

**FINES4U (PTY) LTD AND ANOTHER
V
DEPUTY REGISTRAR, ROAD TRAFFIC INFRINGEMENT AGENCY,
AND OTHERS**

GAUTENG DIVISION, PRETORIA

PRINSLOO J

2017 FEBRUARY 24

CASE No 30586/2014

Prinsloo J:

[1] This review application centres, by and large, on the provisions of the Administrative Adjudication of Road Traffic Offences Act 46 of 1998 (to be referred to as AARTO or the Act) and its proper implementation, or lack of such implementation, by the respondents, or some of them.

[2] Before me, Mr *Dreyer SC*, assisted by Mr *Schabert*, appeared for the applicants and Mr *Hopkins*, assisted by Mr *Ayitey Ayayee*, appeared for the fourth respondent. The other respondents did not take an active part in the proceedings.

Brief remarks about AARTO and some of its provisions

[3] AARTO came into effect on 1 July 2007.

[4] When the events forming the subject of this dispute took place, AARTO was still in an implementation stage, and, it appears, it was being implemented on a limited scale by employing certain 'pilot projects' mainly in the Pretoria and

Johannesburg Metropolitan areas.

[5] The short title of AARTO reads as follows:

‘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 the prosecution of offences in terms of the national and provincial laws relating to road traffic, and implement a points 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.’

[6] It appears that it was the intention of the legislature, in enacting AARTO, that this Act would be implemented, in a sense, in tandem with the Criminal Procedure Act 51 of 1977. In this regard, it is noteworthy that s 2 of the Act, setting out the objects thereof, provides that ‘(t)he objects of this Act are, *despite the Criminal Procedure Act, 1977*’ (emphasis added).

[7] Eight objects are listed which can be briefly summarised as follows:

‘To encourage compliance with the national and provincial laws and municipal by-laws relating to road traffic and to promote road traffic safety; to encourage the payment of penalties imposed for infringements *and to allow alleged minor infringers to make representations*; to establish a procedure for the effective and expeditious adjudication of infringements; to alleviate the burden on the courts of trying offenders for infringements; 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; to reward law-abiding behaviour by reducing demerit points; *to establish an agency to support the law enforcement and judicial authorities and to undertake the administrative adjudication process*; and to strengthen co-operation between the prosecuting and law enforcement authorities by establishing a board to govern the agency.’ [Emphasis added.]

[8] The Road Traffic Infringement Agency (also referred to by the abbreviation RTIA) was established in terms of s 3. The Road Traffic Infringement Agency Board was established in terms of s 6, to represent and control the Road Traffic Infringement Agency (RTIA or, at times simply referred to in AARTO as ‘the Agency’). I add, for the sake of detail, that, in the founding affidavit, the fourth respondent is described as the Road Traffic Infringement Agency but, in the headings of the papers, the fourth respondent is described as the Road Traffic Infringement Agency Board. The parties appear to loosely refer to the s 3 Agency and the s 6 Board, created to ‘represent and control the Agency’ but, for present purposes, I accept that nothing turns on this. This issue, such as it may be, did not receive any attention during the proceedings before me. I note, however, that the representations made by the first applicant on behalf of the second applicant in respect of alleged minor traffic infringements had to be made, in terms of AARTO, to the Agency and not to the Board and the representations officers, to whom I will refer later, who adjudicated upon the representations, were also contracted by the Agency and not by the Board. In the circumstances, it appears to be appropriate to accept, for present purposes, that the description of the fourth respondent, in the founding affidavit, as the Agency and not the Board, ought not to be interfered with. I say no more on this

technical subject.

A summary of the structure or workings of AARTO

[9] Without being disrespectful to the legislature, I take the liberty to observe that AARTO contains the most elaborate scheme of steps to be taken to bring an offender (or ‘infringer’ as described in the Act) who committed a minor traffic infringement or offence to book.

[10] At the close of the proceedings before me I requested counsel to jointly prepare a summary of this process. I am indebted to counsel on both sides who prepared what they described as a ‘simplified exposition of the AARTO process’. The wording has the approval of all counsel and the document was supplied to me some time after the hearing. I made one or two adjustments.

[11] It seems to me to be convenient to reproduce the essence of this ‘simplified exposition’ in this judgment. I do so by following, by and large, the wording used by counsel and the numbering of their paragraphs:

[11.1] The applicable adjudication and execution procedure in terms of AARTO, for purposes of this exposition, is dealt with in detail in ss 17, 18, 19, 198, 20, 21 and 22 of AARTO.

[11.2] The exposition prepared by counsel is said to be more descriptive than the process described on the AARTO website.

[11.3] The process is summarised as follows by counsel:

[11.3.1] *Infringement notice (s 17)*

On receiving an infringement notice from the issuing authority (this is defined in the Act as a local authority, a provincial administration or the Road Traffic Management Corporation established under s 4 of the Road Traffic Management Corporation Act 20 of 1999 in so far as such

authority, administration or corporation is responsible for traffic matters; although, as I already indicated, for present purposes the issuing authority comprises only the Tshwane and Johannesburg Metro Police departments who are implementing, or attempting to implement, AARTO in the form of pilot projects conducted in these metropolitan areas) via registered mail or served in person, an alleged infringer (the infringer) has the following options which he or she may exercise within the first 32-day period:

- [11.3.1.1] Pay a discounted penalty (50 %) which may, by arrangement in terms of s 198, be paid in instalments;
- [11.3.1.2] make a representation to the agency (or RTIA) in terms of s 18;
- [11.3.1.3] nominate the driver of the vehicle who committed the alleged infringement by providing the agency with his or her details; or
- [11.3.1.4] elect to be tried in court (in terms of s 22), failing which the matter should be referred to the agency for the issue of a courtesy letter (in terms of s 19).

[11.3.2] ***Courtesy letter (s 19)***

Should anyone of the aforesaid options not be exercised within 32 days from the date of service of the infringement notice, the issuing authority must notify the agency, which must, subsequent thereto, but not later than 32 days after notification (reg 6 read with reg 3(3)), serve an infringer with a courtesy letter, informing him or her that he or she has failed to comply with the infringement notice and notifying him or her of different elections which he or she may make within a further 32 days from date of the service of the courtesy letter. These would be the making of representations in respect of a minor

infringement, payment of the penalty and the prescribed fee of the courtesy letter to the agency, or notifying the agency in the prescribed manner that he or she elects to be tried in court. The courtesy letter must also state that a failure to comply with the requirements thereof within the time permitted, will result in the registrar issuing an enforcement order in terms of s 20. It is useful to add that if an infringer complies with either an infringement notice or a courtesy letter by paying the penalty the agency must update the national contraventions register in the prescribed manner, record the demerit points incurred by the infringer in terms of s 24 in the national contraventions register and notify the infringer by registered mail in the prescribed manner that the demerit points have been recorded against his or her name in the national contraventions register. The Agency must also provide the infringer with a printout of the demerit points incurred by him or her together with an indication of the amount of points left before his or her driving licence, professional driving permit or operator card is suspended in terms of s 25 or cancelled in terms of s 27. The 'national contraventions register' is defined in the Act as meaning the National Traffic Information System on which the offence details of every individual are recorded in terms of the Act (this system is also referred to as eNatis).

[11.3.3] ***Representations (s 18)***

Where a representation is made either at infringement notice or courtesy letter stage it must be considered by a representations officer who may allow or reject it ('representations officer' is defined in the Act as meaning a person contracted by the Agency in terms of s 5 or appointed by the registrar in terms of s 10 to consider representations submitted by any person who, after having

committed a minor infringement, elects to make a representation).The representation is not valid unless submitted within 32 days of the date of service of the infringement notice or the courtesy letter. If rejected, the infringer may, after notification by the agency:

[11.3.3.1] Elect to be tried in court but only if the representations officer so advises; or

[11.3.3.2] pay the penalty, the courtesy letter fee and the representations fee which may, by arrangement, be paid in instalments, within 32 days of such notification, failing which the registrar must issue an enforcement order.

[11.3.4] ***Enforcement order (s 20)***

[11.3.4.1] Should an infringer not respond to the notification by the representations officer or the courtesy letter or fail to appear in court, after having elected to do so, he or she must be served with an enforcement order.

[11.3.4.2] The order will demand, as the only option, that he or she pays the penalty, plus the courtesy letter fee plus an additional enforcement fee (without the possibility of paying in instalments) within 32 days from the date of service of the order, failing which a warrant must be issued to recover the penalty and fees.

[11.3.4.3] No enforcement order is issued unless the registrar is satisfied that the jurisdictional requirements provided for in s 20(2) have been met.

[11.3.4.4] The infringer's only option is to apply for the revocation of the enforcement order by submitting reasons to the satisfaction of the registrar why it should be revoked.

[11.3.4.5] Once an enforcement order has been issued, no driving

licence, professional driving permit or licence disc may be issued to an infringer in respect of a motor vehicle registered in his or her name until such enforcement order has been complied with or revoked.

[11.3.4.6] It is useful to point out that the ‘notification by the representations officer’ referred to in [11. 3.4.1] above is a notification in terms of s 18(7) dealing with the representations which an infringer may make. Section 18(7) stipulates—

‘If the representations are rejected, the representations officer may advise the infringer to elect in the prescribed manner to be tried in court, and must serve or cause to be served on the infringer a prescribed written notification informing him or her—

(a) of the reasons of the decision, and provide the issuing authority concerned with a copy thereof;

(b) if the infringer does not elect to be tried in Court—

(i) that the penalty, the prescribed representations fee and the prescribed fee of the courtesy letter, if any, are payable to the agency or that the arrangements are made with the agency in the prescribed manner to pay in instalments, not later than 32 days after the date of service of the notification; and

(ii) that a failure to pay the penalty and fees or to make arrangements to pay in instalments will result in an enforcement order being served on the infringer and that the infringer will become liable to pay the penalty and fees and the prescribed fee of the enforcement

order; and

(c) if the infringer elects to be tried in court, which may only be done on the advice of the representations officer, that the provisions of section 22 apply.'

I mention the provisions of s 18(7) because it received some attention during the hearing as it is common cause that no reasons were ever supplied after representations were rejected by any of the representations officers. Reasons for the rejections only came to light after the review application was launched and the fourth respondent supplied the record in terms of Uniform Rule 53(4). Further reference to this subject will be made later.

[11.3.5] ***Warrant of execution (s 21)***

[11.3.5.1] Should the infringer not respond to the enforcement order a warrant may be issued by the registrar and handed to the sheriff for immediate execution. The warrant allows the sheriff to:

[11.3.5.1.1] Seize and sell the infringer's movable property to defray the penalty, fees and costs applicable;

[11.3.5.1.2] seize and deface his or her driver's licence and/or professional driving permit;

[11.3.5.1.3] remove and deface the licence discs of all his or her vehicles;

[11.3.5.1.4] if applicable, seize and deface the operator cards of all the vehicles for which he or she is the registered operator; and

[11.3.5.1.5] immobilise all his or her vehicles.

[11.3.5.2] A warrant may also be issued by the registrar after non-compliance with notification in terms of s 19B(l)(a) and (ii)(a) to make payment of outstanding penalties and fees.

[11.3.5.3] An infringer may, upon issuance of a warrant, be reported to a credit bureau by the registrar.

[11.3.6] **Court (s 22)**

[11.3.6.1] When an infringer elects to be tried in court as a result of an infringement notice or the advice of the representations officer or the courtesy letter the issuing authority must prepare a summons in terms of the Criminal Procedure Act 51 of 1977 (the CPA) after cancellation of the infringement notice, summoning him or her to appear in court.

[11.3.6.2] In the event that the execution of a warrant produces no movable property to seize and sell in order to satisfy the enforcement order or the execution of the warrant renders less than what is required to satisfy it, the issuing authority is likewise obliged to prepare a summons (after cancellation of the infringement notice) summoning the infringer to appear in court.

[11.3.6.3] Once a summons has been prepared by the issuing authority the CPA applies.

[11.3.6.4] When the infringer, after having elected to appear in court and having been summoned to appear in or attend court fails to do so, the court must not, despite the provisions of s 55 of the CPA, issue a warrant for his or her arrest, but the clerk of the court must notify the issuing authority which must inform the agency, and the registrar must proceed to issue an enforcement order.

[11.3.6.5] In instances where an infringer was summoned to appear in court because the execution of a warrant had not produced movable property capable of being seized and sold or the infringer having failed to comply with the enforcement order after execution of the warrant, the case must be handled in terms of the CPA.

[12] So much for the 'simplified exposition' of the AARTO process.

Joinder of some representations officers, the fifth to eighth respondents and others

[13] An allegation is made in the founding affidavit that the respondents 'bluntly refused' to disclose the identity of the representations officers who dealt with the representations made by the first applicant on behalf of the second applicant. The applicants were keen to join these representations officers as interested parties.

[14] It appears that, after the record was obtained in terms of rule 53(4), details of some of these representations officers became evident so that an application was launched by the applicants, in October 2014, to join the fifth to eighth respondents and also some other representations officers who could only have been identified by their employee and/or internal identification numbers.

[15] The application was opposed but the order was granted joining the fifth and eighth respondents as co-respondents in the main application and granting leave to the applicants to join other presumed representations officers known only by their employee and/or internal identification numbers. I assume that this resulted in the ninth respondent also being cited as a party.

[16] Nothing turns on this, because, in the event, the applicants are only seeking relief against the fourth respondent.

The relief sought

[17] After the joinder of the fifth to eighth respondents and, it seems, also the ninth respondent, as mentioned, the applicants filed an amended notice of motion seeking the following relief:

- ‘1. That the first, alternatively fourth, alternatively fifth to ninth respondents' decision in terms whereof the first applicant's representations lodged in terms of s 18 of the Administrative Adjudication of Road Traffic Offences Act (Act 46 of 1998) were rejected, be set aside or reviewed and set aside;
2. That the decision by the first, alternatively fourth, alternatively fifth to ninth respondents to impose additional penalties in terms of the Administrative Adjudication of Road Traffic Offences Act (Act 46 of 1998) subsequent to the rejection of the first applicant's representations, be reviewed and set aside;
3. That the first, alternatively fourth, alternatively fifth to ninth respondents' decisions to decline the first applicant's representations in respect of those infringement notices listed in the schedules annexed hereto marked as annexure “D”, be reviewed and set aside, and that the representations filed in respect thereof be upheld;
4. That the first, alternatively fourth, alternatively fifth to ninth respondents be ordered to pay the costs of this application, alternatively that those respondents who elect to oppose the relief

applied for herein be ordered to pay the costs.'

[18] The respondents initially accepted certain of the representations made by the first applicant on behalf of the second applicant (the successful representations), rejected others (the unsuccessful representations) and initially failed to adjudicate on some of the representations (the pending representations).

[19] Prayer 3 was introduced into the notice of motion to cater for the pending representations. However, after the record was filed in terms of rule 53(4) it transpired that the fourth respondent disposed of the pending representations on 23 October 2013 by rejecting them, save for one, on 21 May 2014. The last-mentioned representation was successful. Accordingly, the pending representations may resort under the unsuccessful representations (prayer 1 of the amended notice of motion) so that the relief sought under prayer 3 as quoted falls away.

Some background notes and some arguments offered on behalf of the parties

[20] The first applicant company conducts business and renders services in respect of the management of traffic offences by representing members of the public, as well as corporate and state entities in making representations to the respondents and/or facilitating the payment of traffic fines and penalties, no doubt also working inside the ambit of the AARTO-process. The managing director of the applicant is Ms Cornelia Johanna van Niekerk (Van Niekerk) who was duly appointed by the second applicant to act as its proxy for purposes of these services. This is in accordance with the provisions of reg 336 of the National Road Traffic Regulations promulgated under AARTO.

[21] During or about September 2013 Van Niekerk, in her representative capacity, made enquiries on behalf of the second applicant with the agency. In reply thereto the agency provided her with a schedule listing the second applicant's infringements as at 11 September 2013. It appeared that some 639 infringement notices were issued against the second applicant resulting in penalties coming to some R322 000. The infringements spanned the period 2008 to 2013. Van Niekerk submitted representations in terms of s 18 of the Act in respect of 424 alleged infringements.

[22] Of particular importance, for purposes of deciding this application, is the fact that it is common cause that the fourth respondent (or any of the other respondents for that matter, although relief ultimately was only sought against the fourth respondent) failed all together to comply with the mandatory provisions of the Act, described earlier, dealing with the service of notices. This applies to infringement notices, courtesy letters, reasons for rejecting representations and so on.

[23] In this regard, the following observations can be made:

- In terms of reg 3(1) of the AARTO Regulations 2008 (the Regulations) the infringement notice:

‘... *shall* be issued and served or caused to be served on the infringer

—

(a) in person, . . .

(b) by *registered mail*, on a form similar to form AARTO 03 as shown in Schedule 1, *within forty days* of the *commission of the infringement*.’ [Emphasis added.]

The same would apply in respect of courtesy letters and, for example, s 18(7) notification of rejection of representations by the representations officer and the reasons for such rejection.

- In para 15.14 of the founding affidavit Van Niekerk says the following:

‘As set out aforesaid the time period over which the infringements against the second applicant span, goes as far back as 2008. None of these notices were served in the prescribed manner on the second applicant.’

This is not disputed in the opposing affidavit. Instead, the fourth respondent's deponent says the following:

‘I have, in any event, already acknowledged that RTIA has experienced difficulties in consequence of the South African Post Offices' dysfunctionality. However, RTIA's method of dealing with a dysfunctional Post Office is entirely irrelevant in this review. If the applicants mean to suggest that the Regulations are irrational because they cannot work without a properly functioning Post Office, then that is surely a different matter to be dealt with in a different application. Applicants who feel truly aggrieved that they are not receiving notices because the prescribed manner of service is not being complied with, should either challenge the constitutionality of the AARTO Act and Regulations (which expressly provide for service by registered post) or else bring a *mandamus* compelling RTIA to do things differently’

I find myself in respectful disagreement with these submissions. In her replying affidavit, Van Niekerk, correctly in my view, says the following about the stance adopted by the fourth respondent:

‘46.2 The failure to comply with the peremptory notice requirements in respect of the AARTO Act, ie the service of infringement notices and courtesy letters, is central to this review.

46.3 The respondents' failure to comply with these peremptory provisions in fact constitute grounds for the review of the decisions, as more fully explained and dealt with in the applicants' founding affidavit as amplified.’

- Because the failure of the fourth respondent (which is common cause) to comply with the peremptory provisions of the AARTO structure, with particular reference to service of the documents such as infringement notices, courtesy letters and s 18(7) reasons, goes to the root of this review application, it is useful to quote further from the fourth respondent's opposing affidavit:

‘67. I have already made the concession that RTIA experienced teething problems when first implementing the AARTO Act and regulations. The teething problems were experienced *inter alia* because of the challenges faced by the South African Postal Service. As the applicants point out in their founding affidavit, certain documents need to be “served”. As they also rightfully point out, apart from personal service there can *only* be service if service is effected by registered post. This requires the active

participation of the South African Post Office. Thus, if the Post Office does not properly function then infringement notices cannot properly be served nor can courtesy letters. I readily accept that this has happened in many instances. The challenges experienced by the Post Office *have* impeded RTIA's ability to properly implement the AARTO regulatory regime. It is a massive cause of concern to RTIA that the regulatory framework relies so heavily on the Post Office for its work.'

[The emphasis is that of the deponent on behalf of the fourth respondent.]

- On the same subject of the fourth respondent's failure to comply with the peremptory provisions of the AARTO process, Van Niekerk, in the founding affidavit, correctly, points out that the duty to issue a courtesy letter if an infringer has failed to comply with an infringement notice, as described, is also couched in peremptory terms ('the agency *must* issue a courtesy letter') in s 19 and it is also prescribed, in peremptory terms, what information the courtesy letter *must* contain. Van Niekerk then goes on to point out the following:

'10.11 In addition to these facts, a report entitled "AARTO Pilot Project Status Report" dated 26 July 2013, attached hereto as annexure "E", which was tabled before the Department of Transport categorically states that infringement notices identical in nature to the notices issued against the second applicant matter in question have "*stagnate*" and will eventually have to be cancelled.

10.12 The second applicant's infringement notices were issued during

the period 2008 to 2013 and since then, it has not progressed beyond the stages of infringement notices. I therefore respectfully submit that these infringement notices should be cancelled, since the prescribed processes have not been adhered to and it cannot proceed any further without violating the provisions of the Act herein described.’ [Emphasis added.]

The reference to what is stated in the AARTO pilot progress status report is also not contested in the opposing affidavit. The AARTO pilot project status report is obviously an official document which goes under the banner of the Department of Transport. It is dated 26 July 2013, not long before Van Niekerk lodged her representations. In the introductory summary of the report a statement is made that on 1 April 2010 the pilot phase was completed and both pilot sites (this would be Johannesburg and Tshwane) were proclaimed as full AARTO sites. I take the liberty to quote a few extracts from the report, which, as I said, is not disputed, and which would have a bearing on the present subject under discussion:

‘Due to a lack of practical knowledge of the implementation process it is evident that the role players do not have a full insight into the practical implementation and are short-sightedly looking at hardware issues only. It is therefore clear that the role players are not really in a state of readiness to implement AARTO.’

And

‘No courtesy letters and enforcement orders being sent out and/or granted AARTO administrative process is severely depended (sic) upon

very strict timelines and prescribed methods of serving documents via registered mail.

Failure from the infringer to respond to any notices within a period of thirty two days must result in the serving of a courtesy letter by the RTIA (registered mail) and after day 64 with an enforcement order by the RTIA (again registered mail).

As an example within the City of Johannesburg it took up to 3 years to re-align the budgetary process to fund the registered mail process for the first infringement notices.

Due to severe financial constraints within the City of Johannesburg, there was a period that all Johannesburg AARTO infringement notices were sent by ordinary mail in direct conflict with s 30(1).

However after consultation with the budget office, an amount of approximately R10 million per month was made available as from 22 December 2012. The projection and motivation was that the payment rate (compliance that was approximately 25 % with normal mail) will be increased to at least 50 % or 60 % with the granting of an enforcement order that will automatically result in an e-Natis block. This additional income would have 'subsidised' the registered mail costs incurred by the City.

The RTIA being the legally required body to send out and *fund* the courtesy letters and enforcement order notifications literally has had ***no funds*** to comply with the AARTO Act s 30. No courtesy letters and

enforcement orders have been sent out since 22 December 2012.'

[Emphasis added, the bolded emphasis is that of the author of the report.]

And

'The cases that cannot be complied with in terms of an enforcement order will eventually need to be cancelled/withdrawn from the e-Natis system.

Due to the fact that the RTIA is not complying with the administrative prescription of sending out courtesy letters and enforcement orders all infringement notices are legally null and void.

It therefore makes all law enforcement fruitless and wasteful expenditure.

National roll-out cannot be considered unless the RTIA is financially sustained to comply with section 30.'

[Emphasis added.]

- Section 30, which, by the fourth respondent's own admission was not complied with, stipulates:

(1) Any document required to be served on an infringer in terms of this Act, must be served on the infringer personally or sent by registered mail to his or her last known address.

(2) A document which is sent by registered mail in terms of subsection (1), is regarded to have been served on the infringer on the tenth day after the date which is stamped upon the receipt issued by

the post office which accepted the document for registration, unless evidence to the contrary is adduced, which may be in the form of an affidavit.'

(According to the statute which I consulted, the date of commencement of s 30 was 1 July 2008, in the area of the City of Tshwane and 1 November 2008 in the Johannesburg City Metropolitan area. In annexure D to the founding affidavit, which is a schedule of the infringement notices issued against the second applicant, the earliest infringement notice I could find is dated 25 October 2008 which is well after the commencement of s 30 in the Tshwane area and only days before the commencement thereof in the Johannesburg area. Chronologically the next 'oldest' infringement notice is dated December 2008.)

- I have already quoted the contents of para 67 of the opposing affidavit in which the deponent on behalf of the fourth respondent, quite properly in my view, makes the concession that RTIA experienced teething problems inter alia because of the challenges faced by the South African Postal Service. The allegation is made, as I quoted, that the challenges experienced by the Post Office have impeded RTIA's ability to properly implement the AARTO regulatory regime, and that it is a massive cause of concern to the agency that the regulatory framework relies so heavily on the Post Office for its work. This submission is made on behalf of the fourth respondent in support of the latter's argument, in limine, that the relief claimed by the applicants is academic. I will revert to several arguments in limine offered on behalf of the fourth respondent. For the sake of detail, and while about the acknowledged failure by the fourth respondent to comply with the AARTO process, it is useful to quote paras 68 to 70 of the opposing affidavit as well, dealing with the argument in limine, to which I will revert, to the effect that the relief sought

has become academic:

‘68. In other words, I am more than happy to accept that many courtesy letters may not have been *properly* served. But I also made the point in earlier parts of this affidavit that the Registrar is mandated by s 20(2) of the AARTO Act to only ever issue an 'enforcement order' if he is satisfied that the jurisdictional facts had been met. Because he has not always been satisfied that those jurisdictional facts had been met, he has not issued enforcement orders against the applicants. Not even in respect of the 208 unsuccessful representations. As far as I am aware, no enforcement orders have been issued against the applicants.

69. The applicants also do not make any positive allegation in their founding papers to assert that any of the impugned decisions ever culminated in enforcement orders. For reasons already advanced, only enforcement orders themselves have a direct external legal effect. Infringement notices on their own do not. Neither do courtesy letters. A party's *rights* can therefore only ever be adversely effected (sic) if an enforcement order has been issued. Since none have been issued there has been no adverse impact on the applicants.

70. Absent any enforcement orders being issued, and absent any administrative action being produced, there is nothing to review. The review is consequently academic.’

[The emphasis is that of the fourth respondent's deponent.]

- In the founding affidavit, Van Niekerk, correctly in my view, also makes the submission—

‘that the Agency's compliance with the prescribed periods of notification is obligatory and not a discretionary matter. It is an absolute requirement for the issuing of any enforcement order and fundamental to the due administrative process envisaged in terms of the Act.’

[24] Having now dealt, at some length, with the subject of service of documents in terms of the AARTO scheme, I return to a few more remarks about the background facts and some arguments advanced on behalf of the parties.

[25] I return to the subject of the representations made by Van Niekerk in terms of s 18 after she received the schedule listing the second applicant's alleged infringements as at 11 September 2013. In the founding affidavit, Van Niekerk says she made 570 representations. They were all identical except that some were suggested to be made at the infringement notice stage and some at the courtesy letter stage. It is not clear why this had to be done because it is common cause that the process was never advanced beyond the infringement notice stage and the infringement notices were never served on the second applicant in terms of s 30. Nevertheless, according to the founding affidavit some 155 of the representations were successful and some 208 unsuccessful although they were based on exactly the same grounds, to which I will refer later. Some 207 had not yet been adjudicated upon and the unsuccessful representations had a fee of R200 000 added to each of them thereby incurring a total penalty of R41 600 for the account of the second applicant. I mentioned earlier that after the application was launched the remaining pending representations were considered and rejected with the exception of one of them which was successful. This is why the relief sought in prayer 3 fell away.

[26] Van Niekerk received 'only a few' so-called 'AARTO 09' or 'result of representation' forms at a late stage in her capacity as the duly appointed proxy. There was no compliance with s 30. It may be that the figures as to the successful and unsuccessful and pending representations given by Van Niekerk are wrong because in their heads of argument, counsel pointed out that there were only 424 representations and not 570. In the greater scheme of things, nothing turns on this for purposes of deciding the dispute.

[27] When Van Niekerk enquired about all the 'AARTO 09 result of representation' forms in respect of the representations she was told by personnel of the agency who did not want to be identified that 'we don't send them anymore'. This is undisputed. This also serves to confirm the common cause fact that the fourth respondent failed completely to comply with the provisions and requirements of the AARTO system. Moreover, this failure flies in the face of the peremptory provisions of s 18(7) directing the representations officer, if the representations are rejected, to advise the infringer of the options available and to serve or cause to be served on the infringer a prescribed written notification informing him or her, inter alia, of the reasons for the decision and provide the issuing authority concerned with a copy thereof. In addition, failure by the administrator to furnish reasons for administrative action could also be in conflict with the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and, more particularly, s 5 thereof.

[28] When no reasons in terms of s 18(7) or, for that matter, AARTO 09 forms, were received, Van Niekerk called in the assistance of the national chairman of the Justice Project South Africa (NPC) who wrote a letter to the members of the s 6 Board representing the s 3 Agency. Their attention was drawn to the

provisions of s 5 of PAJA and also the fact that no AARTO 09 forms had been received. They were reminded of the fact that Van Niekerk was informed by their staff, with reference to the AARTO 09 forms, that 'we don't send them anymore'. They were also confronted with the fact that identically worded representations were upheld in some instances and rejected in others. They were asked to furnish the legal grounds on which the inconsistent decisions were based.

[29] In response to the letter of the national chairman, the first respondent, deputy registrar of the Agency, wrote a scathing letter, not to the national chairman but to Van Niekerk pointing out to her that she was not attacking the merits of the alleged infringements but simply complaining about failure to serve infringement notices, courtesy letters and enforcement orders which was merely an attempt to circumvent the penalties imposed. The first respondent also accused Van Niekerk of acting in breach of her fiduciary duty towards the second applicant 'in terms of both common and statutory law failing which you may be held criminally liable in terms of the provisions of sub-section 5 of s 332 of the Criminal Procedure Act, 1977'. With respect, this is totally incorrect. There are other questionable observations made in the letter which I need not dwell upon. In conclusion of the letter the first respondent, obviously displaying bias and unnecessary aggression towards Van Niekerk, stated:

'(P)lease note that I have instructed all representations officers to mark all representations submitted by you under the same or similar circumstances as unsuccessful with immediate effect. I am also considering the reversal of all representations made successful under the above circumstances to correct the inconsistencies, as decisions of representations officers are not *functus officio*. It would appear that

you indeed were informed of the outcome hence your complaint of inconsistencies in the adjudication results albeit not on the prescribed form. The fact that AARTO 09 forms are not being dispatched may be ascribed to the same financial difficulty the Agency finds itself as with courtesy letters and enforcement orders. This is no secret and has been made public’

The fact that all the pending representations were subsequently rejected (barring the one successful one) may well be the result of the first respondent's declared intention to order the representations officers to act accordingly. Moreover, under these circumstances it would be arguable, as did counsel for the applicants, that the representations officers were not allowed to exercise their discretion freely and that they were unduly influenced. All these developments, including the obvious unreasonable and biased approach adopted by the first respondent, would be relevant to the review grounds offered by the applicants in terms of s 6 of this PAJA review. I add that the applicants were at pains to point out that the review was not necessarily only based on PAJA but was also properly launched as a so-called ‘legality review’. I will briefly return to these subjects.

[30] The national chairman wrote a further letter to the first respondent confronting him with the contents and tenor of his letter to Van Niekerk and pointing out that a s 6 PAJA review was being contemplated.

[31] Added to all this, was the refusal by the Agency, in answer to a request for those details by Van Niekerk's erstwhile attorney, to furnish particulars of the identities of the representations officers. This, as I have explained, had to be obtained by means of the rule 53(4) record and the subsequent joinder

application.

[32] The reasons, as requested, were never furnished. Reasons for the conflicting decisions of the representations officers in respect of identical representations only emerged after this application was launched and when the Rule 53(4) record was supplied. Broadly speaking, it appears that some of the representations officers felt that failure to attack the merits of the alleged infringements was fatal to those representations which justified their rejection. Other representations officers, as I mentioned, upheld the representations.

[33] On a general reading of all these exchanges, including the refusal to furnish reasons, the apparent bias and unreasonableness displayed by the deputy registrar and the refusal to disclose the identity of the representations officers I am left with the impression that there is much to be said for the review grounds offered by the applicants in their PAJA review, alternatively their legality review. I will return to this subject.

[34] So much for the background facts and some arguments offered on behalf of the respective parties.

[35] I turn to the details of the identically worded representations submitted by Van Niekerk.

Particulars of the representations submitted by Van Niekerk

[36] Two examples of these representations are attached to the founding papers. They are identical, except that in one instance the words 'infringement notice' in the last paragraph was replaced with the word 'courtesy letter'. Nothing turns on this.

[37] I quote the ‘motivation’ which forms part of the representation prepared on a form 1 AARTO 08:

‘Section 19(1) of the AARTO Act states that “if an infringer has failed to comply with an infringement notice as contemplated in section 17(1)(f) and the Agency has been notified of the failure in terms of section 17(2), *the Agency must issue a courtesy letter and serve it on the infringer*”. The period contemplated in section 17(1)(t) is currently 32 days after the *date of service* of the infringement notice.

Section 20(1)(a) of the AARTO Act, states that “if an infringer fails to comply with the requirements of a notification contemplated in section 18(7) or a courtesy letter contemplated in s 19(2)(b) or has failed to appear in Court as contemplated in s 22(3), as the case may be, *the Registrar must, subject to subsection (2) issue an enforcement order*, serve it on the infringer and update the National Contraventions Register accordingly”.

The word “*must*” does not infer that these are optional provisions and the periods of time referred to are in no way ambiguous or open to interpretation. Additionally, the e-Natis system automatically disallows the discount after an automatically calculated period has expired, on which date, the courtesy letter *must* be generated. It is therefore not reasonable to expect that the issuing authority would need to “notify the Agency” in order for a courtesy letter to be issued, given the fact that the Agency, and the e-Natis system would in fact be in a better position to know whether an infringement notice has been

paid or not.

In addition to these facts, the report entitled “AARTO Pilot Project Status Report” dated 26 July 2013 which was allegedly tabled before the Department of Transport categorically states that infringement notices identical in nature to the matter in question have “stagnated” and will eventually have to be cancelled. This infringement notice was issued on 2013/03/20 and since then, it has not progressed beyond “infringement notice” despite the fact that it should have been an Enforcement Order already. I therefore respectfully submit that this infringement notice should be cancelled, since the prescribed processes have not been adhered to and it cannot proceed any further without violating the provisions of the Act herein described.’

[The emphasis is that of Van Niekerk who crafted the representations.]

[38] This particular representation was signed by Van Niekerk on 25 September 2013. This is shortly after the Agency provided Van Niekerk with the schedule listing the second applicant's alleged infringements as at 11 September 2013.

[39] As I pointed out, a substantial number of these representations were upheld, and rightly so in my view, whereas a substantial number of the identically worded representations were rejected, presumably on the basis that the ‘merits’ of the alleged infringement were not attacked in the representation and a further substantial number remained pending by the time when the application was launched. As I pointed out, they were later, barring one that was upheld, rejected, presumably after the first respondent, the Deputy Registrar, instructed the representations officers to do so, as he mentioned in

his scathing letter to Van Niekerk of 29 October 2013. I take the liberty, at the risk of unnecessary repetition, to revisit his conclusionary words in this letter:

‘In conclusion, please note that I have instructed all representations officers to mark all representations submitted by you under the same or similar circumstances as unsuccessful with immediate effect. I am also considering the reversal of all representations made successful under the above circumstances to correct the inconsistencies, as decisions of representations officers are not *functus officio*.’

This letter of the first respondent deputy registrar is dated 29 October 2013 and the pending representations were rejected after that, and after this application was launched in April 2014.

[40] It is convenient, at this point, to deal, in part, with the merits of the review application of the applicants, with particular reference to the so-called ‘legality review’ which is offered in addition to or in the alternative to the PAJA review:

- The fourth respondent concedes that in exercising their functions the representations officers do so as part of the administrative process.
- As counsel for the applicants correctly point out in their comprehensive heads of argument, decisions of an administrative nature which may not amount to ‘administrative action’ as defined in PAJA, may nevertheless constitute grounds for judicial review under the principle of legality, which is applicable to all exercises of public power and not only to administrative action as defined in PAJA and which requires that all exercises of public power be, at the minimum, lawful and rational—see *Khumalo v MEC for Education, Kwa-Zulu Natal* 2014 (5) SA 579 (CC) (2014

(3) BCLR 333; [2013] ZACC 49) at 587G–588A; *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SACR 111 (GNP) (2014 (1) SA 254) at 146e–g.

- It seems to me that this principle of legality was initially recognised in the leading case of *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) (1998 (12) BCLR 1458; [1998] ZACC 17) at 400D–401A where the following is said:

‘[58] It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality.

[59] There is of course no doubt that the common-law principles of *ultra vires* remain under the new constitutional order. However, they are underpinned (and supplemented where necessary) by a constitutional principle of legality. In relation to “administrative action” the principle of legality is enshrined in s 24(a). In relation to legislation and to executive acts that do not constitute ‘administrative action’, the principle of legality is necessarily implicit in the Constitution. Therefore, the question whether the various local governments acted *intra vires* in this case remains a constitutional question.’

- In this case, the official AARTO Pilot Project Status Report pronounces that—

‘Due to the fact that the RTIA is not complying with the administrative prescription of sending out courtesy letters and enforcement orders all infringement notices are legally null and void.

It therefore makes all law enforcement fruitless and wasteful expenditure.

National roll-out cannot be considered unless the RTIA is financially sustained to comply with section 30.’

As I pointed out, this report is dated 26 July 2013, shortly before the schedule presented to the applicants by the Agency saw the light in September 2013 and was followed by Van Niekerk's representations in the same month.

- I have also pointed out that the fourth respondent's deponent, correctly, conceded that the whole process is flawed and that no enforcement orders can be or have been issued against the applicants. I quoted paras 67 to 70 of the opposing affidavit. Indeed, I recorded that the deponent on behalf of the fourth respondent submitted that the review application is of no more than academic significance because there is ‘nothing to review’.
- Under these circumstances, the Agency, represented by the representations officers, acted beyond their statutorily conferred powers by not following the AARTO process, couched in peremptory terms, but nevertheless imposing fines and penalties after adjudicating upon the representations. By their own admission, these were fruitless exercises, amounting to nothing more than ‘wasteful expenditure’. In addition, their

actions, such as they were, amounted to irrational conduct in that conflicting decisions were given in respect of identically worded representations, no reasons were given for the decisions, there was a refusal to disclose the identity of the representations officers and the actions of the first respondent were patently biased and unreasonable, inter alia, where he instructed the representations officers to 'mark all representations submitted by you under the same or similar circumstances as unsuccessful with immediate effect'.

- In short, they offended the principle of legality which dictates that they may exercise no power and perform no function beyond that conferred upon them by law as stated by the learned judge in *Fedsure* at 400D–E.

[41] For these reasons, I have come to the conclusion, and I find, that the review application falls to be upheld on the basis, at least, that the fourth respondent, represented by the representations officers and others, performed actions which fly in the face of the principle of legality.

[42] In conclusion on this subject, I add, with respect, that counsel for the fourth respondent, in their comprehensive heads of argument, failed, in my view, to offer any persuasive arguments to counter what I consider to be a compelling case for a legality review. This is, with respect, perhaps not surprising in view of the proper concession that the AARTO process was not complied with and any steps which may have been contemplated against the second applicant were rendered unenforceable. The main thrust of the fourth respondent's argument on legality appears to be that a case for a legality review was not made out in the founding papers but rather in the replying affidavit. In my view, the relevant facts were fully canvassed in a comprehensive founding affidavit with annexures, to which I have referred in some detail. The facts relating to a PAJA review, in this instance, do not differ from the facts

relating to the legality review. The reliance on a legality review amounts to legal argument. No new matter was introduced in the replying affidavit to sustain a legal argument on legality review which did not already appear in the founding papers.

In my view, this is not a classic case such as that in the well-known judgment of *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others* 1974 (4) SA 362 (T). In that case, it seems to me, the principle was reaffirmed that facts necessary to sustain the case ought, generally, to appear in the founding affidavit and ought not to be introduced anew, to the surprise and prejudice of the respondent, in the replying affidavit—see *Titty's Bar* at 368H–369B. In any event '(i)t lies, of course, in the discretion of the Court in each particular case to decide whether the applicant's founding affidavit contains sufficient allegations for the establishment of his case' (*Titty's Bar* at 369A–B).

In the present case, I am satisfied that the necessary allegations, also to sustain a case for a legality review, appear in the founding affidavit and, inasmuch as it may be necessary, I exercise my discretion in favour of the applicants in this regard.

[43] I add, that it is stated emphatically in the replying affidavit that the applicants' review was not only located in PAJA 'as is suggested by the respondent . . . to the extent that PAJA may not apply, which is not conceded, the review is based on the principle of legality'. Later in the replying affidavit it is also stated that the application is primarily directed at a review of the legality of the decisions sought to be impugned and that 'if PAJA does not apply, the principle of legality will'. The following submission is also made in the replying affidavit:

‘It is denied that the decisions of the representations officers cannot be characterised as administrative action. It is submitted that the decisions of the representations officers constitute administrative action which is reviewable in terms of PAJA or on the basis that the decisions lack legality.’

[44] Inasmuch as the reliance on a legality review may not have been pertinently stated in the founding affidavit, this could not have led to any prejudice on the part of the fourth respondent. Indeed, this is not a case where the fourth respondent may have required an opportunity to file a further affidavit in order to remedy such prejudice. As I mentioned, the facts alleged in the founding affidavit also cover the argument for a legality review.

[45] This, in my view, is really the end of the matter, but, where the fourth respondent raised a number of arguments in limine, which do not have a direct bearing on the legality review, and which counsel urged me not to rule on at the commencement of the proceedings but only after the issues had been fully canvassed, I will, nevertheless, briefly deal with those arguments in deference to the fact that they were raised on behalf of the fourth respondent.

The arguments in limine

(i) First argument in limine: the review, located in PAJA, was instituted out of time and there was no condonation application or an application for an extension of the permissible time periods afforded under PAJA

[46] As I pointed out, this argument, in any event, does not apply to a legality review.

[47] As I explained, no reasons were supplied for the rejection of the unsuccessful representations despite such reasons having been requested. No AARTO 09 forms were supplied in this regard and Van Niekerk was informed that the Agency did not 'send them anymore'. Consequently, the fourth respondent failed to comply with the peremptory provisions of s 18(7) to which I have referred.

[48] AARTO 09 forms were only obtained by the applicants after they had instituted this application in April 2014. It only happened when the fourth respondent was requested, in terms of rule 53(4), to produce the record. This happened in three tranches in June, July and August 2014.

[49] It follows that the applicants were only informed of the administrative action or became aware of such action that had been taken and the reasons therefore as required by s 7(1)(b) of PAJA, after the record was finally filed which occurred on 12 August 2014. Until that date there was no compliance with the provisions of s 18(7) of AARTO.

[50] Counsel for the applicants argued that even if the impugned decisions do not constitute 'administrative action' as intended by PAJA, the decisions taken in terms of s 18(5) of AARTO are nevertheless of an administrative nature, reasons for which, in terms of s 18(7) of AARTO, were only given on 12 August 2014 when the full record had been filed.

[51] No delay could have occurred as the outcome itself, divorced of its reasons, does not constitute a decision contemplated by AARTO in the absence of service of the reasons for the decision. Put differently, as counsel argued, the decision-making process is only completed on service of the reasons for the decision.

[52] Moreover, as mentioned, the fourth respondent furnished Van Niekerk with a spreadsheet of all outstanding infringement notices and it was this document that was used to establish which infringement notices should be the subject of representations. The spreadsheet was authored by the fourth respondent's members on 11 September 2013 and the representations were submitted on 25 September 2013. The dates of the unsuccessful representations range from 30 September 2013 to 23 October 2013.

[53] The fact remains, as was argued by counsel, that no reasons were given for the action until service of the record in August 2014 so that the periods referred to in s 7(l)(b) of PAJA are not applicable and no delay occurred, nor did it occur if that s does not apply. The applicable period, in terms of this subsection, is that the proceedings for review must be instituted within 180 days (about six months) from the time when the aggrieved person became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons. Of course, in this case, the applicants only became so aware after they instituted the proceedings, because no reasons were furnished, despite a request for that to happen and no AARTO 09 forms were supplied.

[54] Counsel for the applicants argued, correctly in my view, that the dates of the alleged transgressions between December 2008 and August 2013, are irrelevant for purposes of deciding this issue. On a proper reading of PAJA, it is the date on which the applicants were informed of the reasons for the rejection of the representations which is relevant.

[55] In any event, the scathing letter from the first respondent, addressed to Van

Niekerk, is only dated 29 October 2013, and correspondence from the national chairman flowing from that is dated November 2013. That is when it became apparent that a review application was indicated and the National Chairman said as much in his letter of 5 November 2013. Only on 12 November 2013 did the attorneys representing Van Niekerk ask the Registrar of the Agency for details of the representations officers concerned. This was declined only on 28 November on the basis that the relevant proxy in terms of which Van Niekerk was acting had to be furnished. The application was launched well inside six months after this development. I add that it appears clearly from the replying affidavit that a challenge by the fourth respondent of the validity of Van Niekerk's

proxy was unfounded. The proxy, attached to the papers, was also registered on the e-Natis system.

[56] Even if I were to find that there was an unreasonable delay (which appears to be not to be the case) it seems that such delay is fully explained in the papers and must largely be laid at the door of the fourth respondent and its officers. I see no prejudice for the fourth respondent, particularly in view of the latter's admission that the enforcement process has stagnated and that enforcement orders will not, because jurisdictional requirements have not been met, be issued.

[57] Counsel reminded me of the provisions of s 9 of PAJA allowing for a court to extend the periods, including the 180 day period 'for a fixed period' on application by the aggrieved party where the interest of justice so require. Such an 'application' can be said to have been introduced in the heads of argument of counsel, although it seems to me to be unnecessary because there would be no point in a fixed period extension, the proverbial horse having bolted and the

application having been launched almost three years ago.

[58] In all the circumstances, I see no merit in the argument offered on behalf of the fourth respondent that the PAJA review application was out of time. This argument in limine therefore falls to be dismissed.

(ii) The decisions of the representations officers are not reviewable because they do not constitute 'administrative action' as defined in s 1 of PAJA

[59] Of course, this argument, also, does not apply to the legality review.

[60] The definition of 'administrative action' in PAJA, provides that it includes any decision taken, or any failure to take a decision by—

‘(a) an organ of state ... or

(b) a natural juristic person other than an organ of state when exercising a public power or performing a public function in terms of an empowering provision *which adversely affects the rights of any person and which has a direct, external legal effect, ...*’ [Emphasis added.]

[61] The main thrust of the argument of the fourth respondent is that the action of the representations officers cannot amount to administrative action because it has no final effect on the rights of the infringers. It is argued that where the representations officer rejects an infringer's representation it is not yet the 'end of the road' for the infringer. The latter has the opportunity to elect to be tried in Court under s 18(7)(b) and (c). Of course, such an election will not even come into play given the fact that the AARTO procedure was not followed at all. It was argued that the decisions of the representations officers

had no adverse legal effect, in the spirit of the definition, because, for the reasons mentioned, no enforcement orders can, or will, be issued.

[62] It was argued on behalf of counsel for the applicants that the mere presence of entries on the National Contraventions Register of the alleged infringements, as happened in this case, adversely affects the rights of the applicants and has a direct, external legal effect. Examples of the provisions in AARTO providing for updating of this national contraventions register (NCR) and, indeed, for cancellation of infringement notices appear in ss 17, 18, 19 and 20 and were briefly referred to in the condensed summary of the AARTO structure mentioned earlier in this judgment. Consequently, so it was argued, the alleged infringements of the second applicant which have been recorded on the NCR will continue to stand (unless removed as a result of a successful review application) despite the fact that it may be tainted by a materially flawed and unlawful procedure which led to the recordal, as happened in this instance. Moreover, such irregular infringement notices will continue to be displayed on the NCR, despite the fact that the authorities may have no intention of enforcing them by way of an enforcement order.

[63] Counsel also argued that there is no effective guarantee that enforcement orders may not become a reality some time in future.

[64] Moreover, counsel pointed out that the laws on prescription are not applicable to penalties and fees payable in terms of AARTO and may be collected at any time—see s 31(2) of the Act.

[65] It was argued by counsel that the adverse effect is a result of the representations officers' decisions to ignore the representations that the whole

process was flawed and unlawful. In so doing, so the argument goes, the infringer is affected in that he will neither obtain the rights that a company has following a successful representation, namely the cancellation of the infringement notice on the NCR at the instance of the Agency, nor will he be able to elect to go to court. Remaining on the NCR for all to see while the process was flawed and unlawful affects the reputation and dignity of the infringer as well as his right to just administrative action.

[66] It was also argued on behalf of the applicants that, at the very least, the adverse decisions of the representations officers have the capacity to affect adversely the alleged infringer's rights in the respects mentioned— see *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) (2005 (10) BCLR 931; [2005] 3 All SA 33; [2005] ZASCA 43) at 323D–F.

[67] It was also argued that the decisions have a direct external legal effect, in the spirit of the definition, because the infringer does not have an automatic choice to elect to go to court because it is the representations officer, within his discretion, who has to advise the infringer that he has a choice whether or not to elect to be tried in court— see s 18(7) of the Act. Having availed the infringer of his choice to elect to be tried when the record was served long after 32 days had passed to do so, effectively deprived the infringer to make such election. The decisions accordingly produced a final effect.

[68] It was also argued on behalf of the applicants that it is apparent that an infringer's details should not be recorded on the NCR if he is not guilty of an offence or infringement. It was argued that the infringer's details should not be recorded on the NCR until his representation, whether at infringement stage or

courtesy letter stage, is rejected. It is only after an infringer elects to pay that he is, quite correctly, considered to be guilty of the infringement where after his details will be recorded on the NCR. Of course, given the fact that the AARTO process was not complied with in any sense of the word, these options, including representations made in regular fashion, are no longer open to the applicants.

[69] In any event, it seems to me that where the process was tainted it would not be in the interest of justice to allow details of the alleged offences, which could not be addressed because of the tainted procedure, to remain on the NCR on a permanent basis.

[70] Against this background, I have come to the conclusion, and I find, that the actions of the fourth respondent, represented by the representations officers, fell inside the ambit of the PAJA definition of administrative action. Consequently, this argument in limine, also, falls to be dismissed.

(iii) Internal remedies have not been exhausted

[71] Section 7(2) of PAJA stipulates that subject to s 7(2)(c), no court or tribunal shall review an administrative action in terms of PAJA unless any internal remedy provided for in any other law has first been exhausted. Subsection (c) stipulates that in exceptional circumstances and on application of the person concerned, the court or tribunal may exempt such person from the obligation to exhaust any internal remedy if it is deemed to be in the interest of justice.

[72] In this instance, it was argued on behalf of the fourth respondent that the internal remedies lie in the choice to approach the court or by applying to the respondent to revoke the infringement order.

[73] It was argued on behalf of the applicants that, on a proper interpretation of AARTO, there is no provision for internal remedies which need first to be exhausted as contemplated in PAJA or the common law.

[74] The representations officers' decisions are also a final determination on the matters which serve before them having regard to their functions as defined in terms of AARTO.

[75] Moreover, the non-compliance by the respondents with the AARTO procedure resulted in the second applicant, as described, being unable to elect to go to court and there is an indication that there are no enforcement orders to be issued which may be revoked.

[76] In any event, it appears that the only remedy left for the applicants was to approach this court on the basis of a review application.

[77] In the result, this argument in limine also falls to be dismissed.

(iv) The relief claimed is academic

[78] I have dealt with this issue, to some extent, when quoting from paras 67 to 70 of the answering affidavit.

[79] Counsel for the applicants argued that the suggestion by the respondent that no enforcement orders may be issued affords no answer to the fact that the infringements nevertheless remain on the NCR. With this submission I agree.

[80] Penalties and fees imposed, which do not prescribe, and infringements

recorded on the NCR remain despite the illegality of the decisions taken and it can hardly be contended, so it was argued, that the matter is academic.

[81] It was argued that the administrative action remains present and detrimental to the rights or interests of the applicants as well as those of the public against whom AARTO may be enforced.

[82] As I mentioned, the applicants have no guarantee that enforcement orders may not in due course be issued, and the question of prescription also does not come into play.

[83] It was argued that when the matter is in the public interest, such as in this case, it is in the interest of justice to have it adjudicated upon.

[84] In the result, I have come to the conclusion, and I find, that the relief sought has not become academic in nature so that this argument in limine should also be rejected.

[85] So much for the arguments in limine

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Revisiting the fourth respondent's 'defence on the merits'

[86] The main thrust of the fourth respondent's case lies in the arguments in limine which I have dealt with.

[87] Under the heading 'RTIA's defence on the merits' the fourth respondent offers no more than an analysis of an internal policy document referred to as its 'Standard Operating Procedure: Adjudications'. This document purports to provide guidelines to representations officers as to what requirements are to

be met before representations can be adjudicated upon and examples when representations are to be successful and when they are to be unsuccessful.

[88] In view of this, it is argued on behalf of the fourth respondent that it was quite understandable that some representations officers could uphold representations identical to other representations which were rejected by other representations officers. With respect, I find this argument unconvincing, and only make the following remarks:

- In my view, it remains an indication of irrationality on the part of the decision-makers if they come to diametrically opposed conclusions in respect of identically worded representations.
- There is a provision in the 'Standing Operating Procedure' to the effect that 'representations will always be unsuccessful if the infringer has not actually disputed the road traffic violation or if the infringer's explanation is not supported by any acceptable evidence or else is simply improbable'. This is clearly ultra vires the provisions of AARTO: there is no provision in AARTO to the effect that the s 18 representations are limited to a debate on the merits of the infringement. There are not, and cannot be, any prohibitions against an infringer advancing a technical argument such as irrationality and/or illegality on the part of the Agency and its officers who failed to comply with the AARTO structure or procedure.

[89] No other defences on the 'merits' are offered on behalf of the fourth respondent.

[90] I have already dealt with a rather cursory argument offered in an attempt to counter the case for a legality review. That argument I have already rejected.

The grounds of review offered on behalf of the applicants

[91] The review grounds are properly described and tabulated and clearly fall inside the ambit of s 6 of PAJA and also the ambit of what is required to sustain a successful legality review.

[92] The grounds are, inter alia, concisely tabulated in paras 22 to 24 of the founding affidavit. They are compelling and need not be repeated.

Conclusion

[93] In all the circumstances, I have come to the conclusion, and I find, that the review application falls to be upheld, either in terms of PAJA, or as a legality review, or both.

[94] As to costs, there is no reason why these should not follow the result in terms of the general practice. The costs flowing from the employment of two counsel would also be justified.

The order

[95] I make the following order:

1. The first, alternatively fourth, alternatively fifth to ninth respondents' decisions in terms whereof the first applicant's representations lodged in terms of s 18 of the Administrative Adjudication of Road Traffic Offences Act 46 of 1998 were rejected, are reviewed and set aside.
2. The decisions by the first, alternatively the fourth, alternatively fifth to ninth respondents to impose additional penalties in terms of the Administrative Adjudication of Road Traffic Offences Act (Act 46 of 1998) subsequent to the rejection of the first applicant's representations mentioned in 1 above, are reviewed and set aside.

3. The fourth respondent is ordered to pay the costs of this application which will include the costs flowing from the employment of two counsel.

Applicant's Attorneys: *Giesel & Breytenbach Attorneys*, Pretoria.

Fourth Respondent's Attorneys: *Majavu Inc*, Pretoria.