THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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East Rand Member District of Chartered Accountants v Independent Regulatory Board for Auditors (113/2022) [2023] ZASCA 81 (31 May 2023)

Today the SCA upheld an application for leave to appeal in terms of S 17 (2) *(d)* of the Superior Courts Act 10 of 2023 and the appeal, with costs, against the decision of the Gauteng Division of the High Court of South Africa, Pretoria (the high court).

On 5 June 2017, the Independent Regulatory Board for Auditors (IRBA), a statutory body established in terms of s 3 of the Auditing Professions Act 26 of 2005 (the Act), whose objects are set out in s 2 of the Act, promulgated the Mandatory Audit Firm Rotation Rule (MAFR), which came into effect on 1 April 2023. The first applicant, whose members are chartered accountants, approximately fifteen percent of whom are registered auditors who practice in small to medium sized audit firms, objected to the introduction of the MAFR.

The MAFR requires that, an audit firm, including a network firm shall not serve as the appointed auditor of a public interest entity for more than ten consecutive financial years. Thereafter, the audit firm would only be legible for reappointment as the auditor after the expiry of at least five years. The IRBA claimed amongst other reasons that, the long tenure of audit firms, which in some instances endured for 80 to 114 years. According to the IRBA, the fact that Chief Financial Officers who held sway in the decision to appoint an audit firm were drawn from a limited pool of audit firms, exacerbated the perception of a lack of independence. The IRBA was of the view that these factors posed a risk to audit outcomes. The promulgation of the MAFR was in addition to other measures it had introduced, namely the Mandatory Audit Tendering (MAT) and Joint Audits (JA) "to strengthen auditor independence."

The SCA noted that the promulgation of the MAFR must be viewed against the backdrop of s92 of the Companies Act 71 of 2008 which regulates individual audit tenure. That section provides that an individual auditor or designated auditor may not serve as an auditor of a company for more than five years. It provides for a cooling off period of two years between the appointment cycles.

Represented by its chairman, the second applicant, the first applicant (applicants) applied to the IRBA for the reason for promulgating the MAFR on 22 September 2017. The IRBA furnished those reasons on 1 December 2017. On 29 May 2018, some 179 days after receiving the reasons, the applicants instituted proceedings to review and set aside the MAFR in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), alternatively based on the principle of legality. The applicants first directed the review at three decisions, namely (a) the decision taken by the IRBA on 28 July 2016 to introduce the MAFR, (b) the decision taken by the IRBA on 28 March 2017.to adopt the final rule and the (c) the promulgation of the final rule on 5 June 2017. Before the hearing, the applicants reformulated the relief sought and restricted themselves to the review of the promulgation of the MAFR.

The IRBA opposed the review on two grounds, the first being that the applicants delayed in instituting the review under PAJA. The second was that the decisions were not susceptible to review under PAJA. They were quintessentially policy pronouncements taken pursuant to the subordinate rule making powers conferred by the Act.

The high court found that PAJA applied to the review and considered each of the decisions preceding the promulgation of the MAFR. It held that the applicants instituted the review out of the time period prescribed in s 7(1) of PAJA and that they had delayed unreasonably in doing so. When it considered the prospects of success, to determine whether it should condone the delay, the high court held that it could not find 'the proverbial 'smoking gun'. It found it was unnecessary to fully traverse the merits of the review. On appeal to it, the high court dismissed their application for leave to appeal, which prompted an application for leave to appeal to the SCA. The application was referred to oral argument in terms of s 17 (2) *(d)* of the Superior Courts Act, with a direction to the parties to be prepared to address the Court on the merits if called upon to do so.

Whether to grant the applicants leave to appeal centred on whether or not the high court was correct in dismissing the application on the grounds of delay. The SCA held that to decide whether the delay precluded the applicants from pursuing the review inescapably called into play the consideration of the merits of the review. Even though the applicants raised numerous grounds for review, the primary complaint turned on whether the exercise of the power by the IRBA to promulgate the MAFR was *ultra vires* the Act, a matter of statutory interpretation. It became apparent during the argument that there were reasonable prospects of success on appeal. In view of the importance of the matter to the parties, the public and its obvious Constitutional implications, leave to appeal must be granted.

On the strength of the Court's decision in *Esau and Others and Minister of Co-operative Governance and Traditional Affairs and Other 2021 (3) SA 593 (SCA) at para 45,* the SCA held that the policy decisions preceding the promulgation of the MAFR were not ripe for review until the promulgation on 5 June 2017. Although ordinarily the period within which to institute the review would have commenced on 5 June 2017, in this case, the 180- day period began to run on 1 December 2017 when the applicants received the reasons from the IRBA. The applicants launched the review 179 days after receiving the reasons from the IRBA. There was no question of an unreasonable delay for consideration. On the contrary, when taking to account the content of the reasons furnished, they were no more than a regurgitation of public notices preceding the promulgation. The IRBA could have provided the reasons earlier than 1 December 2017 if time was of the essence. Importantly, the SCA held that the MAFR came into effect on 23 April 2023, approximately five years after the institution of the review. Potentially, the real effect of the MAFR will only be fully known or felt some 10 years after it came into effect. It found that there had been no unreasonable delay in instituting the review and the high court had thus erred. It set the decision aside.

Turning to the merits of the review, which the high court had already pronounced on albeit briefly, both parties agreed that the matter was important and that they and the profession at large would benefit from the Court's consideration of the matter. The SCA considered whether the MAFR is *ultra vires* the Act and observed that the IRBA may not exercise a power not conferred by its founding Act or act in a manner inconsistent with it.

The IRBA first relied on s 10(1) *(a)* read with ss 4(1*) (b), (c)* and *(e)* of the Act as the source of its power to promulgate the MAFR. Section 10(1) *(a)* permits the IRBA to prescribe rules on matters "permitted or required" to be prescribed by the Act. Those matters are located in s 4, which defines the IRBA's general functions. The functional areas pertain to the prescription of standards of professional competence and auditing standards. The SCA held that the MAFR is not a standard of competence or a professional standard. Its import is to impose a broad restriction on companies, audit committees, current and future shareholders from appointing an audit firm of their choice. At the same time it prohibits audit firms from accepting appointments even if selected by a company.

Confronted by these difficulties, the IRBA sought to rely on s 10(1) *(b)* which permits it to prescribe rules aimed at a better execution of the Act. The SCA held however that, when published, there was no reference to that provision. Reliance was instead placed on s 10(1) *(a).* This was the stance taken by the IRBA in its opposing affidavit. There was therefore no support for the position advanced. The SCA held that the promulgation of the MAFR was *ultra vires* the Act and set it aside.

With regards to the costs of the appeal, it found that both the applicants and the respondents were responsible for the voluminous record comprising unnecessary material. Consistent with other decisions by the Court, it expressed its displeasure, holding that the necessary record required to resolve the appeal comprised a half of the volumes of the record filed. Accordingly, it held that the attorneys for both the applicants and the respondents may not recover from their clients more than fifty percent of the costs associated with the preparation, perusal and copying of the record in the appeal. It upheld the appeal with costs which included the costs of two counsel where so employed.