Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. 20825/2017
and Case No. 22046/2018

Before: The Hon. Mr Justice Binns-Ward
Date of hearing: 22 November 2018 and 25 February 2019
Date of judgment: 20 March 2019

In the matter between:

BRACKENFELL TRAILER HIRE (PTY) LTD	First Applicant
PASCAL CONSTANCE SPRAGUE	Second Applicant
GERHARDUS ADRIAAN ODENDAL	Third Applicant

and

THE MINISTER OF TRANSPORT	Respondent

JUDGMENT

BINNS-WARD J:

Introduction

[1] The applicants seek, in terms of paragraph 2 of their notice of motion, an order declaring that –

(a) 'on a proper construction of sub-sections 73(1), (2) and (3) of the National Road Traffic Act 93 of 1996, the presumptions for which they provide are not applicable to trailers;

alternatively,

(b) the prosecution under the National Road Traffic Act 93 of 1996 of the owner of a trailer for an offence involving the driving or parking of a vehicle towing or having parked that trailer is unlawful and inconsistent with the Constitution of the Republic of South Africa (Act 108 of 1996)'.

[2] The first applicant is Brackenfell Trailer Hire (Pty) Ltd, a company that carries on business in the hiring out of trailers of various types. Its business is an amalgamation of those previously conducted by the second and third applicants individually. The amalgamated business has a fleet of approximately 3000 trailers available to hire. With few exceptions,[1] trailers are required, in terms of s 4 of the National Road Traffic Act ('the NRTA') read with the National Road Traffic Regulations, 2000 (as amended), to be registered and licenced, and it is an offence to operate them on a public road if they are not so registered and licenced. About two thousand of the trailers used in the business were contributed by the second and third applicants, and remain registered in their respective names individually; whilst the balance, which are registered in the name of the first applicant, have been acquired since the company's take over of the second and third respondents' businesses.

[3] Regulation 8 of the National Road Traffic Regulations requires that a natural person 'proxy' be identified when a motor vehicle of which a juristic person is the titleholder is registered. An employee of the first applicant has been nominated as the proxy for this purpose in respect of the trailers owned by the company.

[4] All of the trailers concerned fall within the ordinary meaning of the word, being unpowered vehicles that are towed by another.[2] As its name suggests, the first applicant's business is conducted from premises in Brackenfell in the Western Cape, but the trailers that it rents out end up being towed by its customers to all corners of the country.

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[1] Trailers drawn by tractors (as defined) and trailers owned by the Department of Defence are exempted from registration in terms of reg. 5 of the National Road Traffic Regulations, 2000.

[2] The primary definition of '*trailer*' in the *Oxford Dictionary of English* is '*an unpowered vehicle towed by another*'.

[5] Section 73 of the National Road Traffic Act ('the NRTA') resorts in Chapter XII of the Act, which is entitled '*Presumptions and Legal Procedure*'. It provides:

> **Presumption that owner drove or parked vehicle.**
>
> (1) Where in any prosecution in terms of the common law relating to the driving of a vehicle on a public road, or in terms of this Act, it is necessary to prove who was the driver of **such** vehicle, it shall be presumed, in the absence of evidence to the contrary, that **such vehicle** was driven by the owner **thereof**.
>
> (2) Whenever a vehicle is parked in contravention of any provision of this Act, it shall be presumed, in the absence of evidence to the contrary, that **such** vehicle was parked by the owner **thereof**.
>
> (3) For the purposes of subsections (1) and (2) and section 88 it shall be presumed, in the absence of evidence to the contrary, that, where the owner of the vehicle concerned is a corporate body, such vehicle was driven or parked, as contemplated in those subsections, or used as contemplated in that section 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 as such director or servant or in furthering or endeavouring to further the interests of the corporate body.

(Underlining and bold text provided for highlighting purposes, having regard to the questions in issue in these proceedings.)

[6] Section 73 falls to be construed with appropriate regard to the specially defined meanings of certain of the words used therein. The definitions are to be found in s 1 of the NRTA, which sets out the given meaning of various words used in the statute. The defined meanings given in s 1 are, by virtue of the provision, subject to the important qualification '*unless the context otherwise indicates*'. The following definitions set out in s 1 (which, by virtue of the special definition therein of '*this Act*', also apply in respect of the National Road Traffic Regulations) are pertinent for present purposes:

> **"vehicle"** means a device designed or adapted mainly to travel on wheels or crawler tracks and includes such a device which is connected with a draw-bar to a breakdown vehicle and is used as part of the towing equipment of a breakdown vehicle to support any axle or all the axles of a motor vehicle which is being salvaged other than such a device which moves solely on rails
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> **"motor vehicle"** means any self-propelled vehicle and includes—
>
> (a) a trailer; and

(b) a vehicle having pedals and an engine or an electric motor as an integral part thereof or attached thereto and which is designed or adapted to be propelled by means of such pedals, engine or motor, or both such pedals and engine or motor, but does not include—

(i) any vehicle propelled by electrical power derived from storage batteries and which is controlled by a pedestrian; or

(ii) any vehicle with a mass not exceeding 230 kilograms and specially designed and constructed, and not merely adapted, for the use of any person suffering from some physical defect or disability and used solely by such person

"trailer" means a vehicle which is not self-propelled and which is designed or adapted to be drawn by a motor vehicle, but does not include a side-car attached to a motor cycle;

"driver" means any person who drives or attempts to drive any vehicle or who rides or attempts to ride any pedal cycle or who leads any draught, pack or saddle animal or herd or clock of animals, and **"drive"** or any like word has a corresponding meaning or any like word has a corresponding meaning

"owner", in relation to a vehicle, means—

(*a*) the person who has the right to the use and enjoyment of a vehicle in terms of the common law or a contractual agreement with the title holder of such vehicle;

(b) any person referred to in paragraph (a), for any period during which such person has failed to return that vehicle to the title holder in accordance with the contractual agreement referred to in paragraph (a); or

(c) a motor dealer who is in possession of a vehicle for the purpose of sale,

and who is licensed as such or obliged to be licensed in accordance with the regulations made under section 4, and 'owned' or any like word has a corresponding meaning

"park" means to keep a vehicle, whether occupied or not, stationary for a period of time longer than is reasonably necessary for the actual loading or unloading of persons or goods, but does not include any such keeping of a vehicle by reason of a cause beyond the control of the person in charge of such vehicle.

[7] The only party cited as a respondent in the case was the national Minister of Transport. He is the member of the Cabinet responsible for the administration of the Act. When the application came before Papier J in May 2018, an order was taken, by agreement between the applicants and the respondent, postponing the hearing to November for wider notice of the proceedings to be given. The order directed that this should occur by way of publication of the order in the Rapport and Sunday Times newspapers and by physical delivery of a copy thereof to the MEC for Transport and

Public Works (Western Cape), the Minister of Justice and Constitutional Affairs, the National Director of Public Prosecutions, the Director of Public Prosecutions (Western Cape) and the heads of the traffic departments at Brackenfell and Durbanville.[3] The notice given in terms of the order made by Papier J, which included directions as to how any interested party might intervene in the proceedings, did not result in any other parties coming forward.

[8] When the matter first came up before me, in November 2018, I was concerned that yet wider notice of the application should be given. Road traffic regulation is after all an area of concurrent competence between the national and provincial spheres of government. Traffic and parking are also matters in respect of which municipalities have executive and legislative competence in terms of s 156 of the Constitution. Notice of the application had been given in terms of Uniform Rule 16A, but that was only pertinent in respect of the alternative relief sought by the applicants.

[9] I therefore directed that notice of the application be given by means of substituted service to the all of the provincial and local government authorities nationally, and further postponed the hearing in order for that to happen. In compliance with those directions, a copy of the order and of the notice of motion was served by registered post on the members of the executive councils responsible for road traffic matters and for local government in each of the provinces and by facsimile (telefax) at the national head office and each of the provincial offices of the South African Local Government Association ('SALGA').

[10] The notice that was duly given to these other parties in compliance with the order also did not elicit any reaction.

[11] The respondent did, however, supplement his answering papers after the November postponement, amongst other things, by obtaining a supporting affidavit from a senior state advocate in the office of the Director of Public Prosecutions (Western Cape).

[3] Brackenfell and Durbanville both fall within the municipal area of the City of Cape Town, and it appears from the affidavits of service of the order made by Papier J that traffic matters in the Durbanville area are managed from the traffic department's office in Brackenfell.

[12] The content of the senior state advocate's supporting affidavit was mainly argumentative. He expressly declined to enter into any debate about the proper construction of s 73 of the NRTA, and confined himself to the questions arising from the alternative relief sought by the applicants in terms of paragraph 2.2 of their notice of motion.[4]

[13] In the result, the Minister of Transport was the only party to oppose the application.

The factual context of the application for declaratory relief

[14] The applicants were moved to bring the application because of the on-going difficulties that each of them is experiencing arising out of the bringing of charges against them for traffic violations, the commission of which is captured by the traffic policing authorities on camera. The overwhelming majority of the violations concerned are driving offences, such as exceeding the speed limit or proceeding against a red traffic light. A very small number of the traffic violations involve parking offences, in which tickets are issued to the applicants in respect of trailers registered in their names that are found illegally parked.

[15] It is important for the purposes of this case to be mindful of the distinction between offences involving the *driving* of a motor vehicle (*moving* violations) and what might be called *stationary* violations, which would generally have to do with the parking of a vehicle. The dichotomy is significant because it is given express recognition in the wording of the presumptions discretely provided for in subsections (1) and (2) of s 73 of the NRTA.

[16] The traffic violations that are pertinent in respect of the relief sought by the applicants are committed by persons towing or parking trailers that have been hired from the first applicant. As mentioned, the trailers are registered in the name of the company or those of either the second or third applicant. The criminal charges that are preferred arising out of the commission of these offences are brought by means of the service of summons or by the delivery of notice in terms of s 341 of the Criminal Procedure Act 51 of 1977; although, as I shall describe presently, the second and third applicants are in many instances unaware of the institution of the prosecutions until

[4] See paragraph [1](b) above for the relief sought by the applicants in para. 2.2 of the notice of motion.

sometime after the issue of warrants for their arrest for being in contempt of court by virtue of their failure to appear for trial.

[17] In the matters that prove problematic for the applicants the commission of the driving offences involved is captured on camera by a device that is so positioned that the motor vehicle used in the offence is photographed from the rear. Owing to the fact that the motor vehicle concerned is towing one of the applicants' trailers at the time, the trailer obscures the rear number plate of the motor vehicle, and only the registration number of trailer is visible on the photograph.

[18] The relevant prosecuting authorities – which, it would appear, are almost invariably the local authorities within whose respective territorial jurisdictions the offences are committed or the local public prosecutors acting in close co-operation with such authorities – proceed in those cases against the applicants. The authorities have no evidence as to the identity of the driver of the towing vehicle at the time of the photographed commission of the offence, but proceed against the applicants on the basis of the registered ownership information obtainable in respect the trailer in tow at the time. The obvious inference is that they proceed against the applicants only by reason of their appreciation of the effects of the presumptions in s 73 of the NRTA, one of which is to provide an incentive to the identified registered motor vehicle owner, if he or she did not commit the offence, to provide the particulars of the person who was using the vehicle at the relevant time. That evidence gathering is indeed one of the objects of the presumptions was noted by Cameron J (Mailula J concurring) in *S v Meaker* 1998 (8) BCLR 1038 (W), 1998 (2) SACR 73,[5] in respect of the materially equivalent provisions of s 130 of the Road Traffic Act 29 of 1989, which was the immediate predecessor of the NRTA on the statute book.[6]

[19] The notices issued in terms of s 341 of the Criminal Procedure Act in such matters include a section in which the recipient registered owner of the vehicle involved in the alleged offence may fill in the particulars of the person who was using the vehicle at the relevant time. The Director: Road Traffic Legislation and Standards in the

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[5] At pp. 1055J-1056B (BCLR), and 90j-91b (SACR).

[6] Section 130 of the Road Traffic Act provided:
Where in any prosecution under the common law relating to the driving of a vehicle on a public road, or under this Act, it is material to prove who was the driver of the vehicle, it shall be presumed, until the contrary is proved, that such vehicle was driven by the owner thereof.

Department of Transport made the answering affidavit on behalf of the respondent. He averred that when an owner completes and returns the s 341 notice to the road traffic authority giving the particulars of the third party who was in charge of the vehicle at the time, no further steps are taken against the registered owner. This was referred to as a 'redirect process'. It was also averred that if a registered owner who had been summonsed to appear in court on the basis of a presumption in s 73 of the NRTA informed the public prosecutor that someone else had been using the vehicle at the time of the alleged offence and provided the third party's particulars, proceedings against the owner would be withdrawn.

[20] The second and third applicants testified that the redirect system did not function efficiently, although the evidence they provided in support of that allegation was sketchy. They also testified that there were many instances in which cases against them were called in court without a summons ever having been served on them. In such matters warrants of arrest for contempt of court had nevertheless been issued because of their failure to appear. In addition to the to be expected prejudicial consequences of warrants of arrest, the applicants allege, and the respondent confirms, that they are also blocked, while such warrants and the payment of any related fines remain outstanding, from being able to renew their drivers' and motor vehicle licences. They claim that these problems are occasioning serious administrative dislocations in their business.

[21] The applicants contend that most of the difficulties would not arise were it appreciated that the presumptions in s 73 apply not against the owners of trailers, but only against the owners of the towing vehicles; hence the application for declaratory relief. Their claim for alternative relief arises only if the court is not with them on the import of s 73.

[22] In the event that it is held that the presumptions are applicable to them in their capacity as owners of the hired-out trailers, they contend that the statutory provisions derogate unjustifiably from their constitutional rights in terms of s 35(3)(h) of the Constitution. Section 35(3) of the Bill of Rights entrenches the right of every accused person to a fair trial, including (in terms of paragraph (h) thereof) the right 'to be presumed innocent, to remain silent, and not to testify during the proceedings'.

The proper construction of s 73 of the NRTA

[23] Any exercise of literary construction, if it is to be well directed, must take place with proper regard to the context in which the language in issue has been employed. Context in this regard includes not only the primary effect of the combination of the words used in the peculiar textual setting, which is the obvious point of departure, but also the apparent purpose of their employment as may be inferred from the evident object of the document in which they have been integrated. The determination of the actual effect of the language should give sensible expression, *grounded on the words that have been used*, to the objectively discernible object of their provision. This necessarily implies a unitary (or holistic) exercise, as opposed to a componential one.[7] The exercise is objective in character, in that the wording used must speak for itself. Accordingly, if the language employed is contextually unambiguous, effect must be given to it according to its plain tenor, unless to do so would result in an absurdity.[8] Nothing more, nothing less. Any temptation by a judge to improve on it, in order to give what he or she might consider would be better effect to the apparent object of the text by construing it to have a wider import than the wording used does, should be eschewed, for that would be to stray impermissibly into the realm of legislating or contract-making.[9]

Section 73(1)

[24] It is plain that subsection (1) of s 73 has application only in prosecutions in which it is necessary to prove who was the driver of the vehicle to which the alleged

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[7] *Rainy Sky SA & Others v Kookmin Bank* [2011] UKSC 50, [2012] 1 All ER 1137 (SC) at para. 21 (endorsed in at least four judgments of the Supreme Court of Appeal, most recently in *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* [2018] ZASCA 176, [2019] 1 All SA 291 (SCA) at paras. 59-61). English jurisprudence seems to maintain some distinction between contractual and statutory construction; whereas with us, notwithstanding that we do apply various canons of interpretation peculiarly in statutory construction, most importantly constitutional compatibility, general principles of textual interpretation apply indiscriminately, regardless of the character of the deed or instrument in issue. *Rainy Sky* was a judgment concerning the construction of a contract, but the earliest reference to it in a South African judgment that I am aware of (*Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13, [2012] 2 All SA 262 (SCA), 2012 (4) SA 593) was in a matter concerning the construction of a statutory provision.

[8] Cf. *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16, 2014 (4) SA 474 (CC), 2014 (8) BCLR 869, at para. 28.

[9] See the cautionary note sounded in *Natal Joint Municipal Pension Fund v Endumeni Municipality* supra, in para. 18, that judges should take care not to cross the divide between interpreting and legislating by substituting what they regard as reasonable, sensible or businesslike for the words actually used.

offence relates. It is also clear that the range of offences potentially implicated in the application of s 73(1) all concern the driving of a vehicle. (See the parts of the quoted provision that were highlighted in paragraph [5] above.)

[25] The defined meaning of 'drive' in the NRTA extends the ordinary meaning of the verb by including the riding of a pedal cycle[10] and the leading of animals without derogating from the ordinary meaning of the word. The pertinent ordinary meaning of '*drive*' is 'operate and control the direction and speed of a motor vehicle'.[11] One does not drive a trailer when using it; one drives the motor vehicle that is used to tow the trailer. Should a driver unlawfully exceed the speed limit or proceed against a red traffic light or overtake on a sold white line while towing a trailer, he or she commits the relevant driving offence through his or her operation and control of the towing motor vehicle, not through the use of the trailer. The prosecutor's task would be to prove who was driving the motor vehicle too fast, or who was behind the wheel of the motor vehicle when it was driven across the intersection when the light was red or when it overtook another vehicle by crossing a solid white line. That a trailer was being towed at the time would be quite irrelevant to the task of proving the elements of the offence. It follows that the words '*such vehicle*' in s 73(1) relate to the vehicle that is being driven when the offence is committed, and not any other vehicle.

[26] There is nothing ambiguous about the language in which s 73(1) is couched. And construing the provision according to its tenor does not give rise to absurd or unbusinesslike results, or defeat the evident object of the provision. One knows from everyday experience that the majority of motor vehicles on the road can be identified, and their registered owners traced, by means of the vehicle's number plate particulars irrespective of whether the vehicle is seen from the front or the rear when the driver commits a moving offence. (The only exceptions that come to mind are motorcycles and trailers, which are required to display only rear number plates.) A situation in which a vehicle's rear number plate is obscured because it is towing another vehicle, while it is not unusual, will nevertheless present in a distinct minority of motor traffic instances.

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[10] A '*pedal cycle*' is defined in terms of s 1 of the NRTA to mean '*any bicycle or tricycle designed for propulsion solely by means of human power*'.

[11] Oxford Dictionary of English.

[27] The regulations made under the NRTA require that number plates should be affixed in a position in which they are readily visible and that the vehicle should not be operated on a public road in conditions in which they are obscured, unless their temporary obstruction is beyond the control of the driver.[12] A specific exception to the general rule in respect of the non-obstruction of number plates applies to towing vehicles by virtue of reg. 35(9) of the National Road Traffic Regulations, 2000,[13] which provides: '*The provisions of subregulation (7) in relation to legibility and visibility of a number plate which is affixed to the back of a motor vehicle, shall not apply to a motor vehicle which is towing another vehicle*'. There is no dispensation, however, from the requirement that a towing vehicle that is required to bear a rear number plate must bear such a number plate even when it is towing another vehicle. Of interest for present purposes is the consistency of the pertinent provisions of the regulations with the provisions of the Act, in which the identities of the towing vehicle and the vehicle that is being towed are treated discretely, it being recognised that two (or more) separate vehicles with their own individual registered identity are involved. My attention was not directed to any provision of the Act that would make it necessary for the prosecution to prove the identity of the owner of a trailer as a necessary element of a *driving* offence.

[28] The respondent advanced an argument which sought to avoid the effect of the plain tenor of s 73(1) by contending that 'a purposive construction' required accepting that the presumption applied against the owner of the trailer because so many moving offences are identified by means of the use of cameras that photograph the vehicle driven by the offending driver from the rear, with the result that when a trailer is being towed, the rear number plate of the vehicle occupied by the driver is obscured, and all that appears on the photograph is the number plate of the trailer. Distilled to its essence the argument came down to a contention that violence should be done to the plain language of the provision in order to bring within its embrace a class of cases in respect of which the actual wording gives no assistance to the prosecution. The argument was to the effect that construing the provision according to its language would leave a lacuna that would expose a loophole in the ambit of the presumption, and that it was therefore

[12] Reg. 35(6)(b) of the National Road Traffic Regulations, 2000.

[13] Originally published in GNR 225 of 17 March 2000 and subsequently amended from time to time, most recently in terms of R1408 published in GG40420 dated 11 November 2016.

necessary to interpret the provision in a way that would avoid the gap. This was the nature of the so-called 'purposive interpretation' that was contended for. Support was sought for the thesis in the inclusion of 'trailer' in the Act's special definition of 'motor vehicle'.[14]

[29] The argument is fallacious. It proceeds from the misdirected premise that statutory interpretation involves giving effect to a broadly discernible object of the legislation, even if the wording employed by the legislature has not addressed it in a specific aspect. Engaging in that sort of interpretative embroidery would be to add to the legislation, not to construe what the lawmaker has put there. In this case the proper interpretation of the words exposes a possible lacuna, it does not cause it. If the lacuna is problematic, then it is for the legislature to remedy the position by amending the legislation. And were it minded to do so, it would no doubt have to consider the constitutional justifiability of presuming the owner of vehicle B to have been the owner of vehicle A when the vehicle A was used in the commission of an offence. (That was a question that did not arise in *Meaker*'s case supra.)

[30] Moreover, in my judgment, the construction of s 73(1) contended for by the respondent gains no assistance from the inclusion of 'trailer' in the defined meaning of 'motor vehicle'. One can readily understand how, in the context of certain of the statute's provisions, the term 'motor vehicle' might sensibly include a trailer. Section 4, which regulates the licensing and registration of motor vehicles, is an example. But the enactment's special definition of 'trailer',[15] more particularly that element thereof that defines a trailer as something '*which is designed or adapted to be drawn by a motor vehicle*' makes it clear beyond any doubt that the legislature did not have in mind a vehicle that could be driven. It contemplated rather a vehicle that was designed or constructed to be *drawn* by *another* vehicle that could be driven. It is the driving of the latter vehicle (i.e. one falling within paragraph (b) of the statutory definition of '*motor vehicle*' that enables a trailer to be drawn. It is not without significance in this regard that the definition of 'motor vehicle' has been framed in a manner that draws a line of distinction between types of vehicle that are designed to be drawn (para. (a)) and those capable of being driven rather than drawn (para. (b)).

[14] See paragraph 0 above.

[15] Id.

(When the legislation is directed at treating the towing and towed vehicles compositely for any purpose, the expression '*combination of motor vehicles*' is employed; a term also defined in s 1 of the NRTA.[16])

[31] For these reasons I have concluded that the presumption in 73(1) does not operate against the owner of a trailer in in any prosecution in terms of the common law relating to the driving of a vehicle on a public road, or in terms of the NRTA, in which the trailer was at the time being towed by another vehicle being driven at the time by the person involved in the commission of the alleged offence. Put differently, in cases in which it is necessary for the prosecution to prove the identity of the driver of the vehicle used in the commission of an offence, whether at common law or in terms of the Act, the presumption in s 73(1) operates only against the owner of such vehicle, and not against the owner of any trailer being towed by such vehicle at the time, unless the nature of offence concerned pertains to the operation of a 'combination of motor vehicles' (as defined).

Section 73(2)

[32] Quite different considerations bear on the applicability of the presumption in s 73(2). In respect of parking cases, the vehicle involved in the commission of the offence might well be a trailer, with or without the towing vehicle. It is the fact that the vehicle is stationary in some spot that makes out the offence. The rationale for the presumption is the probability that if it were not the owner of the vehicle who put it there, the owner would know who was in possession of it at the relevant time. All the considerations taken into account in this regard in the judgment in *Meaker* would pertain, and it is unnecessary in the circumstances to repeat them. I am not persuaded that there is any merit in the applicants' counsel's attempt to draw a distinction between the current case and that in *Meaker* on the basis that trailers are likely to be less valuable than self-propelled vehicles, and that therefore the notion that their owners would know who was in possession of them at any given time is less compelling. As it is, the evidence is that the applicants are able to provide particulars of the identities of the hirers of their trailers at any given time.

[16] See e.g. regulation 155 of the National Road Traffic Regulations, which prohibits the operation on a public road of a vehicle or *combination of motor vehicles*, which does not comply with the prescribed standards of braking performance.

[33] In the result the applicants have not made out a case for relief in terms of paragraph 2.1 of their notice of motion insofar as s 73(2) of the NRTA is concerned.

Section 73(3)

[34] Subsection 73(3) does not operate independently of the presumptions in subsections (1) and (2). It is implicated only insofar as a presumption under either of the latter two subsections arises, and when the owner of the vehicle concerned happens to be a juristic person. The applicants' complaint therefore does not require any separate consideration of the incidence of s 73(3). The effect of what has been held thus far is that it will apply in prosecutions against the first applicant's proxy in respect of offences comprehended by s 73(2), but not in those to which s 73(1) refers.

Relief sought in the alternative in terms of para. 2.2 of the notice of motion

[35] Insofar as the refusal of any declaratory relief to the applicants in respect of the effect of the presumption created by s 73(2) of the NRTA results in a need to consider the other declaratory relief sought in the alternative, that can be disposed of shortly. No basis has been laid for the remedy sought in paragraph 2.2 of the notice of motion as formulated.

[36] As mentioned in the introduction to this judgment, the contention that underpins the alternative relief is that the presumptions in s 73 are incompatible with an accused's rights to a fair trial in terms of s 35(3)(h). But the relief is not framed in a manner that seeks a declaration of constitutional incompatibility. And the notice of motion was not amended, even after the difficulties with the formulation of the relief sought in terms of paragraph 2.2 thereof were highlighted in the respondent's answering papers and during the course of argument.

[37] It was common ground between counsel that the presumptions in s 73 derogate from the rights of accused persons in terms of s 35(3)(h), despite the fact that they do not create a reverse onus in the true sense. It was in issue, however, whether the derogation was justifiable in terms of s 36 of the Constitution. As far as I was able to discern from the evidence, the second and third applicants and the proxy for the first applicant have not actually ever found themselves confronted with the effect of the presumptions in the context of a trial. And the evidence, especially that given by the senior state advocate, suggests that it is unlikely that they ever would be. A question of this nature should in principle not be raised in the abstract, but rather in the course

of a criminal trial in which it is alleged that the presumption would operate in a manner that would infringe the accused's fair trial rights. The individually identified fair trial rights in s 35 of the Constitution do not constitute an exhaustive list, and in any event they are not absolute. Fairness is an elastic concept in the sense that what might be considered fair or unfair in any given situation depends very much on the peculiar circumstances of the case.

[38] Accordingly, in the exercise of my discretion in respect of the granting of declaratory relief, I decline to make any declaration as sought in terms of paragraph 2.2 of the notice of motion.

Costs

[39] The applicants will achieve substantial success insofar as they will obtain favourable declaratory relief in respect of the import of s 73(1) of the NRTA. Their application for similar relief in respect of s 73(2) has been unsuccessful, however; as has their application for alternative relief. As a significant part of the oral argument was given over to matters in respect of which the applicants have been unsuccessful, I do not think it would be fair for the respondent to be burdened with liability to pay all of the applicants' costs of suit. In my judgment, justice will be done if, leaving aside the wasted costs occasioned by the postponement on 22 November 2018, the respondent pays two thirds of the applicants' costs.

[40] The proceedings set down for hearing on 22 November 2018 were postponed for two reasons. The first, as already mentioned, was because I was not satisfied that sufficiently wide notice of the application had been given. The second was because, contrary to an earlier intimation by their attorneys to the respondent's attorneys, it became apparent that the applicants were persisting with an attack on the constitutionality of s 73 of the NRTA. This prompted the respondent's counsel to seek a postponement to deal with matter that the respondent had not addressed in his answering papers filed of record at that stage because it had appeared unnecessary to do so in the context of the applicants' attorneys' aforementioned intimation. As to the first reason, it was the responsibility of the applicants to have given sufficient notice of their application, and they should bear the consequences of not having done so. As to the second reason, I consider that the respondent was entitled to a postponement in the

circumstances. The applicants will therefore be ordered to pay the wasted costs incurred by the respondent in respect of the hearing on 22 November.

[41] The employment by both sides of two counsel seems to me to have been reasonable, having regard to the relative importance of the issues involved.

Case no. 22046/18

[42] It remains to deal with an application brought by the applicants in separate proceedings under case no. 22046/18 during the interval between the first and second hearings before me of the principal application in case no. 20825/2017. Those proceedings, in which the City of Cape Town, the National Director of Public Prosecutions and the Minister of Transport were cited as the respondents, came before the duty judge in the fast track of the Third Division on 10 December 2018. The City of Cape Town was the only respondent to appear at that hearing to oppose the application. The applicants sought costs in those proceedings only against any respondent that opposed their application. In the result, the only parties with an interest in the determination of costs in those proceedings are the applicants of the one part and the City of the other.

[43] The duty judge was persuaded to make what was in essence an order that stayed the institution or continuation of any prosecutions against the applicants for offences involving the towing or parking of trailers owned by them, and setting aside certain warrants of arrest issued in relation to proceedings already instituted in respect of such offences. The aforementioned relief was granted pending what was referred to in the order as 'the return day', and subject to the provision by the first applicant to the City of Cape Town's attorney of certain information concerning the hirers of the trailers involved.

[44] The order that was made does not read sensibly in material respects; most especially by reason of its failure to make provision for any 'return day', and the absence, in any event, of an evident purpose for a return day. I also have reservations about the competence of certain of the relief granted under it. For instance, it is not apparent upon what basis the court purported to cancel warrants of arrest issued by various unidentified inferior courts. That is a measure that would ordinarily follow only in appropriate review proceedings, and on notice to the judicial officers who had authorised the issue of the warrants concerned. But that is water under the bridge.

[45] The order made by the duty judge also provided that that matter should 'be heard together with case number 20825/2017 [being the principal case determined by this judgment] between the same applicants and the third respondent [the Minister of Transport]'. What was still to be heard and decided in case no. 22046/18, apart from the determination of costs, was not apparent. And, if only costs were to be determined, it was not apparent why I should determine them, rather than the judge who had decided the application.

[46] When the application in case no. 22046/18 was duly brought before me in accordance with the direction given by the duty judge, there was no appearance on behalf of the City of Cape Town. I was asked by the applicants' counsel, however, to make an order by agreement between the applicants and the City extending the interim interdict granted on 10 December 2018 until 'the final disposal' of the matter in case number 20825/17, with costs to stand over for later determination. I acceded to the request. The effect of the order can only be to extend the prohibitory interim interdicts contained in the order made by the duty judge pending 'the final determination' of the principal case. I interpret 'final determination' to include the determination of any appeals that might ensue from this judgment, or the confirmation of this judgment by the failure of the losing party to challenge it within the time that application can be made for leave to appeal from it, whichever occurs first.

[47] Apart from the aforementioned extension of the interim interdict sought by agreement, it was not clear to me what I was supposed to do with the application in case no. 22046/18, and the applicants' counsel were not really able to enlighten me. I invited them and, through them, the attorney who had appeared for the City before the duty judge but was nowhere to be seen when the matter came before me, to make written representations. None were forthcoming. I am therefore not disposed to make any further order in case no. 22046/18. If the applicants or the City of Cape Town seek to have the costs of those proceedings determined after the 'final determination' of the matter in case no. 20825/2017, they must make arrangements through the registrar for that to be done by the duty judge who made the order on 10 December 2018.

Order

[48] The following order is made in case no. 20825/2017:

1. It is declared that in cases in which it is necessary for the prosecution to prove the identity of the driver of the vehicle used in the commission of an offence, whether at common law or in terms of the National Road Traffic Act 93 of 1996, the presumption in s 73(1) of the said Act operates only against the owner of such vehicle, and not against the owner of any trailer being towed by such vehicle at the time the offence is committed, unless the nature of the offence concerned pertains specifically to the operation of a 'combination of motor vehicles' (as defined in the Act).
2. Save as provided in terms of paragraph 1, the application is otherwise dismissed.
3. Save as provided in terms of paragraph 4, the respondent shall be liable for two thirds of the applicants' costs of suit, including the fees of two counsel where such were engaged.
4. The applicants shall be liable to pay the wasted costs incurred by the respondent in respect of the postponement of the hearing set down on 22 November 2018, including the fees of two counsel.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Applicants' counsel:	**W.R.E. Duminy SC** **J.C. Tredoux**
Applicants' attorneys:	**Jordaan & Ferreira Inc** **Somerset West** **Rapp Van Zyl Attorneys** **Cape Town**
Respondent's counsel:	**R. Jaga SC** **Z. Titus**
Respondent's attorneys:	**The State Attorney** **Cape Town**