IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER : 42649/2012

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES ~~YES~~ / NO
(3) REVISED ✓

25/2/2014
DATE

SIGNATURE

In the matter between

FINES4U CC	First Applicant
VAAL CAR HIRE (PTY) LTD	Second Applicant
and	
THE JOHANNESBURG METROPOLITAN POLICE DEPARTMENT	First Respondent
THE ROAD TRAFFIC INFRINGEMENT AGENCY	Second Respondent
THE MUNICIPAL COUNCIL FOR THE CITY OF JOHANNESBURG METROPOLITAN COUNCIL	Third Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL FOR COMMUNITY SAFETY, GAUTENG PROVINCE	Fourth Respondent
THE MINISTER OF POLICE	Fifth Respondent
THE MINISTER OF TRANSPORT	Sixth Respondent

JUDGMENT

André Gautschi AJ :

[1] This application concerns the implementation of the Administrative Adjudication of Road Traffic Offences Act, 46 of 1998 ("the AARTO Act" or simply "AARTO") and its Regulations[1].

[2] The first applicant is a close corporation which is in the business of administering road traffic offence notices ("traffic fines") issued to its clients (mainly large fleet owning entities) by the various issuing authorities throughout the Republic of South Africa.

[3] The second applicant (Vaal Car Hire (Pty) Ltd) is one of its clients.

[4] The third respondent (the Municipal Council for the City of Johannesburg Metropolitan Council, hereinafter referred to as "the City") has oversight over the first respondent (the Johannesburg Metropolitan Police Department, hereinafter referred to as "the JMPD"). There is some dispute about whether the JMPD is a juristic entity in its own right capable of suing and being sued, but it is in my view of no moment, since the City has in any event been cited.

[5] The second respondent is the Road Traffic Infringement Agency created by section 3 of AARTO and will hereinafter be referred to as "the Agency".

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[1] The Administrative Adjudication of Road Traffic Offences Regulations, 2008 as amended ("the AARTO Regulations")

[6] The applicants have also joined the Member of the Executive Council for Community Safety, Gauteng Province as the fourth respondent, the Minister of Police as the fifth respondent and the Minister of Transport as the sixth respondent, for any interest they may have in this matter.

[7] Only the first and third respondents oppose the application. The applicants were represented by Mr McNally SC leading Mr Goslett, and the first and third respondents were represented by Mr Budlender leading Mr Ferreira.

[8] The nature and focus of the application has changed since it was launched, for reasons which will become clear later. However, in essence, the application is aimed at coercing the first and third respondents as the issuing authority, and the Agency, to perform their functions properly in the implementation of the AARTO Act.

[9] The AARTO Act was introduced in order to approach traffic offences differently from the traditional prosecution of offenders who did not admit guilt. Accordingly, its objects include to establish a procedure for the effective and expeditious adjudication of infringements[2]; to alleviate the burden on the courts of trying offenders for infringements[3]; to penalise drivers and operators who are guilty of infringements or offences through the imposition of demerit

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2 Section 2(c) of AARTO

3 Section 2(d) of AARTO

points leading to the suspension and cancellation of driving licences, professional driving permits or operator cards[4]; and to establish an agency to support the law enforcement and judicial authorities and to undertake the administrative adjudication process[5]. The demerits points aspect of AARTO is not yet in operation, and, I am told, the balance of the Act is in operation only in Tshwane and Johannesburg.

[10] The administrative adjudication process of road traffic offences as provided for in AARTO involves a separation of powers between two bodies. The first is the issuing authority, which means a local authority, a provincial administration or the Road Traffic Management Corporation[6]. The City is an issuing authority as defined. It acts as such through the JMPD. The second is the Agency created to administer the scheme for the adjudication of road traffic infringements.

[11] The process begins with an allegation that a person has committed an infringement[7]. That person must be issued with an infringement notice by the issuing authority[8], which must either be served personally or by registered

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4 Section 2(e) of AARTO

5 Section 2(g) of AARTO

6 Section 1 of AARTO, sv. "issuing authority"

7 Section 17(1) of AARTO

8 Section 17(1) of AARTO

post[9]. This notice is issued instead of a summons to appear in the Magistrate's Court or written notification contemplated in sections 56 or 341 of the Criminal Procedure Act[10].

[12] The alleged infringer is then dealt with by an administrative process created by AARTO rather than through the criminal justice system unless, as one of the available options, the alleged infringer elects to be tried in a court on a charge of having committed the alleged offence[11], in which event the Criminal Procedure Act applies.

[13] Three further features of AARTO are relevant to this application :

13.1 In terms of section 17(1)(f) of AARTO, an alleged infringer has certain options, which, broadly speaking, are to pay the penalty or make representations to the agency, to make arrangements with the agency to pay the penalty in instalments, to elect to be tried in a court as aforesaid, or to provide information to the satisfaction of the issuing authority that he or she was not the driver of the motor vehicle at the time of the alleged infringement and to identify the alleged driver.

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9 Regulation 3(1) of the AARTO Regulations

10 Act no 51 of 1977

11 Section 17(1)(f)(iv) of AARTO

13.2 Representations are dealt with and processed by the Agency[12].

13.3 An infringer is defined as a person who has allegedly committed an infringement[13], and may be a corporate body. A corporate body which is the registered owner of a motor vehicle must nominate a proxy, upon whom the infringement notice would then be served. However, the proxy cannot be prosecuted for the statutory transgression of the owner, the corporate body, but acts merely in a representative capacity[14].

[14] Against this background, the first applicant contended that the JMPD had usurped the functions of the Agency by considering representations made, responding to representations and receiving payment of penalties levied. The JMPD, it was alleged, also refused to accept an election by the sole member of the first applicant, who is also the deponent to its founding and replying affidavits, Ms Cornelia van Niekerk, acting as proxy for the corporate body whom she represented, that the corporate body be tried in a court. The applicants complained that by doing this the JMPD had done away with the separation of powers so carefully devised by AARTO.

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12 Section 18 of AARTO

13 Section 1 of AARTO sv. "infringer"

14 Regulation 336 of the National Road Traffic Regulations promulgated under the National Road Traffic Act, 93 of 1996 and published under GN R225 in GG20903 on 17 March 2003 and section 332 of the Criminal Procedure Act

[15] The National Traffic Information System (previously "NaTIS" and now "eNaTIS" presumably because it is now in electronic format) is a national register of motor vehicles kept and administered by the registering authorities and others in compliance with their obligations in terms of the National Road Traffic Act[15]. According to the JMPD and the City it also functions as the national contraventions register ("the NCR") as defined in section 1 of the AARTO Act[16]. In terms of section 4(6) of the AARTO the Agency is obliged to establish the prescribed information management system and database which is connected with the NCR, and in terms of regulation 19 of the AARTO Regulations, both the issuing authority and the Agency are obliged to record certain information on the NCR. The applicants complained that the five infringement notices referred to below had not been captured on eNaTIS.

[16] In order to obtain the desired relief, and clearly as a test case, the applicants chose five infringement notices which had been served on Ms van Niekerk as the nominated proxy for the second applicant in whose names the relevant motor vehicles are registered. In respect of those notices, Ms van Niekerk made written representations at the offices of the JMPD on 25 October 2012 and, because of her past experience of the JMPD's rejection of her representations, on the next day she attempted to make the election on behalf

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15 No. 93 of 1996, section 77

16 The NCR is defined to mean "the National Traffic Information System on which the offence details of every individual are recorded in terms of this Act."

of the second applicant to be tried in a court on each of the five infringements. An employee of the JMPD refused to accept the duly completed election forms.

[17] In relation to the five infringement notices, the applicant sought the following mandatory interdicts (I summarise) :

17.1 that the JMPD and the Agency be compelled to comply with the provisions of AARTO in respect of the five infringement notices;

17.2 that the JMPD be compelled to register the infringements in the five infringement notices on the NCR;

17.3 that the JMPD be compelled to deliver the representations made in respect of the infringement notices to the Agency;

17.4 that the JMPD and the Agency thereupon be compelled in respect of the five infringement notices to act in accordance with the provisions of section 18 of AARTO.

[18] At the end of the hearing, the applicants moved for an amendment to insert a new prayer 4A in the notice of motion to read :

> "That the first and third respondents be compelled, in the event of the first applicant as proxy for the recipient of an infringement notice, duly electing to be tried in a court in accordance with section 17(1)(f)(iv) of AARTO, to accept such election and proceed in accordance with the provisions of section 22 of AARTO."

This amendment was opposed and I shall revert to it.

[19] Although the representations in respect of the five infringement notices had been made on 25 October 2012 and there had been no response thereto, the launching of the application in mid-November 2012 galvanised the JMPD into action. The representations were considered and accepted, and the five infringement notices which formed the heart of the application were cancelled. In addition, in their answering affidavit the first and third respondents indicated that certain changes had been made with effect from 22 December 2012. It was seemingly accepted that the practice of appointing JMPD employees to perform the work of the Agency had to stop, and the necessary system was put in place so that the eNaTIS system would operate as the NCR. All of these events caused the applicants to amend their relief to include "other and subsequent notices".

[20] Mr Budlender submitted that the cancellation of the five infringement notices, the putting in place of a system to function as the NCR, and the now proper separation of powers between the issuing authority and the Agency, had two consequences, both fatal to the application:

20.1 First, the relief sought was a number of mandatory interdicts. An interdict is not a remedy for past wrongs, but is appropriate when

future injury is feared[17]. Save for the question of the ability of a proxy to elect that the corporate infringer be tried in a court, this point is in my view well taken.

20.2 Secondly, the relief sought in the application had become moot and I should dismiss the application for that reason alone. Mootness between the parties does not present an absolute bar to justiciability, and I have a discretion in this regard, to be exercised judicially, as to what the interests of justice require.[18] Important considerations in this regard are the practical effect of the Court's order on the parties or others, and whether the Court's determination of the issue would benefit the larger public or achieve legal certainty. [19] In my view, the issues which arise in this mater are of concern to others, and dealing with them in this judgment will benefit others and achieve legal certainty in the interpretation and implementation of AARTO. In light of this, and the important administrative functions performed by these organs of state, I am satisfied that the interests of justice would be served if I deal with the issues in this application. I accordingly decline

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17 Condé Nast Publications Ltd v Jaffe 1951 (1) SA 81 (C) at 86H ; National Council of Societies for the Prevention of Cruelty to Animals v Openshaw 2008 (5) SA 339 (SCA) at para [20]

18 Independent Electoral Commission v Langeberg Municipality 2001 (3) SA 925 (CC) at para's [9] and [11]

19 Independent Electoral Commission v Langeberg Municipality *supra* at para [11]; Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as *amicus curiae*) 2008 (2) SA 472 (CC) at para [29]

to avoid deciding this matter on the grounds of mootness.

[21] There is a further consideration. Although the respondents had in a letter invited the applicants to withdraw their application because, by cancelling the five infringement notices they had so to speak pulled the rug from under the applicants' feet, there was no tender of costs in that letter nor any acknowledgement of wrongdoing, and the right of a proxy for a corporate body to make an election for the corporate body to be tried in court remained a live issue. Accordingly, the applicants were entitled to pursue the one live issue and the rest of the matter on the question of costs, and the original issues need to be decided at least for the purposes of costs.

[22] Mr McNally identified five issues which he submitted were to be decided in this matter.

[23] The first issue is the question of whether the proxy could make the election that a corporate body infringer be tried in court. There is no dispute that Ms van Niekerk is the duly appointed proxy for the second applicant.

[24] I have already pointed out that an infringer is defined as a person who has allegedly committed an infringement, and that this could be a corporate body. In addition, the operator of a motor vehicle, whether a corporate entity or otherwise, is obliged to keep a record of the full names, accompanied by acceptable proof of identification, and postal and residential addresses, of any

person that may drive the vehicle, upon threat of imprisonment[20]. Where the registered owner of a motor vehicle is a corporate body this obligation falls upon the corporate body and not on the proxy nominated in terms of the National Road Traffic Act. The proxy cannot be prosecuted for the statutory transgression of the owner, the corporate body, but acts merely in a representative capacity.

[25] There is a presumption that the owner of a motor vehicle was the driver[21]. There is a further presumption, where the owner is a corporate body, that the vehicle was driven by a director or servant of the corporate body in the exercise of his or her powers or in the carrying out of his or her duties or in furthering or endeavouring to further the interests of the corporate body[22].

[26] Section 17 of AARTO, which deals with the infringement notice, and *inter alia* the options available to the infringer, clearly applies also to the corporate body as an infringer. In terms of section 17(1)(f), the infringer may exercise the options I have mentioned before. The corporate body as an infringer, which has "no body to be kicked or soul to be damned"[23], must act through a human representative, who is the proxy. It follows in my view that just as the corporate body as infringer may pay the penalty or make representations to the agency,

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20 Section 17(5) of AARTO

21 Section 73(1) of the National Road Traffic Act

22 Section 73(3) of the National Road Traffic Act

23 British Steel Corporation v Granada Television Ltd [1981] AC 1096 at 1127 per Lord Denning MR

it may also elect to be tried in a court, and may do so through its proxy. I agree with the applicants in this regard.

[27] I shall return to this when dealing with the amendment moved at the end of the hearing.

[28] The second issue is whether the JMPD/City as the issuing authority is obliged to give its written reply to all representations made. This turns on an interpretation of sections 18(4) and (5) of AARTO, which read :

> "18. **Representations.—**
>
> (1) An infringer who has been served with an infringement notice alleging that he or she has committed a minor infringement, may make representations with respect to that notice to the agency.
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> ...
>
> (4) (a) The representations officer must, in the prescribed manner, inform the issuing authority concerned if representations indicating the existence of reasonable grounds why the infringer should not be held liable for the penalty have been received.
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> (b) Any representations contemplated in paragraph (a) must be submitted to the issuing authority concerned, **who must reply thereto within the prescribed time**.
>
> (5) A representations officer—
>
> (a) must duly consider the representations **and any reply thereto**;
>
> ... "
>
> (my emphasis)

[29] Mr McNally's submission was that the words "must reply" indicates that a reply

is peremptory. Mr Budlender on the other hand pointed to the words "any reply", which he submitted indicated that the obligation to reply was not peremptory.

[30] The word "must" is not always to be construed as peremptory rather than directory. Other circumstances may negate this construction[24]. In my view, the sensible construction to be placed on the emphasised portions quoted above, is that the issuing authority may reply, but if it does so, must do so within the prescribed time. That construction would sit comfortably with the words "any reply" in section 18(5)(a). To adopt the construction urged upon me by Mr McNally would mean that the words "any reply" should have read "the reply". Furthermore, one may imagine that there could be thousands of representations made, to which the issuing authority may or may not wish to reply. Should it choose not to reply, the representations alone will be considered by the agency. I do not believe that it could have been the intention of the legislature to burden the issuing authority with the obligation to reply to each and every representation, whether it wishes to do so or not.

[31] Accordingly, in my view, the proper construction to be placed on the emphasised portions of section 18(4) and (5) above is that they do not place a peremptory obligation on the issuing authority to reply to every

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24 Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Smith 2004 (1) SA 308 (SCA) at para [32]

representation made.

[32] The third issue is whether the representations were considered by the proper "representations officers".

[33] In terms of section 18(5)(a) quoted above, the representations officer must duly consider the representations and any reply thereto. A "representations officer" is defined to mean

> "a person contracted by the agency in terms of section 5 or appointed by the Registrar in terms of section 10 to consider representations submitted by any person who, after having committed a minor infringement, elects to make a representation".

[34] The Minister of Transport made a determination of qualifications and experience of representations officers[25] namely that a person to be appointed as a representations officer as contemplated in section 10(1) of AARTO had to :

> "(1) be the holder of at least a three (3) year qualification in law from a recognised tertiary institution; or
>
> (2) have a three (3) year qualification in traffic or police management or equivalent qualification, from a recognised tertiary institution; or
>
> (3) have practiced as an attorney or advocate, traffic officer, magistrate, prosecutor or police officer for an uninterrupted period of at least three (3) years; and

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[25] In terms of section 10(2)(a) of AARTO published in General Notice 258 in the Government Gazette 33038 on 19 March 2010

(4) **not be employed** as a magistrate, prosecutor, police officer or **by an issuing authority**; and

(5) be in possession of at least a code B valid driving licence free of endorsements."

(my emphasis)

[35] It is common cause that employees of the JMPD were appointed to fill the positions of representations officers at the Agency. This is clearly in contravention of the Minister of Transport's determination and the scheme of separation of powers inherent in AARTO. This was obviously appreciated by some or more of the respondents, because I am told that this practice ceased very soon after receipt of the application, and the problem no longer exists.

[36] To the extent necessary, I find that the applicants' objections in this regard were well founded.

[37] The fourth issue was a failure to register the infringement notices on the NCR. It is common cause that this was not done prior to 22 December 2012. In the answering affidavit, the first and third respondents allege (and this is not disputed) that from 22 December 2012 infringement notices are registered on the eNaTIS system, which serves as the NCR. There is therefore no longer an infraction of the statute, but the complaint prior to 22 December 2012 was in my view well founded.

[38] The fifth issue is the lawfulness of the cancellation of the five infringement notices.

[39] The five infringement notices were cancelled at a time when JMPD employees were fulfilling that function in the Agency. Technically, the cancellations were unlawful and should be set aside. That amounts to a review of administrative action. Whilst it seemed that the first and third respondents objected to such a procedure because rule 53 had not been used, and there had not been any reference to PAJA, Mr Budlender distanced himself from those objections. He accepted that, arising as it did out of the answering affidavit, separate proceedings under rule 53 were not required but the point could be dealt with in the same application, and that specific reference to PAJA was not required in order to know that the administrative review was being brought within its provisions.

[40] Rather, Mr Budlender focussed his attack on the lack of prejudice. The cancellation of the five infringement notices had given the applicants the best result they could hope for. What prejudice could there be to them if the cancellations were left intact? Mr McNally sought to counter this by postulating advantages to the applicants if the cancellations were set aside and the representations had to be considered afresh by properly appointed representations officers. In my view the fact that a different consideration of the representations might yield some fruitful avenues for the applicants to test legislation in court is not a valid reason to ignore the fact that there is no real prejudice. In my view, the cancellations cannot and should not be set aside.

[41] Mr McNally conceded that, if I was against the applicants on the question of

the cancellation of the five infringement notices, most of the relief sought would be academic and the mandatory interdicts sought could not be granted. Faced with the fact that such a result would mean that there was no relief which specifically covered only the one live issue, namely whether a proxy could elect that the corporate infringer be tried in a court, he moved the amendment to which I refer in paragraph 18 above. The amendment was opposed. Mr Budlender submitted that it was brought late, that the focus of the affidavits had not been on the election by the proxy, and indicated that if I granted the amendment the first and third respondents required an opportunity to deal therewith in further affidavits.

[42] In my view, the question of the election is covered by prayer 1, and the amendment was only necessitated by the fact that prayer 1 might fall away because of a possible adverse finding on the cancellation of the five infringement notices. The facts surrounding Ms van Niekerk's attempts to make the election are fully canvassed in the affidavits, and whilst they may not have been the focus of the application, they are and have always been a live issue in the application. In my view, there is no prejudice to the first and third respondents, or any other respondents for that matter, if the amendment is granted, and I decline the request that further affidavits be filed in this regard.

[43] Prayer 4A is in fact the only prayer which can succeed in this matter, given that the other difficulties have been removed. The first and third respondents have made it clear that they do not recognise the right of a proxy to make an

election to be tried in court on behalf of the corporate infringer, and there is accordingly a reasonable apprehension of a future infringement in this regard. Mr Budlender submitted that, on a proper reading of section 17(1)(f) of AARTO, it was not permitted, as Ms van Niekerk did, to make representations and to elect to be tried in court; the infringer must select one of the options available. I agree with this submission. However, Ms van Niekerk explained that she had made the election on the next day because of her past experience that the first applicant's representations had routinely been rejected. In making it clear in their answering affidavit that they did not recognise the proxy's right to make such an election, the first and third respondents did not rely on the fact that the election had been made on the day after the representations had been made and before they had been ejected. The reasonable apprehension of future wrongs therefore remains. There is no suitable alternatively remedy. In the circumstances, I will grant prayer 4A, in a slightly modified form, *inter alia* to reflect Ms van Niekerk as the proxy.

[44] As far as the costs are concerned, the applicants were entitled to most of the relief sought when the application was launched. Although the answering affidavit rather pulled the rug from under their feet, as I have indicated, they were entitled to continue because there had been no tender of costs and no acknowledgement of wrongdoing, and it was only in the answering affidavit that the fact that changes had been made from 22 December 2012 were revealed. Accordingly, in my view, the applicants are entitled to their costs of the application.

[45] In the circumstances I make the following order :

" 1. The first and third respondents are compelled, in the event of Ms van Niekerk as proxy for the recipient of an infringement notice duly electing that the infringer be tried in court in accordance with section 17(1)(f)(iv) of the Administrative Adjudication of Road Traffic Offences Act, 46 of 1998 ("AARTO"), to accept such election and proceed in accordance with the provisions of section 22 of AARTO.

2. The first and third respondents are ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved, such costs to include the costs of two counsel."

ANDRÉ GAUTSCHI
ACTING JUDGE OF THE HIGH COURT

Date of hearing	:	29 January 2014
Date of judgment	:	25 February 2014
Counsel for the applicants	:	JPV McNally S.C., with him RJ Goslett
Instructed by	:	Burger Attorneys (Mr Burger)
Counsel for the first and third respondents	:	S Budlender, with him N Ferreira
Instructed by	:	State Attorney (Mr KG Lekabe)