Agency Board

[99] Section 6 establishes a board called the Road Traffic Infringement Agency Board the functions of which are set out in section 7. These include:

(a) to approve the business plan prepared in terms of section 8(2) and monitor the efficient and effective operation of the RTIA;

(b) to monitor the success achieved by the RTIA in promoting compliance with the road traffic laws;

(c) to receive annual reports contemplated in section 8(4) and to advise the registrar on measures to be taken to improve the RTIA's effectiveness;

(d) to advise the Minister regarding amendments to the AARTO Act or any other road traffic legislation in order to improve the RTIA's effectiveness; and

(e) to identify and recommend institutional, technical and logistical support which the RTIA may provide to assist the prosecution of road traffic offenders and the adjudication of offences by the courts.

[100] The AARTO Act is a short Act. Chapter I contains section 1 (definitions) and section 2 which sets out the objects of the AARTO Act. Chapter II deals with the Road Traffic Infringement Agency Board and other provisions relating to the administration of the RTIA. Chapter III deals with the adjudication procedure. Chapter IV deals with the points demerit system. The last chapter is Chapter V which deals with some general matters.

[101] In terms of section 17, the adjudication procedure starts with the issuing to an alleged infringer by an issuing authority of an infringement notice specifying the name and address of the alleged infringer, and:

(a) specifying the particulars of the alleged infringement

(b) specifying amount of the prescribed penalty to be paid;

(c) informing the alleged infringer that the demerit points position can be ascertained from the national contravention register at, among others, a driving licence testing centre;

(d) informing the alleged infringer to pay the penalty within 32 days or to make arrangements to pay the penalty in instalments or to elect in the prescribed manner to be tried in court on a charge of having committed an alleged offence or to provide information in the prescribed manner that he or she was not the driver of the vehicle.

[102] Section 18 makes provision for an alleged infringer who has been served with an infringement notice in respect of a "minor infringement"[72] to make representations to the RTIA. In terms of section 19 the RTIA issues a courtesy letter to an alleged infringer who has not complied with an infringement notice issued to him or her. The courtesy letter simply urges an alleged infringer to make representations (in the case of a minor infringement) or pay the penalty imposed or notify the RTIA that he or she elects to be tried in a court for the alleged infringement. Section 20 provides for an enforcement order where an alleged infringer has failed to act in accordance with the infringement notice and courtesy letter. Section 21 provides for the issuing of a warrant for the seizure and sale of the alleged infringer's movable property to defray the penalty and fees due or to seize the driving licence or to deface the driving licence or to immobilise the motor vehicle of which the alleged infringer is the owner or registered operator.

[103] As indicated above Chapter IV deals with the demerit points system. Section 24 makes the following provisions about the demerit points system:

"(1) Any person who has committed an offence or an infringement, incurs the number of demerit points prescribed under section 29(c) in accordance with subsections (2) and (3).

[72] A "minor infringement" is defined in section 1 as meaning "an offence categorised as a minor infringement under section 29(a)". Section 29(a) empowers the Minister to "prescribe offences, and categorise them into minor infringements, major infringements and other offences".

(2) Subject to subsection (4), demerit points are incurred on the date on which the penalty and fee, if any, imposed for the infringement are paid, an enforcement order is issued or the infringer is convicted of the offence, as the case may be.

(3)

(a) If a person has committed two or more infringements or is convicted by a court of two or more offences arising out of the same circumstances, demerit points are recorded, subject to paragraph (b), only in relation to one such infringement or offence, being, in any case where the same number of demerit points does not apply to all those infringements or offences, the infringement or offence to which the greatest number of demerit points applies.

(b) The demerit points in respect of offences or infringements by operators and drivers are recorded separately even if they arise out of the same circumstances.

(4) If a person appeals against a conviction by the court for an offence no demerit points are recorded unless the appeal is rejected or abandoned in which case demerit points are incurred in the prescribed manner.

(4A) For the purpose of recording the demerit points as contemplated in subsections (3) and (4), the clerk of the court must notify the agency of the result of each prosecution and appeal.

(5) A print-out from the national contraventions register which is verified by the agency is on the face of it evidence of the demerit points incurred by a person, but nothing prevents a person from approaching the court on appeal or review in connection with the demerit points recorded against that person in the said register."

[104] The application of the demerit points system may lead to the suspension of an alleged infringer's driving licence or ultimately its cancellation. The AARTO Amendment Act establishes—

(a) the Road Traffic Infringement Authority in place of the current RTIA with broadly similar functions; and

(b) an Appeals Tribunal that will deal with appeals from infringement decisions taken by the new Road Traffic Infringement Authority.

As noted, these amendments are not yet in force.

[105] Having dealt with the major features of the AARTO Act, I return to the question: what is the subject matter or substance of the AARTO Act, including its purpose and effect? Put differently, what is the AARTO Act about? It seems to me that the subject matter of the AARTO Act is the encouragement of compliance with the national and provincial laws as well as municipal by-laws relating to road traffic regulation and road safety, the introduction of an administrative system of adjudication of alleged infringements of national and provincial laws and municipal by-laws relating to road traffic and road safety, the establishment of an agency to support the law enforcement and judicial authorities and to introduce the demerit points system to both encourage compliance with road traffic laws and discourage non-compliance therewith.

The question of exclusive legislative competence

[106] The next question is whether the subject matter of the AARTO Act as explained above falls under the functional area of "Road traffic regulation" in Part A of Schedule 4 or the functional area of "provincial roads and traffic" in Part A of Schedule 5 or the functional area of "municipal roads" or "traffic and parking" in Part B of Schedule 5. The first point to be made here is that the functional area of "provincial roads and traffic" makes it clear that it is about provincial roads. Therefore, to the extent that the AARTO Act relates to, among others, national roads, it does not appear to be legislation that would fall within the exclusive legislative competence of the provincial sphere of government. The functional area described as "municipal roads" clearly relates to municipal roads. The AARTO Act does not relate only to municipalities.

[107] Another important point to make is that, whereas the word "regulation" appears in the functional area of "road traffic regulation", the same word does not appear in the functional areas of "provincial roads and traffic" and in "municipal roads" or in "traffic and parking." That word is in the functional area of "road traffic regulation" for a reason. There is also a reason why it does not appear in the other three functional areas. It speaks to the legislative point that the Constitution has given the national and provincial spheres of government the competence to make laws that regulate road traffic.

[108] The South African Concise Oxford Dictionary gives the verb "regulate" this meaning: "1. control or maintain the rate or speed (of a machine or process) 2. control or supervise by means of rules and regulations." It gives the noun "regulation" the meaning: "1. a rule or directive made and maintained by an authority [as modified] in accordance with regulations 2. the action or process of regulating or being regulated." The Cambridge International Dictionary of English gives the following meaning to the verb regulate: "to control, esp by making something work in a particular way you can regulate the temperature in the house by adjusting the thermostat and the radiators. Her mother strictly regulates how much TV she can watch. She has a well-regulated lifestyle."

[109] In *Liquor Bill* this Court referred to some points that would apply to the present case if this Court were to accept OUTA's contention. This Court inter alia said in the context of that case:

> "The Minister's affidavit states in this regard that duplicated or varying provincial licensing requirements would be 'unduly burdensome' for manufacturers and that it was therefore 'economically imperative that control over the activities of manufacturers should take place at national level'. He states that major industries, including the liquor industry 'as a single integrated industry' should not have to 'run the risk of fragmentation arising out of a variety of differing regulatory regimes being imposed upon their operations in different provinces', including what he described as the deleterious effects of 'cross-border arbitrage' between competing provinces. He avers that '[w]ithout a national system of regulation and a national standard to which wholesalers will have to adhere the results would be chaotic': 'The spectre arises of a single business operation having to be separately licensed on differing terms and conditions in different parts of South Africa.'
>
> For the reasons given earlier, the Constitution entrusts the legislative regulation of just such concerns to the national Parliament, and I am of the view that the Minister has shown, at least in regard to manufacturing and distribution of liquor, that the maintenance of economic unity necessitates for the purposes of section 44(2)(b) the national legislature's intervention in requiring a national system of registration in these

> two areas. *The manufacturing and wholesale distribution of liquor (national and international sales) are important industries, which provide employment for a substantial number of persons. They also generate foreign income. That these trades require control is obvious, and the most effective way of doing so is through a national regulatory system.* This enables the government to regulate the trade vertically and horizontally, to set common standards for all traders concerned, and enables traders to conduct their activities with a single licence, according to a single regulatory system. The Western Cape government's denial of the Minister's averment that the production and distribution tiers necessitate a national approach can thus not be sustained."[73] (Emphasis added.)

[110] The word "roads" in Schedule 5 probably refers to the physical infrastructure (the construction and maintenance of roads), which is not something with which the impugned legislation deals.

[111] The words "traffic" and "parking" in Schedule 5 must be interpreted, sensibly, to indicate those matters which are of purely intra-provincial or intra-municipal concern as the case may be. Nobody has suggested that the National Road Traffic Act[74] (NRTA) is constitutionally questionable. The NRTA's preamble correctly states that it is "to provide for road traffic matters which shall apply uniformly throughout the Republic and for matters connected therewith". For example, it is obviously appropriate to have a uniform set of road traffic markings and road traffic signs applying throughout the country as well as standardised procedures for licensing drivers and vehicles. This does not prevent a province or municipality from supplementing the national regime with additional provisions of local concern. Furthermore, in respect of provincial and municipal roads, each province and municipality can decide where particular traffic signs or road markings should be placed. For example, a municipality can decide whether an intersection of municipal roads should be controlled by a stop street, a traffic light or a yield sign; or that the speed limit on a particular road should be lower than the national norm.

[73] *Liquor Bill* above n 7 at paras 77-8.

[74] 93 of 1996.

[112] The AARTO Act, like the NRTA, regulates matters which must appropriately be regulated nationally. A person licensed to drive a vehicle may drive the vehicle anywhere in South Africa and on any type of road. Legislative provisions aimed at encouraging drivers to drive safely, and penalising them when they do not, is something which is eminently suitable for national regulation. It would lead to chaos if each province or each municipality had its own rules about safety on the road. Again, this would not prevent a province or municipality from passing an ordinance or by-law to create additional rules or offences to cater for regional or municipal concerns.

[113] When one compares the functional area described as "road traffic regulation" with the one described as "Provincial road and traffic" as well as the one described as "municipal roads" it is clear that the one relates to provincial roads and the other relates to municipal roads. Even though the functional area relating to "traffic and parking" does not have the prefix "municipal", the context makes it clear that it relates to the local sphere of government.

[114] While the national and provincial spheres of government are given the competence to make laws concerning road traffic regulation, it is quite clear that the local sphere of government is not given any competence to make laws that relate to road traffic regulation. It seems to me that, in relation to the functional area "road traffic regulation", the Constitution confers upon the national and provincial spheres of government the concurrent competence of making laws that control traffic on the roads. The laws that the national and provincial spheres of government may make concerning road traffic regulation apply to all roads including, municipal and provincial roads, and apply to the traffic on all roads, including municipal and provincial roads. This does not interfere in any way with the competence of a municipality to make by-laws relating to municipal roads or to traffic and parking.

[115] The power to make laws that control traffic or movement on the roads necessarily includes power to enforce those laws and to encourage compliance and discourage non-

compliance with those laws. Accordingly, it is properly the concern of both the national and provincial spheres of government that the system of dealing with the infringement of laws relating to road traffic should be effective, which is part of what Parliament seeks to do through the AARTO Act. These are matters that need to be dealt with nationally and inter-provincially.

[116] The AARTO Act establishes a national framework to improve road safety by making laws relating to road traffic that will both encourage and reward compliance with such laws and discourage and penalise non-compliance with such laws. The Acts clearly leave the finer details to the provincial and municipal spheres of government.

[117] The adjudication of, and, penalisation for the breach or contravention of road traffic laws are national and inter-provincial matters. Persons may violate traffic laws in any number of 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 also to sensibility and effectiveness. The system of prosecuting traffic violations, like the system of issuing and revoking driving licences 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.

[118] The functional area "road traffic regulation" in Schedule 4:

(a) does not confine Parliament to regulating only national roads;

(b) includes the power to make framework legislation dealing with national standards, minimum requirements, and monitoring procedures in relation to road traffic; and

(c) the said framework legislation can touch on matters concerning provincial and municipal roads and traffic.

[119] The functional area described as "provincial roads and traffic" in Part A of Schedule 5 starts with the word "provincial" which shows that it cannot be a national

functional area. The implications of the proposition that the AARTO Act falls within the functional area of "provincial roads and traffic" in Part A of Schedule 5 are very serious. They are that only a provincial legislature has the competence to pass a law such as the AARTO Act. If this were the position, it would mean that each one of our nine provinces could pass their own version of the AARTO Act. That would mean, for example, that a driver could be prohibited from driving in one or more provinces but be permitted to drive in other provinces. That could happen, for example, where, if two or more provinces have legislation that, like the AARTO Act, uses the demerit points system, in one province a driver accumulated such a high number of demerit points that his or her driving licence got suspended or cancelled in that province but not in others. The result thereof would be that such a driver is prohibited from driving in one province but the moment he or she crosses the provincial border into another province he or she is allowed to drive because in the latter province his or her driving licence has not been suspended or cancelled.

[120] In my view, the subject matter of the AARTO Act falls within the functional area "road traffic regulation" in Part A of Schedule 4. Therefore, the AARTO Act falls within the concurrent legislative competence of the national and provincial spheres of government in Part A of Schedule 4 to the Constitution.

The question of exclusive executive competence

[121] OUTA also contended that, through the AARTO Act, Parliament usurped law enforcement functions exclusively reserved for the local sphere of government and this rendered the AARTO Act inconsistent with the Constitution. The High Court also reached this conclusion. Interestingly, the High Court did not identify the administrative or executive functions that the AARTO Act is said to have usurped from the local sphere of government and given to organs of state falling under the national sphere of government.

[122] In its written submissions OUTA also contended that the AARTO Act usurped the administrative or executive functions of the local sphere of government and gave

them to organs of state in the national sphere of government. This was so, OUTA submitted, even if it was legislatively competent for the national Parliament to enact framework legislation applicable to all roads, including municipal roads. OUTA argued that municipalities have exclusive executive competence over the enforcement of laws relating to municipal roads, traffic and parking. It submitted that the AARTO Act purported to vest in the RTIA and the Appeals Tribunal, when it comes into operation, administrative powers over municipal roads and traffic law enforcement.

[123] OUTA also submitted that the Constitution conferred on municipalities exclusive executive authority over municipal roads, traffic and parking. It argued that Parliament could not vest any of that authority in the RTIA or the Appeals Tribunal as these were organs of state in the national sphere of government. OUTA also submitted that, if municipal traffic law decision-making and enforcement were to be moved from a system of judicial decision-making and enforcement through the criminal law to a system of administratively imposed fines and demerit points, it was only municipal organs of state that could be vested with those administrative decision-making and enforcement powers.

[124] Unfortunately, OUTA also did not identify the specific provisions of the AARTO Act which it submits have taken away from municipalities their functions and powers in respect of municipal roads, traffic and parking. In my view, the AARTO Act has not taken away any such functions from municipalities. The reason why neither the High Court in its judgment nor OUTA in its written submissions identified such provisions in the AARTO Act is that there are no such provisions. On the contrary, it is clear from certain provisions in the AARTO Act that municipalities have a role to play even in the dispensation that the AARTO Act seeks to introduce. The definition of "issuing authority" in the AARTO Act includes a local authority. In terms of section 6(2)(a), which lists the objects of the AARTO Act, the first object is given as "to encourage compliance with the national and provincial laws and municipal by-laws and road traffic and to promote road traffic safety".

[125] The first object of the AARTO Act as reflected in section 2(a) shows that the AARTO Act contemplates that the dispensation introduced by the AARTO Act will not do away with the by-laws made by municipalities relating to road traffic. If there will still be by-laws relating to road traffic after the AARTO Act has come into operation, who will carry out the administrative and executive functions relating to them if it will not be municipalities? There is no provision in the AARTO Act that takes those functions away from municipalities and gives them to any other organ of state.

[126] Section 17 of the AARTO Act provides that, if a person is alleged to have committed an infringement, an authorised person or a person duly authorised by an issuing authority must, instead of issuing a notice contemplated in section 56 or 341 of the Criminal Procedure Act[75] and, subject to section 23 of the AARTO Act, serve or cause to be served on that person an infringement notice containing the particulars set out in section 17(1)(a) to (f). Section 23 of the AARTO Act provides that, if, on the same set of facts, it is said that a person has committed both an infringement and a criminal offence, that person must be dealt with in terms of the Criminal Procedure Act, despite the provisions of the AARTO Act. Section 23 of the AARTO Act is clear proof that the AARTO Act has not taken away from municipalities any functions they presently perform in relation to the enforcement of traffic by-laws because under the current system municipalities enforce their by-laws in regard to criminal traffic contraventions and it would seem that section 23 allows that to continue. In the circumstances OUTA's contention that the AARTO Act usurps certain executive or administrative functions that are reserved only for municipalities falls to be rejected.

[127] OUTA also creates the impression in its written submissions that, insofar that the AARTO Act seeks to introduce an administrative adjudicative system for traffic or road infringements that are not serious, it proposes to take away something from municipalities. This is simply not true. Under the current system, traffic contraventions

[75] 51 of 1977.

are adjudicated by the courts as criminal offences, which is a system that falls under the national sphere of government.

Section 17 of the AARTO Amendment Act

[128] The last point taken by OUTA relates to section 30 of the AARTO Act as it will be amended by section 17 of the AARTO Amendment Act when that Act comes into force. Section 30(1) currently provides that any document required to be served on an infringer in terms of the Act must be served "personally or sent by registered mail to his or her last known address". Such documents would include infringement notices, courtesy letters and enforcement orders. Once amended by section 17 of the AARTO Amendment Act, the section will permit service of such documents on an infringer to take place by "personal service" or "postage" or "electronic service". OUTA contends that service of such documents by any mode other than personal service and registered mail will lead to many alleged infringers not receiving these documents and yet the Road Traffic Infringement Authority[76] will go ahead and take steps in terms of the AARTO Act which will lead to the disqualification of alleged infringers from driving or suspension or cancellation of their driving licences in circumstances where they may have had a defence against such allegations of infringements but did not raise it because they did not receive such notices or documents.

[129] OUTA also contends that, once those consequences have occurred, the AARTO Act burdens the alleged infringer with the responsibility of having to get his or her disqualification or suspension or cancellation of his or her driving licence reversed. This may be difficult for many alleged infringers because it might require litigation which could drag on for a long time while the alleged infringer is not able to drive. OUTA submits that this state of affairs will limit an alleged infringer's right of movement and right to choose a trade, occupation and profession as entrenched in section 22 of the Constitution. I point out that section 22 of the Constitution provides that the practice of any trade, occupation or profession may be regulated by law. OUTA

[76] The entity that will replace the RTIA when the amendments come into force.

argues that there is no justification for such limitation of these rights and that, in order to be consistent with the Constitution, service of notices and documents contemplated by the AARTO Act should be by personal service or registered mail.

[130] It seems to me that the challenge must fail because it will always be necessary for RTIA to show that the alleged infringer probably received the notice or document irrespective of the method of service it used to send the notice or document to the alleged infringer. It would be important that the efforts of the RTIA in bringing the notice or document to the attention of the alleged infringer be carefully scrutinised before any of the rights of alleged infringers may be adversely affected. I think that this would be in line with the approach taken by this Court in *Sebola*[77] and *Kubyana*[78] in respect of notices that credit providers are required to issue to their debtors who default on payments in terms of section 129 of the National Credit Act[79] and the various legal steps that a credit provider may take against a debtor after a section 129 notice.

[131] Both *Sebola* and *Kubyana* dealt with the meaning of section 129 of the National Credit Act. I note that OUTA's contention is based on the assumption that if mail or a document is sent by registered mail, it will reach the addressee. A reading of this Court's few judgments in *Sebola* and *Kubyana* will show that service by registered mail comes with serious problems itself. Section 129 requires a credit provider, when a consumer is in default under a credit agreement, to "draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent ...". Although this Court was divided in *Sebola*, Cameron J writing for the majority, and I, for the minority, the outcome in both judgments was the same. However, the two judgments adopted somewhat different approaches. In his judgment Cameron J seemed more inclined not to require a section 129 notice to reach the debtor personally whereas I was more

[77] *Sebola v Standard Bank of South Africa Ltd* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC).

[78] *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC).

[79] 34 of 2005.

inclined to insist that such notice should reach the debtor personally or come to their attention. Although Cameron J's judgment was the majority judgment, there seems subsequently to have been an acknowledgement by this Court that there was a need for more clarity as to what this Court's decision meant. Later, this Court was to seek to achieve better clarity in *Kubyana* when it sought, to a large extent, to reconcile the majority and minority judgments in *Sebola.*

[132] In *Sebola* Cameron J said:

> "To sum up: The requirement that a credit provider provide notice in terms of section 129(1)(a) to the consumer must be understood in conjunction with section 130, which requires delivery of the notice. The statute, though giving no clear meaning to 'deliver', requires that the credit provider seeking to enforce a credit agreement aver and prove that the notice was delivered to the consumer. Where the credit provider posts the notice, proof of registered despatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivery to the consumer, will in the absence of contrary indication constitute sufficient proof of delivery. If, in contested proceedings the consumer avers that the notice did not reach him or her, the court must establish the truth of the claim. If it finds that the credit provider has not complied with section 129(1), it must in terms of section 130(4)(b) adjourn the matter and set out the steps the credit provider must take before the matter may be resumed.
>
> What the statute requires depends on the form of communication the credit provider uses. The Act clearly contemplates other forms of communication, including email and fax. These proceedings do not require us to say anything about them."[80]

[133] The minority judgment in *Sebola*, inter alia, said:

> "The language of section 96 is clear. The section says that the notice must be delivered 'to the other party'. That leaves no room for the proposition that a notice that is not delivered to such party is good enough. Furthermore, if one then gives the word

[80] *Sebola* above n 77 at paras 87-8.

> 'deliver' in section 96(1) its ordinary meaning of handing over or transferring something to the possession or keeping of another, quite clearly that proposition is inconsistent with the notion that a letter which is stuck at the consumer's local post office has been delivered to him or its contents have been drawn to his notice.
>
> Section 96(1) also makes it clear where the delivery of the legal notice must take place. It says 'at . . . the address of that other party as set out in the agreement, unless paragraph (b) applies'. That means that there are only two addresses at which a legal notice, as contemplated in section 96(1) and, therefore, a section 129(1)(a) letter, may be delivered, if the requirements of section 96(1) are to be complied with. It is either at the other party's — in this case the consumer's — address as given in the credit agreement or at the address most recently provided by the recipient in accordance with section 96(2). That means either an address provided by a party to a credit agreement, when he or she changes to a new address different from the one provided in the credit agreement. For an address to come within the provision of s 96(2) it must have been delivered in writing to the party seeking to give legal notice, by hand, registered mail, or electronic mail, if the party seeking to give the legal notice has provided an email address."[81]

[134] In *Kubyana* this Court was once again faced with the same question of the meaning of section 129. In *Kubyana*, too, two judgments were produced, one by Mhlantla AJ, and, the other, by Jafta J. Mhlantla AJ had not been involved in *Sebola.* Jafta J had concurred in the minority judgment in *Sebola*. The two judgments in *Kubyana* were both supported by the same number of Justices of this Court, namely, eight. So, they are both judgments of this Court. It seems to me that they represent this Court's attempts to reconcile the majority and minority judgments in *Sebola* so as to bring about more certainty on what this Court's pronouncement was on the meaning of section 129 of the National Credit Act.

[135] Some of the passages in both Mhlantla AJ's and Jafta J's respective judgments in *Kubyana* reflect this and are relevant to the question I am considering at this stage of this judgment in this matter. That question is: what are we to make of the fact that the

[81] Id at paras 168-9.

service provisions of the AARTO Act in section 30, once amended by section 17 of the AARTO Amendment Act, will permit service of notices and documents on alleged infringers by modes of service other than personal service and registered mail? This question is raised because it is acknowledged that when those modes of service, which are emails, SMSs and WhatsApp messages, are used to send notices and documents to alleged infringers, it will be very easy for the notices or documents not to reach the alleged infringers personally or not to come to their attention. RTIA would proceed and take further steps against an alleged infringer on the assumption that he or she had received the notices and documents when in fact they may not have received them. Here are some of the statements made by this Court in its two judgments in *Kubyana* which support the approach I have taken in this matter in regard to OUTA's challenge of the service provisions.

[136] Mhlantla AJ, inter alia, said:

> "Once a credit provider has produced the track and trace report indicating that the section 129 notice was sent to the correct branch of the Post Office and has shown that a notification was sent to the consumer by the Post Office, that credit provider will generally have shown that it has discharged its obligations under the Act to effect delivery. The credit provider is at that stage entitled to aver that it has done what is necessary to ensure that the notice reached the consumer. It then falls to the consumer to explain why it is not reasonable to expect the notice to have reached her attention if she wishes to escape the consequences of that notice. And it makes sense for the consumer to bear this burden of rebutting the inference of delivery, for the information regarding the reasonableness of her conduct generally lies solely within her knowledge. In the absence of such an explanation the credit provider's averment will stand. Put differently, even if there is evidence indicating that the section 129 notice did not reach the consumer's attention, that will not amount to an indication disproving delivery if the reason for non-receipt is the consumer's unreasonable behaviour."[82]

[137] In Mhlantla AJ's conclusion this Court said:

[82] *Kubyana* above n 78 at para 53.

"The Act prescribes obligations that credit providers must discharge in order to bring section 129 notices to the attention of consumers. When delivery occurs through the postal service, proof that these obligations have been discharged entails proof that—

(a) the section 129 notice was sent via registered mail and was sent to the correct branch of the Post Office, in accordance with the postal address nominated by the consumer. This may be deduced from a track and trace report and the terms of the relevant credit agreement;

(b) the Post Office issued a notification to the consumer that a registered item was available for her collection;

(c) the Post Office's notification reached the consumer. This may be inferred from the fact that the Post Office sent the notification to the consumer's correct postal address, which inference may be rebutted by an indication to the contrary as set out in [52] above; and

(d) a reasonable consumer would have collected the section 129 notice and engaged with its contents. This may be inferred if the credit provider has proven (a) – (c), which inference may, again, be rebutted by a contrary indication: an explanation of why, in the circumstances, the notice would not have come to the attention of a reasonable consumer."[83]

[138] In Jafta J's judgment this Court said:

"The word 'deliver' is commonly used in our law, particularly in the field of contracts and service of court process. In its common sense, deliver means bringing or taking something to a recipient. For example, if a contract of sale requires the seller to deliver a motor vehicle to the purchaser, it is construed to mean that the seller has to take the vehicle to the purchaser. For delivery to take place, it does not follow that the vehicle must have been handed over to the purchaser in person. Depending on the circumstances of the case, taking the vehicle to the purchaser's address may constitute delivery. But the actual taking of the vehicle would constitute factual proof of what was done. And this is a matter of evidence and not interpretation.

It seems to me that in the context of section 130(1) read with section 129(1), delivered means taking a notice to the consumer. As long as steps taken show on a balance of

[83] Id at para 54.

> probabilities that the notice is likely to have reached the consumer, the court before which the proceedings are brought may be satisfied that the notice was delivered.
>
> In delivering the notice, the credit provider may follow any method. This is so because sections 130(1) and 129(1) do not specify a particular method of delivery. All that they require is that the notice be delivered. If a particular method is chosen, whatever is done must constitute adequate proof that the notice has reached the consumer. If, for example, the credit provider has chosen to send the notice by ordinary post, proof of the letter reaching the consumer's address would ordinarily constitute delivery contemplated in the relevant sections. These facts would give rise to the presumption that the notice reached the consumer. This type of presumption is recognised in our law.
>
> But if, in defending the action instituted by the credit provider, the consumer establishes that at the relevant time she was lying unconscious in hospital, the credit provider would have failed to prove delivery and therefore the court would not be satisfied that the notice reached the consumer. Absent an explanation of that nature, the court may be satisfied, on a balance of probabilities, that the notice reached the consumer. But, as mentioned earlier, the enquiry here would be directed at establishing proof of delivery and not the meaning of the word."[84]

[139] It is important to point out that the consequences that may arise from a debtor or consumer not receiving a notice issued in terms of section 129 of the National Credit Act – which was the subject of the judgments of this Court in *Sebola* and *Kubyana* – could also include loss of the debtor's property such as a motor vehicle or a house because of legal steps that the credit provider would have taken against the debtor who had been served a notice or documents by modes of service other than personal service and registered mail in terms of section 129 of the National Credit Act but did not receive them. Accordingly, OUTA's contention in this regard must also fail.

[84] Id at paras 79-82.

[140] In the light of the conclusion I have reached on the contentions between the parties, it is not necessary to deal with section 44(2) of the Constitution and the amicus' submissions.

[141] In the result, it seems to me that this Court must decline to confirm the order of the High Court and uphold the appeal. On the basis of *Biowatch*[85] it would not be appropriate to make any costs order.

[142] The following order is made:

1. The order made by the High Court, Pretoria, 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 inconsistent with the Constitution and invalid is not confirmed.
2. The appeal against the order of the High Court referred to in paragraph 1 above is upheld and the order of the High Court is hereby set aside and replaced with the following:

   "The application is dismissed with no order as to costs."
3. Section 30 of the Administrative Adjudication of Road Traffic Offences Act 46 of 1998, once amended by section 17 of the Administrative Adjudication of Road Traffic Offences Amendment Act 4 of 2019, will not be inconsistent with the Constitution to the extent that it will permit service of notices and documents by modes of service other than personal service or service by registered mail.
4. There is no order as to costs.

[85] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

For the Applicants:	Matthew Chaskalson SC and Emma Webber instructed by Mncedisi Ndlovu & Sedumedi Attorneys
Counsel for the First Respondent	Tembeka Ngcukaitobi SC and Mfundo Salukazana instructed by State Attorney
Counsel for the Third Respondent	Steven Budlender SC and Khelu Nondwangu instructed by Mncedisi Ndlovu & Sedumedi Attorneys
For the Fifth Respondents:	Ngwako Maenetje SC and Mkhululi Stubbs instructed by Noko Ramaboya Attorneys
For the Amicus Curiae:	Karrisha Pillay SC and Trisha Sarkas instructed by Mcaciso Stansfield Incorporated