



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 113/2022

In the matter between:

**EAST RAND MEMBER DISTRICT OF
CHARTERED ACCOUNTANTS**

FIRST APPELLANT

JAROSLAV CERNY

SECOND APPELLANT

and

**INDEPENDENT REGULATORY BOARD
FOR AUDITORS**

FIRST RESPONDENT

**CHAIRPERSON OF THE INDEPENDENT
REGULATORY BOARD FOR AUDITORS**

SECOND RESPONDENT

**CHIEF EXECUTIVE OFFICER OF THE
INDEPENDENT REGULATORY BOARD
FOR AUDITORS**

THIRD RESPONDENT

Neutral Citation: *East Rand Member District of Chartered Accountants and
Another v Independent Regulatory Board for Auditors and
Others* (113/2022) [2023] ZASCA 81 (31 May 2023)

Coram: PONNAN, NICHOLLS, MABINDLA-BOQWANA and WEINER
JJA and SIWENDU AJA

Heard: 5 May 2023

Delivered: 31 May 2023

Summary: Application for leave to appeal – referral to oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013 – Mandatory Audit Firm Rotation Rule – Auditing Professions Act 26 of 2005 – review – dismissal based on delay – prospects of success – whether promulgation of Rule *ultra vires*.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Davis J) sitting as a court of first instance):

1. Leave to appeal is granted.
2. The appeal is upheld with costs, such costs to include the costs of two counsel, where so employed.
3. The attorneys for both the appellants and the respondents shall only be entitled to recover from their clients fifty percent of the costs associated with the preparation, perusal and copying of the record in the appeal.
4. The order of the high court is set aside and substituted with the following:
 - ‘1. The application succeeds with costs.
 2. The Mandatory Audit Firm Rotation Rule (MAFR) as promulgated on 5 June 2017 in Government Gazette No 40888 is reviewed and set aside.’

JUDGMENT

Siwendu AJA (Ponnan, Nicholls, Mabindla-Boqwana and Weiner JJA concurring):

[1] The first applicant, East Rand Member District of Chartered Accountants, is a voluntary association, and the second applicant, Mr Jaroslav Cerney serves as its chairman (the applicants). Members of the first applicant are chartered accountants. Approximately fifteen percent are registered auditors who practice in small to medium sized firms. They are subject to professional regulation by the first respondent, 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).¹ The objects and functions of the IRBA, which are set out in s 2 of the Act, include the regulation of audits performed by auditors, setting and maintaining requisite standards of competence and ethics, and providing for disciplinary procedures.²

[2] The applicants seek the leave of this Court to appeal against the dismissal of their application by the Gauteng Division of the High Court, Pretoria (high court) to review and set aside the Mandatory Audit Firm Rotation Rule (MAFR), which was promulgated by the IRBA on 5 June 2017 in Government Gazette No 40888. The dismissal of the review by the high court, prompted a petition to this Court. The two judges who considered the petition referred the application for the hearing of oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013, with a direction to the parties to be prepared to address the court on the merits if called upon to do so.

[3] Audit firms play a pivotal role in ensuring that representations made by companies in Annual Financial Statements are reliable, accurate and portray a fair and balanced position of a company's financial affairs. Investors and the public rely on the accuracy of those representations to make investment decisions. The industry has been marred both locally and globally by accounting scandals with dire consequences for investors and the public. In part, the IRBA attributes

¹ The predecessor of the IRBA was the Public Accountants' and Auditors' Board established in 1951.

² 'Section 2 states that: 'The objects of this Audit Act are —

(a) to protect the public in the Republic by regulating audits performed by registered auditors;

(b) to provide for the establishment of an Independent Regulatory Board for Auditors;

(c) to improve the development and maintenance of internationally comparable ethical standards and auditing standards for auditors that promote investment and as a consequence employment in the Republic;

(d) to set out measures to advance the implementation of appropriate standards of competence and good ethics in the auditing profession; and

(e) to provide for procedures for disciplinary action in respect of improper conduct.'

the genesis of the problem to the long tenure of audit firms, which have in some instances endured for 80 to 114 years. It claims that Chief Financial Officers, who hold sway in the decision to appoint an audit firm, are drawn from a limited pool of auditors, often from the same auditing firms. According to the IRBA, the acquaintance between audit committee chairs and incumbent auditors exacerbates the perception of a lack of independence and poses a threat to audit outcomes. It identified the need for measures to ‘strengthen auditor independence to enhance audit quality’, a trend adopted and followed by regulators in other international jurisdictions.

[4] On 4 December 2015, the IRBA introduced its first innovation, namely, to make it compulsory for all audit reports of public entities to disclose the number of years that an audit firm or sole practitioner had been the auditor of a particular entity (the audit tenure).³ After considering other measures like Mandatory Audit Tendering (MAT)⁴ and Joint Audits (JA)⁵, it took a decision on 28 July 2016 to introduce the MAFR. The IRBA had prepared a consultation paper, which it had distributed to stakeholders for comment. On 6 December 2016, after receiving the first round of comments, it published a second notice, inviting comments by 25 January 2017 on prescribed parameters as to how to implement the MAFR.⁶ The applicants made written comments, and thereafter held a meeting with the IRBA’s then Chief Executive Officer, with a view to objecting to the introduction of the MAFR. The IRBA nevertheless took a decision to introduce the final rule, on 28 March 2017.

³ Government Gazette (GG) 39475 Government Notice (GN) 138 4 December 2015.

⁴ MAT would make it compulsory for companies to put the engagement of an audit firm out to a public tender process to enhance competition and provide an equal opportunity for all audit firms to tender for appointment.

⁵ A joint Audit entails the appointment of more than one audit firm. This would ensure that the firms rotate in cycles to ensure continuity.

⁶ GG 40392 GN 170 1 November 2016.

[5] On 5 June 2017, the IRBA published the MAFR,⁷ which was to come into effect on 1 April 2023. The MAFR in relevant part reads:

‘1. An audit firm, including a network firm as defined in IRBA Code of Professional Conduct for Registered Auditors, shall not serve as the appointed auditor of a public interest entity for more than 10 consecutive financial years.

2. Thereafter, the audit firm will only be eligible for reappointment as the auditor after the expiry of at least five financial years.’

The publication of the MAFR must be viewed against the backdrop of s 92 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.

[6] On 22 September 2017, the applicants, asserting their right under s 5(1) of PAJA,⁸ requested reasons from the IRBA for the decision to adopt the MAFR. The IRBA furnished its reasons on 1 December 2017, as required by s 5(2) of PAJA. On 29 May 2018, the applicants instituted the review, some 179 days after receiving the reasons. Relying on PAJA, alternatively the principle of legality, the applicants sought an order to review and set aside:

‘1.1 the decision by the first respondent (“IRBA”) taken on or about 28 July 2016 to introduce mandatory audit firm rotation (“MAFR”);

1.2 the decision by the IRBA taken on or about 28 March 2017 on a final rule in relation to MAFR; and

1.3 the promulgation of the final rule in relation to MAFR on or about 5 June 2017.’

⁷ The MAFR is published in GG 40888 GN 100 5 June 2017.

⁸ Section 5(1) states that ‘Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.

(2) The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action.’

[7] The IRBA opposed the review on two grounds, the first being that the applicants delayed in instituting the review. The second was that the decisions were quintessentially policy pronouncements taken pursuant to the subordinate rule making powers conferred on it by the Act and therefore not susceptible to review. Before the hearing, the applicants reformulated the relief sought. Instead of seeking to review the preceding decisions, they restricted themselves to the promulgation of the MARF.

[8] The high court found that the applicants had instituted the review outside of the period prescribed in s 7(1)⁹ of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), and that they had accordingly delayed unreasonably in doing so. When the high court considered the prospects of success to determine whether it should condone the delay, it held that it could not find ‘the proverbial smoking gun’. It found it unnecessary on that account to fully traverse the merits of the review. Thus, the application centres in the first place on whether or not the high court’s finding on delay is correct. In order to decide whether the delay precluded the applicants from pursuing the review, a consideration of the merits of the review, is inescapably called into play. This matter turns on a question of statutory interpretation. Although numerous grounds have been raised, the primary complaint involves the IRBA’s power to promulgate the MAFR, and whether the exercise of that power was *ultra vires* the Act.¹⁰ It became apparent during the argument that there were reasonable prospects of success on appeal, and, in view of the importance of the matter to the parties and the public, and its obvious

⁹ ‘Section 7(1) states that: ‘Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date—

(a) . . .

(b) where no such remedies exist, on which the person concerned was informed of the administrative action, 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.’

¹⁰ ‘Empowering provision’ is defined in section 1 of PAJA as ‘a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken.’

Constitutional implications, leave to appeal must be granted. In what follows the applicants will accordingly be referred to as the first and second appellants.

The Delay

[9] Section 7(1) of PAJA states in the relevant part that:

‘Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date—

...

(b)... on which the person concerned was informed of the administrative action, 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.’

[10] The high court departed from the premise that each of the decisions taken by the IRBA was subject to review ‘despite their quasi-legislative nature’. The high court concluded that: ‘The first decision on 28 July 2016 and the 180 days period lapsed on 25 January 2017; the second decision was on [28] March 2017 and the 180 day period lapsed around 20 September 2017.’

[11] This Court in *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others* held that:

‘As a general rule, policies that have been formulated and adopted by the executive will not be ripe for review until they are implemented, usually after having been given legal effect by some or other legislative instrument. Two principles come into play in this regard: first, that in order for an exercise of public power to be ripe for review, it should ordinarily be final in effect; and secondly, that the decision must have some adverse effect for the person who

wishes to review it, because otherwise its setting aside would be an academic exercise which courts generally eschew.’¹¹

On the strength of *Esau*, the decisions preceding the publication of the MAFR were not ripe for review until the promulgation of the rule on 5 June 2017. The high court accordingly erred.

[12] Ordinarily, the period within which to institute the review would have commenced on 5 June 2017, the date of the promulgation of the MAFR.¹² Reasons for the decision were sought on 22 September 2017. Those reasons were furnished on 1 December 2017. It was thus only from that date that the 180 days began to run.

[13] Although the high court accepted that the review ‘in respect of the last impugned decision’ was launched 179 days after the applicants received the reasons, it criticised the applicants for its dilatory conduct and found the delay unreasonable. It held that, even though the statutory period in s 7(1) of PAJA was 180 days, the appellants were required to explain the delay in only launching the review on the 179th day. The criticism was not justified. The IRBA received the request for reasons on 22 September 2017, it delayed its response until 1 December 2017. When one has regard to the content of the reasons, they amount to no more than a regurgitation of what was conveyed in the public notices preceding the publication. The IRBA was not without fault. It could have provided those reasons earlier to prevent any further delay, if time was of the essence. There has been no explanation for its own delay.

¹¹ *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others* [2021] ZASCA 9; [2021] 2 All SA 357 (SCA); 2021 (3) SA 593 (SCA) para 45.

¹² In terms of section 7(1)(b) of PAJA, this was when the applicants were ‘informed’ of the administrative action, ‘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.’

[14] Importantly, although published on 5 June 2017, the MAFR was only to take effect on 1 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 from the date of its implementation. There was no unreasonable delay in the institution of the review. In these circumstances, the decision of the high court accordingly falls to be set aside.

[15] Turning to the merits of the appeal, we have read the voluminous record, and the high court has pronounced itself on the merits of the review, albeit briefly. Both parties agreed that the matter is indeed important and that they and the profession at large would benefit from this Court's consideration of the matter.¹³

Is the MAFR ultra vires the Act?

[16] The IRBA may not exercise a power not conferred on it by its founding legislation nor can it act in a manner that is inconsistent with the Act.¹⁴ Counsel for the IRBA submitted that s 10(1)(a), read with ss 4(1)(b), (c) and (e), of the Act is the source of the IRBA's power to promulgate the MAFR. Section 10(1) reads:

‘10. (1) The Regulatory Board may, by notice in the Gazette, prescribe rules with regard to—
(a) any matter that is required or permitted to be prescribed in terms of this Act; and
(b) any other matter for the better execution of this Act or function or power provided for in this Act.’

¹³ *Liberty Group Limited v Moosa* (126/2021) [2023] ZASCA 52 (14 April 2023) para 1 (which refers with approval to *Body Corporate of Marine Sands v Extra Dimensions 121 (Pty) Ltd* [2019] ZASCA 161 para 1). In contrast, see *A Penglides (Pty) Ltd and Another v Minister of Agriculture, Forestry and Fisheries and Another* [2022] ZASCA 74; 2022 (5) SA 401 (SCA) para 18, where the court did not pronounce itself on the merits.

¹⁴ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999(1) SA 374 (CC). See also *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at para 119.

[17] Section 10(1)(a) permits the IRBA to prescribe rules on matters ‘required or permitted’ to be prescribed by the Act, while s 10(1)(b) provides for rules aimed at a better execution of the Act. The matters that the IRBA is permitted to prescribe under s 10(1)(a) are located in s 4, which deals with its general functions. The section states in relevant part that:

‘4(1) The Regulatory Board must, in addition to its other functions provided in this Act

...

(b) take steps it considers necessary to protect the public in their dealings with registered auditors;

(c) prescribe standards of professional competence, ethics and conduct of registered auditors

...

(e) prescribe auditing standards.’

Section 4 confines the IRBA’s rule making power to ‘the prescription of standards’ in respect of defined functional areas. As the appellants correctly contend, the MAFR is not a standard of competence or a professional standard. The net effect of the MAFR, as counsel for the IRBA conceded during the hearing, is that it imposes a broad restriction on companies, audit committees and their 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.

[18] Confronted with these difficulties, counsel for the respondents sought instead to rely on s 10(1)(b) of the Act and submitted that the IRBA took steps to protect the public from a series of accounting scandals. However, when published, no reference was made to that provision. Reliance was then only placed on s 10(1)(a). That was the stance taken by the IRBA in its opposing affidavit as well. There is thus no support for the submission. I accordingly find that the promulgation of the MAFR is *ultra vires* the Act and falls to be set aside.

[19] What remains is the issue of costs. The costs of the appeal, including those of the application for leave to appeal must obviously follow the result. The appellants contended that insofar as the proceedings before the high court were concerned, they should be awarded costs on a punitive scale. In motivating for such an order, it was submitted that account had to be taken of: (a) the failure by the IRBA to fully comply with an interlocutory order by Basson J; (b) the costs associated with an application to amend its notice of motion and the objection by the IRBA in terms of rule 30 and rule 30A; and, (c) the general conduct of the IRBA in the litigation, which led to a striking out application. The interlocutory order by Basson J, granted the appellants costs on a punitive scale. That addressed many of the appellants' complaints. Moreover, the subsequent interlocutory disputes formed the subject of an application to strike out, which the appellants abandoned.

[20] It is necessary to comment on the size of the record, which consists of 15 volumes, comprising 2633 pages. It is awash with reports and unnecessary material, not required for the adjudication of the matter. This Court has expressed its displeasure in numerous matters at the disregard for the rules in the preparation of the record and the cost to the parties when that happens.¹⁵ The necessary record to resolve the application should not have exceeded seven volumes. Both parties were responsible for the state of the record. Accordingly, the attorneys for both the appellants and the respondents shall only be entitled to recover from their clients no more than fifty percent of the costs associated with the preparation, perusal and copying of the record in the appeal in this Court.

[21] In the result, I make the following order:

¹⁵ *City of Ekurhuleni Metropolitan Municipality v Takubiza Trading & Projects CC and Others* [2022] ZASCA 82; 2023 (1) SA 44 (SCA) para 18 to 19.

1. Leave to appeal is granted.
2. The appeal is upheld with costs, such costs to include the costs of two counsel, where so employed.
3. The attorneys for both the appellants and the respondents shall only be entitled to recover from their clients fifty percent of the costs associated with the preparation, perusal and copying of the record in the appeal.
4. The order of the high court is set aside and substituted with the following:
 - ‘1. The application succeeds with costs.
 2. The Mandatory Audit Firm Rotation Rule (MAFR) as promulgated on 5 June 2017 in Government Gazette No 40888 is reviewed and set aside.’

N T Y SIWENDU
ACTING JUDGE OF APPEAL

Appearances

For the applicants: HF Oosthuizen SC with him DJ Smit
Instructed by: Warrener de Agrela & Associates Inc, Johannesburg
Honey Attorneys, Bloemfontein

For the respondents: LT Sibeko SC with him S Tshikila and RV Mudau
Instructed by: Cliffe Dekker Hofmeyer Inc, Sandton
Webbers Attorneys, Bloemfontein