THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case Nos: 945/2022 and 40/2023

In the matter between:

INDEPENDENT REGULATORY BOARD FOR AUDITORS	**FIRST APPELLANT**
CHAIRPERSON OF THE INDEPENDENT REGULATORY BOARD FOR AUDITORS	**SECOND APPELLANT**
CHIEF EXECUTIVE OFFICER OF THE INDEPENDENT REGULATORY BOARD FOR AUDITORS	**THIRD APPELLANT**

and

EAST RAND MEMBER DISTRICT OF CHARTERED ACCOUNTANTS	**FIRST RESPONDENT**
RUDOLF JOHANNES BRITS	**SECOND RESPONDENT**
MINISTER OF FINANCE	**THIRD RESPONDENT**

Neutral citation: *Independent Regulatory Board for Auditors and Others v East Rand Member District of Chartered Accountants and Others* (Case no 945/2022 and 40/2023) [2024] ZASCA 114 (22 July 2024)

Coram: ZONDI, SCHIPPERS and WEINER JJA and KEIGHTLEY and BLOEM AJJA

Heard: 11 March 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The time and date for hand-down is deemed to be 11h00 on 22 July 2024.

Summary: Administrative Law – powers of Independent Regulatory Board for Auditors under Auditing Profession Act 26 of 2005 – whether their exercise constitutes executive or administrative action – whether review of impugned decisions time barred – whether prescribing assurance and tax practitioner fees beyond the Board's powers – procedural unfairness – whether the Board should allow representations before prescribing fees and removing fee concession granted to senior auditors – whether gazetting of fees mandatory.

ORDER

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

1 The appeal succeeds in part.

2 Paragraphs 117 (save for paragraph 117.3), 118, 119 and 120 of the High Court's order are set aside and replaced with the following:

'1. The decisions taken by the first respondent:

1.1 published under Board Notice 24 of 2019 in Government Gazette No 42258 dated 1 March 2019, in terms of which it removed the concession to registered auditors over the age of 65 in the form of a 50% discount of their individual annual fees (the fee concession); and

1.2 published under Board Notice 47 of 2020 in Government Gazette No 43110 dated 20 March 2020, in terms of which it failed to reverse its previous decision to remove the fee concession,

are remitted to the first respondent for a decision to be taken afresh, by no later than 31 March 2025, after it has given effect to the right of registered auditors to procedurally fair administrative action, as contemplated in the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

2. The decisions taken by the first respondent to prescribe the following fees published under: (a) Board Notice 24 of 2019 in Government Gazette No 42258 dated 1 March 2019; (b) Board Notice 82 of 2019 in Government Gazette No 42511 dated 5 June 2019; and (c) Board Notice 47 of 2020 in Government Gazette No 43110 dated 20 March 2020, namely:

(i) all assurance fees prescribed in respect of Category C assurance work;

(ii) all fees regarding the recognition of tax practitioners by the first respondent as the registered controlling body;

(iii) all administration fees in respect of assurance fees; and

(iv) that portion of the fees set out in paragraphs 2.1 and 2.3 of Board Notice 24 of 2019 and Board Notice 47 of 2020, which represents an increase of more than consumer price inflation compared to the equivalent fees during the first respondent's 2018/2019 financial year,

are remitted to the first respondent for these decisions to be taken afresh, by no later than 31 March 2025, after it has given effect to the right of registered auditors, and tax practitioners whose registered controlling body is the first respondent, to procedurally fair administrative action, as contemplated in the PAJA.

3. The Board is directed to repay or pass credits to the first applicant's members in respect of Category C assurance fees for the 2020 and 2021 financial years, calculated on the difference between the assurance fees charged by the Board and the amounts recoverable based on the costs of inspections under s 47(2) of the Auditing Profession Act 26 of 2005, that would have been due had the Board charged for inspections actually conducted.

4. Save as aforesaid, the appeal is dismissed with costs including the costs of two counsel.'

JUDGMENT

Schippers JA (Zondi, Weiner JJA and Keightley and Bloem AJJA concurring)

[1] The first appellant, the Independent Regulatory Board for Auditors (the Board), is a body established under the Auditing Profession Act 26 of 2005 (the Act) to regulate the auditing profession. Its objects include the protection of the public by regulating audits performed by registered auditors, and taking measures to advance the implementation of appropriate standards of competence and ethics in the auditing profession. The second appellant is the Chairperson of the Board and the third appellant, its Chief Executive Officer (CEO).

[2] The first respondent, the East Rand Member District of Chartered Accountants (respondent) is a voluntary association whose members are auditors registered under the Act. The second respondent, a former chartered accountant and auditor, passed away prior to the hearing of the matter and the executor of his estate elected not to pursue it. The third respondent, the Minister of Finance (the Minister), was a respondent in the proceedings before the High Court. The Minister did not participate in those proceedings, nor in this appeal.

[3] This is an appeal against an order of the Gauteng Division of the High Court, Pretoria (the High Court), in terms of which it reviewed and set aside the Board's decisions to prescribe fees and penalties payable by auditors under the Act, for the 2020 and 2021 financial years. The High Court granted the Board leave to appeal on limited grounds. It was granted leave to appeal by this Court in respect of the grounds refused by the High Court.

Factual background

[4] The Board's general functions are set out in s 4 of the Act. It provides:

'(1) The Regulatory Board must, in addition to its other functions provided for in this Act-

(a) take steps to promote the integrity of the auditing profession, including-

(i) investigating alleged improper conduct;

(ii) conducting disciplinary hearings;

(iii) imposing sanctions for improper conduct; and

(iv) conducting practice reviews or inspections;

(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;

(d) encourage education in connection with, and research into, any matter affecting the auditing profession; and

(e) prescribe auditing standards.'

[5] The Board is required, under s 8 of the Act, to prescribe, inter alia, accreditation and registration fees; annual fees; and the date on which any fee is payable. These fees, and monies received by way of sanctions imposed by the Board, are among the sources of its funds.[1] Section 9*(c)* of the Act empowers the Board to 'collect fees and invest funds' and s 9*(o)*, to 'do anything that is incidental to the exercise of any of its functions or powers'.

[6] In 2019 the Board prescribed the following fees payable for the 2020 financial year (1 April 2019 to 31 March 2020), published under Board Notice 82 of 2019 (the impugned fees):[2]

(a) a percentage fee model for Category C (low risk) assurance work which includes voluntary audits, reviews required by the Companies Act 71 of 2008 (the Companies Act), and other assurance work not included in Category A (high risk audits and related assurance work);

[1] Section 25 of the Act provides that the Board is funded from, amongst other sources, the collection of prescribed fees and sanctions it imposes.

[2] Board Notice 82 of 2019 was published in *GG* 42511, 5 June 2019.

(b) tax practitioner fees;

(c) penalty fees for late submission of the requisite documents for assurance work and the under-declaration of assurance fees; and

(d) above inflation increases in the annual renewal fee for registration and the administration fee for reinstatement, published in Board Notice 24 of 2019.[3]

[7] The Board also withdrew a fee concession to registered auditors over the age of 65 who previously had received a 50% discount on their annual fees (the fee concession). It did so without giving those auditors an opportunity to make representations as to why the fee concession should not be withdrawn.

[8] On 28 August 2019 the respondent launched an application in the High Court under case number 64848/2019, to review and set aside, alternatively to declare unlawful, the impugned fees and the Board's decision to withdraw the fee concession. The application was brought in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA); alternatively, the principle of legality (the first application).

[9] On 29 May 2020 the Board issued a notice concerning assurance fees payable with effect from 1 April 2020 (to 31 March 2021). The notice stated that the Board had approved the rates applicable to assurance fees payable and that the rates would remain the same as those published in Board Notice 82 of 2019 (the 2020 notice).

[10] On 14 September 2020, the respondent launched a second application, under case number 46298/2020, for an order declaring that the 2020 notice was not a decision of the Board; alternatively, that it is of no force or effect; further

[3] Board Notice 24 of 2019 was published in *GG* 42258, 1 March 2019.

alternatively, reviewing and setting aside the notice. The respondent also sought an order reviewing and setting aside, inter alia, the Board's decisions prescribing the same categories of fees in respect of the 2021 financial year, published under Board Notice 47 of 2020;[4] and its refusal to withdraw its previous decision to remove the fee concession (the second application).

[11] The review grounds, some of which tend to overlap, in summary, were these. The Board was not authorised by the Act to impose the assurance fees that it did. The impugned decisions were materially influenced by an error of law. The Board took into account irrelevant considerations and ignored relevant ones. The administrative action was procedurally unfair, not rationally connected to the purpose of the empowering provision, and unreasonable. The decisions sought to be reviewed and set aside in the second application were challenged mainly on the ground that their validity was dependent on the validity of the decisions challenged in the first application.

The High Court's judgment

[12] The Board raised a preliminary point that the first application was time-barred in terms of s 7(1) of the PAJA. It contended that the impugned decisions and the reasons for them were communicated to the respondent well before the prescribed fees were published in the Government Gazette. The High Court (Janse Van Nieuwenhuizen J) disagreed. It held that the 180-day period within which review proceedings must be instituted as envisaged in s 7(1) of the PAJA, commenced once the fees were published in the Gazette.

[13] The High Court reviewed and set aside the decision to impose a percentage fee for Category C assurance work on the ground that the imposition of that fee was beyond the Board's powers (*ultra vires*). More specifically, it held that the

[4] Board Notice 47 of 2020 was published in *GG* 43110, 20 March 2020.

Act does not provide for assurance fees, and the percentage fee model is inconsistent with the method of recovering costs from particular registered auditors for work done as contemplated in the Act.

[14] The decision to impose tax practitioner fees was set aside essentially on the basis that the Act does not authorise the imposition of any fees in relation to the Board's statutorily conferred position as the recognised controlling body (RCB) for tax practitioners. Further, the Board's reliance on s 8(2)*(c)* of the Act, which empowers it to prescribe fees 'for any other service rendered', was insupportable on the facts.

[15] The decisions concerning the increases in the annual renewal fee for registration and the administration fee for reinstatement were reviewed and set aside on the ground of procedural unfairness. So too, the Board's decision to remove the fee concession.

[16] The High Court concluded that the Act does not authorise the Board to prescribe penalties for the late submission of documents and the under-declaration of fees. There is no appeal against those orders and no more need be said about them.

[17] The High Court ordered the Board to pass credits by 1 April 2023 to all registered auditors in respect of the fees and penalties levied on them pursuant to Board Notice 82 of 2019, Board Notice 24 of 2019 and Board Notice 47 of 2020. The Board was also ordered to pay the costs of the applications, including the costs of two counsel, on an attorney and client scale.

The issues

[18] The following issues are raised by this appeal:

(a) Are the impugned decisions taken by the Board executive or administrative action?

(b) Is the first application time-barred by s 7 of the PAJA?

(c) Is the decision to impose a percentage fee for Category C assurance work beyond the Board's powers?

(d) Does the Act authorise the Board to impose tax practitioner fees?

(e) Is the Board obliged to consult with all registered auditors prior to prescribing any of the impugned fees?

(f) Did the Board's failure to gazette the assurance fees in the 2021 financial year result in the cessation, on 31 March 2020, of the obligation to pay those fees?

(g) Is the remedy granted by the High Court appropriate in the circumstances?

Do the impugned decisions constitute executive action?

[19] The case advanced in the answering affidavit that the impugned decisions constitute executive action, is this. The decisions are 'tied up with the government and the IRBA's policy to fund the regulatory activities of the IRBA from the fee which the Act authorises the IRBA to prescribe'. These are policy issues which the Board took into account and 'not issues with which a Court must interfere in judicial review proceedings'. The court 'is not in a position to make any pronouncement on the policy choices made by the executive branch of the State relating to funding the regulatory activities of the IRBA'. Granting the relief sought by the respondent would infringe the principle of the separation of powers.

[20] The courts have held that there is no universal test to distinguish between executive and administrative action, and consider a range of factors in

determining whether a power or function is executive or administrative, on a case-by-case basis. The focus is particularly on the nature of the power or function.[5]

[21] In *Motau*,[6] a majority of the Constitutional Court identified three pointers in determining whether a decision constitutes executive or administrative action. The first is the source of the power: a power sourced directly in the Constitution 'could indicate that it is executive rather than administrative in nature, as administrative powers are ordinarily sourced in legislation'.[7] The second pointer is the constraints on the power or the level of discretion afforded to the decision-maker: closely circumscribed powers tend to be administrative in nature.[8] And the third is 'whether it is appropriate to subject the exercise of the power to the higher level of scrutiny under administrative-law review'.[9]

[22] Applied to the present case, it is clear that the powers exercised by the Board are not of an executive but administrative nature. First, the source of the Board's power is not the Constitution but the Act. The Board is established and its legal status is determined in Part 1 of the Act. Part 2 sets out the functions and powers of the Board, more specifically, its general functions;[10] and its functions with regard to accreditation of professional bodies,[11] registration of auditors,[12] education, training and professional development,[13] and fees and charges.[14] The Board's general powers and in particular, its powers to make rules are contained in Part 3.[15]

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[5] C Hoexter and G Penfold *Administrative Law in South Africa* 3 ed (2021) at 238; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 para 141; *Minister of Home Affairs and Others v Scalabrini Centre and Others* 2013 (6) SA 421 (SCA) para 53.
[6] *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC).
[7] *Motau* fn 6 para 39.
[8] *Motau* fn 6 para 44. C Hoexter and G Penfold *op cit* at 244, are of the opinion that this indicator is unhelpful, because it is common for administrative discretion to be conferred in broad terms.
[9] *Motau* fn 6 para 44.
[10] Section 4 of the Act.
[11] Section 5 of the Act.
[12] Section 6 of the Act.
[13] Section 7 of the Act.
[14] Section 8 of the Act.
[15] Sections 9 and 10 of the Act.

[23] The funding of the Board is likewise sourced in the Act and administrative in nature. Section 25 provides:

'The Regulatory Board is funded from-

(a) the collection of prescribed fees;

(b) all other monies which may accrue to the Regulatory Board from any other legal source, including sanctions imposed by the Regulatory Board; and

(c) moneys appropriated for that purpose by Parliament.'

[24] The Board's powers to prescribe fees and to obtain funding from other legal sources such as sanctions it imposes, are founded squarely on the Act. So too, its entitlement to monies from Parliament – this is not a policy issue that arises in this case.

[25] Second, the Board's functions – particularly when prescribing fees – are strictly circumscribed, and are simply not of an executive nature. It is authorised to prescribe only the mandatory fees as defined in s 8(1) of the Act, for example accreditation, registration and annual fees; and discretionary fees as defined in s 8(2).

[26] The third pointer – whether it is appropriate to subject the impugned decisions to administrative-law review – places it beyond question that they constitute administrative action. The clearest examples of this are the decisions to prescribe assurance fees in Board Notice 82 of 2019, tax practitioner fees and to withdraw the fee concession. These decisions are not 'limited to matters of high policy or high politics that lie at the heart of executive power such that it would be inappropriate to subject them to administrative-law scrutiny'.[16]

[16] C Hoexter and G Penfold *op cit* fn 5 at 246.

[27] Instead, the impugned decisions constitute administrative action as defined in the PAJA:

'"administrative action" means any decision taken, or any failure to take a decision, by . . . an organ of state, when . . . exercising a public power or performing a public function in terms of any legislation . . . which adversely affects the right of any person and which has a direct, external legal effect . . .'. [17]

[28] It follows that the argument that the impugned decisions constitute executive action, is unsound. The High Court correctly held that they constitute administrative action.

Is the first application time-barred by s 7 of the PAJA?

[29] Section 7(1) of the PAJA requires review proceedings to be instituted without unreasonable delay and not later than 180 days after internal remedies have been exhausted. The 180-day period may however be extended by an application to court under ss 9(1)*(b)* and 9(2) of the PAJA where the interests of justice so require. The respondent did not apply for an extension of the 180-day period.

[30] It is common ground that the first application concerning the Board's decisions for the 2020 financial year was launched on 28 August 2019, within 180 days of the decisions sought to be reviewed and set aside. These decisions were published in the Government Gazette on 5 June 2019 (regarding the Category C assurance fees) and 1 March 2019, respectively (regarding the other impugned fees).

[31] The Board contends that the first application is time-barred by s 7(1) of the PAJA, because the respondent was informed prior to 1 March 2019 of the

[17] Section 1*(a)* of the PAJA.

'underlying decisions' in relation to three of the impugned fee categories, namely Category C assurance fees, tax practitioner fees and the withdrawal of the fee concession. The underlying decisions were set out in a notice issued on 14 June 2012, a memorandum dated 25 January 2018 and a notice issued on 14 December 2018 (the notices):

(a) In the notice of 14 June 2012, the Board informed the respondent that registered auditors would be charged a fee based on a percentage of annual invoices in respect of Category A and B assurance work.

(b) In the memorandum dated 25 January 2018, the respondent was informed of the extension of the percentage fee regime to Category C work.

(c) In a notice dated 21 August 2018 the Board informed the respondent of its decision to impose tax practitioner fees by issuing a notice. In the latter notice the Board stated its intention to levy a separate additional annual fee payable by tax practitioners who had chosen the Board as their RCB, with effect from the 2019 financial year, commencing on 1 April 2019.

(d) By notice dated 14 December 2018, the Board informed the respondent of its decision to withdraw the fee concession with effect from 1 April 2019.

[32] The Board submits that on the plain wording of s 7(1) of the PAJA, where there are no internal remedies, as in this case, the 180-day period began to run when the respondents became aware of the administrative action and the reasons for it, or when they might reasonably have been expected to have become aware of the action and the reasons.

[33] The argument that the first application is time-barred does not withstand scrutiny for three reasons. First, the notices on which the Board relies – not published in the Gazette – do not constitute 'administrative action' as defined in the PAJA. Second, the notices were issued by functionaries of the Board who do

not have the power to take binding decisions. And third, the resolutions referred to in the notices were not ripe for review.

[34] As already stated, the impugned decisions constitute administrative action. They were made by an organ of state exercising a public power or performing a public function in terms of the Act, which adversely affected the respondent's rights and had a direct external legal effect.

[35] The notices do not prescribe the payment of any fees. Neither does the notice of 14 December 2018 take away the fee concession. That being so, the notices do not adversely affect the rights of auditors: they do not deprive auditors of any right nor adversely determine their rights.[18]

[36] Rather, the notices do no more than inform auditors of the following: the manner in which the Board intends to bill auditing firms for assurance work; its intention to levy a separate additional annual fee to be paid by tax practitioners who have chosen the Board as their RCB; and its resolution to remove the fee concession. So construed, the notices have no direct external legal effect – they are merely steps taken within the sphere of public administration, and do not impact directly and immediately on individuals.[19]

[37] That the notices have no direct external legal effect is buttressed by the fact that they were not published in the Gazette. In terms of s 8(1) of the Act, the Board is enjoined to prescribe fees and the date on which any fee is payable. The Act defines 'prescribe' as meaning 'prescribe by notice in the *Gazette*'. In other

[18] C Hoexter and G Penfold *op cit* fn 5 at 316.
[19] *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) para 23, affirmed by the Constitutional Court in *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC) para 27.

words, the administrative action comes into effect only once the fees are published, or the fee concession is withdrawn, in the Gazette.

[38] The first application was launched within 180 days of the publication of the impugned fees and the removal of the fee concession in the Gazette. On this basis alone, the Board's contention that the review is time-barred must fail.

[39] The notices do not constitute decisions taken by the Board. Section 8(1) of the Act makes it clear that absent a delegation of powers or assignment of its duties as contemplated in s 19 of the Act, the function of prescribing fees is that of the Board itself. The underlying decisions contained in the notices and which form the basis of the Board's contention that the first application is time-barred, were not taken by the Board, but constitute recommendations by its officials.

[40] It is common ground that the Board did not delegate its powers nor assign the function of prescribing fees to any of its functionaries. In fact, in the second application the Board conceded that the approval of fees and the overall budget was not delegated, but formed part of a process in which functionaries make recommendations to the Board, which retained the power to adopt or reject those recommendations.

[41] It is clear from the evidence that the impugned decisions were taken by the Board at its meetings on 29 January 2019 and 29 May 2019. Thereafter they were prescribed and published in the relevant Gazettes, and thus came into force.

[42] Finally, administrative decisions that are required to be published in the Gazette, become ripe for review only when they are so published. Until that

happens, they have no 'direct, external legal effect' and may not be challenged in review proceedings.[20]

[43] For the above reasons, the argument that the 2019 review is time-barred, is unsound. It was rightly rejected by the High Court.

The review of Category C assurance fees

[44] Auditors are registered with the Board as either assurance or non-assurance auditors. Those registered as assurance auditors do both assurance and non-assurance work. Those who are registered as non-assurance auditors are not permitted to do assurance work.

[45] The Code of Professional Conduct for Registered Auditors defines an 'assurance engagement' as

'. . . an engagement in which a registered auditor in public practice expresses a conclusion designed to enhance the degree of confidence of the intended user other than the responsible party about the outcome of the evaluation or measurement of a subject matter against criteria.'

[46] Category A or high-risk assurance work, refers to audits that are performed by registered auditors and firms which are required in terms of legislation or regulation. These include audits of public companies required by the Companies Act 71 of 2008 and state-owned enterprises; audits of banks and regulatory returns to the South African Reserve Bank in terms of the regulations made under the Banks Act 94 of 1990; audits of insurance companies, collective investment schemes, pension, retirement and provident funds; audits of medical aid schemes; and audits on behalf of the Auditor-General.

[20] *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) paras 34 and 45.

[47] Category C assurance work is low-risk assurance work which is not included in the definition of Category A assurance work, and involves voluntary audits by decision, independent reviews required in terms of the Companies Act 71 of 2008 and other assurance work. The respondent's members generally practice in small to medium-sized firms and the bulk of their work comprises Category C assurance work.

[48] It is common ground that the Board focuses on inspections of Category A assurance work, which has a higher public interest exposure, demanding more in-depth inspections that take longer to perform and which the Board terms a 'risk-based approach' to inspections. The Board inspects Category C assurance work on a reactive basis only – if information is brought to its attention and where it is deemed necessary or appropriate to perform an inspection, typically in response to a complaint. Such inspections are thus rare.

[49] From the Board's inception in 2006 until 2012, it annually prescribed hourly fees for its inspectors conducting inspections and reviews in terms of s 47 of the Act. Those fees applied to all inspections, whether mandatory or discretionary.

[50] In 2011 the Board altered its fee model with effect from 2012. It ceased charging an hourly fee for inspections in respect of Category A assurance work. Instead, auditors doing that work were obliged to pay the Board a fee twice a year, based on a percentage of the revenue that they derived from their Category A assurance work in the previous calendar year. Registered auditors doing only Category C assurance work, continued to pay for inspections on a prescribed hourly rate. In the second application the respondent indicated that this change entailed a name change from 'inspection fees' to 'assurance fees'.

[51] At the end of 2018 the Board's functionaries prepared a draft budget for 2020 and indicated that drastic measures in the form of increased fees, were necessary. One way of increasing fees was to extend the percentage fee model – previously only applicable to Category A assurance work – to Category C assurance work. The budget thus envisaged that those registered auditors whose practices were rarely, if ever, inspected, would contribute an amount in excess of R14 million for 2020 as an 'assurance fee', purportedly to cover the costs of inspections as contemplated in s 47(2) of the Act.

[52] On 29 May 2019 the Board resolved to adopt a schedule setting out assurance fees that would be payable for 2020, based on a percentage of the total audit and other assurance work invoiced by audit firms and declared for the previous calendar year by each registered auditor. This meant that assurance fees would not, as in the past, be calculated on the percentage of Category A assurance work only, but on the basis of *all* assurance work, including Category C assurance work. The resolution was published in the Gazette on 5 June 2019.

[53] The main grounds upon which the respondent sought to review the decision to impose Category C assurance fees, were the following. The Board is not empowered under s 8(2)*(b)* of the Act to impose assurance fees on an inverted sliding scale, based upon a percentage of the fees earned for assurance work and to extend such assurance fees to Category C assurance work. The Act does not permit the recovery of fees (ostensibly for inspections) 'at a percentage of the total audit fee base declared'. The decision was taken 'in order to serve as a general source of revenue for [the Board] and to build up a "war chest" to cater for its increased expenditure on disciplinary hearings'. Section 8(2)*(b)* envisages the recovery of costs in relation to practice reviews or inspections. Therefore, the decision as implemented in Board Notice 82 of 2019 is reviewable because it is not authorised by an empowering provision as contemplated in ss 6(2)*(a)*(i) and

6(2)*(f)*(i) of the PAJA.[21] It is also irrational within the meaning of s 6(2)*(f)* of the PAJA.[22]

[54] The Board's answer to these review grounds is this. It is authorised under the Act to prescribe fees, and the Act does not stipulate the funding model that must be utilised to recover the costs it incurs in inspecting the practices of registered auditors, but leaves that determination to the Board. It submits that its decision to implement assurance fees for Category C assurance work based on a percentage of the total audit and other assurance work invoiced by audit firms in the previous calendar year, is connected to the actual costs incurred by the Board in inspecting the practices of registered auditors.

[55] Notice 82 of 2019 states that the notice of an adjustment to the assurance fees payable to the Board is given in terms of s 8(2)*(b)* of the Act. Section 8 of the Act provides:

'**Functions with regard to fees and charges**

(1) The Regulatory Board must prescribe-

(a) accreditation, registration, registration renewal and re-registration fees;

(b) annual fees, or a portion thereof in respect of a part of a year;

(c) the date on which any fee is payable; and

(d) the fees payable in respect of any examination referred to in section 37, conducted by an accredited professional body or the Regulatory Board.

(2) The Regulatory Board may prescribe-

(a) any fees payable for the purposes of the education fund referred to in section 7(2);

(b) fees payable for an inspection or review undertaken by the Regulatory Board in terms of section 47; and

(c) fees payable for any other service rendered by the Regulatory Board.

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[21] Section 6(2)*(a)*(i) of the PAJA provides that a court has the power to judicially review an administrative action if the administrator who took it was not authorised to do so by the empowering provision. Section 6(2)*(f)*(i) states that it is reviewable if the action itself contravenes a law or is not authorised by the empowering provision.

[22] Section 6(2)*(f)*(ii)*(bb)* of the PAJA states that an administrative action is reviewable if the action itself is not rationally connected to the purpose of the empowering provision.

(3) The Regulatory Board may grant exemption from payment of any fees referred to in subsection (1) or (2).'

[56] Section 47 of the Act reads:

'**Inspections**

(1) *(a)* The Regulatory Board, or any person authorised by it, may at any time inspect or review the practice of a registered auditor and the effective implementation of any training contracts and may for these purposes inspect and make copies of any information, including but not limited to any working papers, statements, correspondence, books or other documents, in the possession or under the control of a registered auditor.

(b) Despite the generality of paragraph *(a)*, the Regulatory Board, or any person authorised by it, must at least every three years inspect or review the practice of a registered auditor that audits a public company as defined in section 1 of the Companies Act, 2008 (Act 71 of 2008).

(2) The Regulatory Board may recover the costs of an inspection under this section from the registered auditor concerned.'

[57] It is a settled principle that when construing a statute, the inevitable point of departure is the language of the provision, understood in the context in which it is used, having regard to its purpose. This constitutes the unitary exercise of interpretation.[23] In *Capitec Bank Holdings*[24] this Court said:

'[T]he triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concept expressed by those words in the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitute the enterprise by recourse to which a coherent and salient interpretation is determined.'

[58] Section 8, which contains the power of the Board to prescribe fees, is at the heart of this appeal. On its plain language, the power in s 8 must be construed in

[23] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

[24] *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 25.

the context of the scheme of Part 2 of the Act, of which s 8 forms part, and in the light of its purpose, having regard to the objects of the Act as a whole.

[59] Part 2 contains s 4, which sets out the general functions of the Board. Section 4(1)*(a)* states that in addition to its other functions provided for in the Act, the Board must take steps to promote the integrity of the auditing profession by conducting practice reviews or inspections.[25] The Act specifically defines the Board's functions with regard to accreditation of professional bodies (s 5); registration of auditors and candidate auditors (s 6); education, training and professional development (s 7); and fees and charges (s 8).

[60] Section 8 draws a clear distinction between mandatory fees which the Board must prescribe (s 8(1)) and fees which the Board may prescribe in the exercise of its discretion (s 8(2)). In both instances the type of the fees prescribed is clearly defined, with reference to the Board's functions in ss 5 to 8. It follows that the exercise of the power to prescribe fees must conform to the purpose and type of fees contemplated in s 8 of the Act.

[61] Thus, accreditation, registration, or annual fees may not be prescribed under s 8(2) of the Act. Likewise, s 8(1) may not be utilised to prescribe fees for the purposes of the education fund contemplated in s 7(2). In similar vein, fees levied under s 8(2)*(b)* of the Act may not be prescribed for anything other than inspections or reviews undertaken by the Board in terms of s 47. This is reinforced by s 47(2) of the Act which provides that the Board 'may recover the costs of an inspection under this section from the registered auditor concerned'.

[62] The plain wording of s 8(2)*(b)* read with s 47(2) permits of only the following construction: First, the Board must prescribe the fees for an inspection

[25] Section 4(1)*(a)*(iv) of the Act.

or review it undertakes, before it may recover the costs thereof. Second, the costs of the inspection or review must be recovered from the registered auditor who is the subject of that inspection. This is one of those cases where the word 'may', construed in its proper context and in the light of the purpose of s 8(2)*(b)* read with s 47(2), means 'must'.[26] Otherwise construed, s 47(2) of the Act would be rendered meaningless.

[63] The Board correctly applied these provisions between 2006 and 2012 when it prescribed fees for inspections 'on a cost per hour recovery basis'. Auditors were thus charged an hourly rate for inspections, which the Board designated as 'inspection fees'. Those fees were prescribed in accordance with the language, context and purpose of s 8(2)*(b)* read with s 47(2) of the Act.

[64] It will immediately be noted that s 8(2)*(b)* read with s 47(2) does not empower the Board to recover fees for inspections at a percentage of the total audit fee base declared, in particular, 'based on a percentage of the total audit and other assurance work invoiced by the firm, and declared every calendar year by the firm for each Registered Auditor'. A firm of auditors typically charges its client a fee for services rendered, by applying a time and materials pricing model, based on hourly billing and the actual time spent on a project. All of this has nothing to do with an inspection or review under s 47 of the Act.

[65] It follows that s 8(2)*(b)* read with s 47(2) envisages the recovery of costs in relation to inspections. They do not permit the Board to prescribe those fees on the basis of a percentage of Category C assurance work, where the costs of inspections bear no relation to the fees charged, such as voluntary audits by decision, or work by auditors in preparing requests for proposals (tenders) or turnover compliance certificates.

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[26] *Commissioner for Inland Revenue v I H B King; Commissioner for Inland Revenue v A H King* 1947 (2) SA 196 (A) at 209-210.

[66] Indeed, in the answering affidavit in the second application, the Board, with reference to its Inspection Strategy and Process Seventh Inspections Cycle 2018/2019, concedes that there is no link between the fee charged for inspections of firms and the time spent on inspections and related activities. Instead of determining its expenses in relation to inspections and reviews and prescribing specific fees for those functions, the Board simply looked at its budget and determined such fees accordingly.

[67] The Board however contends that Category C assurance fees are connected to the actual costs it incurs in inspecting the practices of registered auditors. This contention firstly, is at odds with the Board's concession that there is no link between the fees charged and the time spent on inspection and related activities. Secondly, as the Board itself states, assurance fees are treated as another source of income for the Board – an 'indirect method' of recovering the costs of inspections under s 47 of the Act.

[68] Thirdly, the Board's methodology in determining fees for Category C assurance work not only bears no resemblance to the costs of inspections of that work, but also results in the irrational levying of higher fees on registered auditors doing Category C assurance work. The evidence shows that after the levying of Category C assurance fees, the Board recovers more than double in assurance fees than it expends on its inspection department.

[69] Finally, the contention fails on the level of the law. *Bertie van Zyl (Pty) Ltd*[27]concerned the determination of inspection fees under the Agricultural Product Standards Act 119 of 1990. This Court held that it was irrational to levy inspection fees – designed to permit the relevant authority to be compensated for

[27] *Bertie van Zyl (Pty) Ltd t/a ZZ2 and Others v Minister of Agriculture, Forestry and Fisheries and Others* [2021] ZASCA 101; [2021] 4 All SA 1 (SCA) paras 32-35.

the cost of carrying out its duties – on a basis that has no connection to the costs incurred by the authority in carrying out those duties.

[70] The extension of assurance fees to Category C assurance work is thus not rationally connected to the purpose for which it was taken, the purpose of the empowering provision and the information before the Board. For this reason also, that decision was reviewable.

[71] The High Court thus correctly concluded that the imposition of Category C assurance fees was beyond the Board's powers and accordingly invalid. Board Notice 82 of 2019 was rightly reviewed and set aside.

Tax practitioner fees

[72] In terms of s 240 of the Tax Administration Act 28 of 2011 (TAA), all tax practitioners are required to be registered with a RCB. The Board is by the operation of law, and by virtue of s 240A of the TAA, not required to apply to the South African Revenue Service (SARS) for recognition as a RCB. By contrast, the South African Institute for Chartered Accountants (SAICA) is required to do so.

[73] SAICA decided to levy a separate subscription fee on all its members (chartered accountants) who chose SAICA as their RCB. As a result, registered auditors who were tax practitioners and members of SAICA informed SARS that the Board was their RCB, so as to avoid the fees charged by SAICA.

[74] The Board furnished the following reasons for prescribing tax practitioner fees. As a RCB, it has added regulatory and administrative functions. These include registration of tax practitioners; strengthening and monitoring compliance by tax practitioners with the Board's continuing professional

development requirements; receipt of complaints from SARS and the public relating to the conduct of tax practitioners; the duty to take disciplinary action against tax practitioners who breach professional rules; and annual reporting to and participation in structures within SARS. Moreover, not all tax practitioners are registered auditors.

[75] These functions, more specifically registration services, the receipt and investigation of complaints against tax practitioners, and instituting disciplinary proceedings against them where appropriate, self-evidently are duties carried out by a RCB, whether it is SAICA or the Board. The evidence is that some auditors cancelled their registration with SAICA in order to avoid the payment of a fee which, it must be accepted, is for services rendered by a RCB to tax practitioners. The respondent however expects similar services to be rendered free of charge by the Board. And when they are not, it challenges the Board's decision on the basis that the Board has no power to prescribe tax practitioner fees and that it exercised this power for an ulterior purpose.

[76] The respondent's contention that tax practitioner fees have no factual basis because the Board incurs no costs linked to the registration of tax practitioners, is absurd. Common sense dictates that the Board would incur expenses in carrying out the functions outlined above. In any event, having regard to the *Plascon-Evans* rule,[28] the Board's version on this score is neither far-fetched nor untenable and must be accepted.

[77] In performing the functions relating to tax practitioners, the Board plainly provides a service in respect of which it is authorised to prescribe fees in terms of s 8(2)*(c)* of the Act. The High Court erred in holding that it has no such power

[28] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.

and consequently that the imposition of tax practitioner fees is unlawful and invalid.

[78] This however is not the end of the inquiry regarding tax practitioner fees. The respondent also challenged that decision on the ground of procedural unfairness. This issue is dealt with below.

Procedural unfairness

[79] The High Court held that the Board had a duty to consult affected parties in terms of the *audi alteram partem* principle (the *audi* principle) before imposing increases on its annual renewal of registration fees and administration fees for reinstatement. The court found that the Board's failure to engage in a consultative process before removing the fee concession was procedurally unfair and reviewable in terms of s 6(2)*(c)* of the PAJA.

[80] The High Court's finding that the Board acted procedurally unfairly was founded on the ostensibly free-floating requirements imposed by the *audi* principle. However, the review of the impugned decisions is exclusively controlled by the Constitution and the PAJA.[29]

[81] It is trite that whether the *audi* principle applies is contextual and relative. The statutory context is a crucial consideration in determining what procedural fairness demands of the Board.[30] Consequently, the requirement to consult to ensure procedural fairness under s 3 of the PAJA and the *audi* principle depends on the circumstances of the case.[31]

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[29] *Notyawa v Makana Municipality and Others* [2019] ZACC 43; 2020 (2) BCLR 136 (CC); [2020] 4 BLLR 337 (CC); (2020) 41 ILJ 1069 (CC).
[30] *Minister of Environmental Affairs and Tourism and Others v Atlantic Fishing Enterprises (Pty) Ltd and Others* 2004 (3) SA 176 (SCA).
[31] *Chairman, Board on Tariffs and Trade, and Others v Brenco Inc and Others* 2001 (4) SA 511 (SCA) paras 13-14.

[82] The Act nowhere imposes a consultative process in respect of fee increases. By contrast, s 10 imposes a statutory duty to consult before the Board prescribes rules: 'it must publish a draft of the proposed rule in the *Gazette* together with a notice calling on the public to comment in writing within the period stated in the notice'. Given the scheme and objects of the Act and the powers and functions of the Board, in my view this is an aspect of the *expressio unius est inclusio alterius* principle (to express one thing is to exclude another). There seems to be no reason to require consultation only when the Board prescribes rules, unless that was Parliament's intention.

[83] What is more, there is a need for decisions to be taken promptly, having regard to the Board's function in prescribing accreditation, registration and annual fees. Consultation would impede this process and the functioning of the Board. In this regard, the dictum by the Court of Appeal in *R (MP) v Secretary of State for Health and Social Care* that when a public body engages in consultation, it must do so properly,[32] shows why the Board's decisions must be taken expeditiously:

'[C]onsultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.'

[84] For these reasons, the High Court erred in finding that the Board was required to consult before prescribing fees. However, the duty to give effect to the right to procedurally fair administrative action contemplated in the PAJA, stands on a different footing.

[32] *R (MP) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1634 para 29.

[85] In the founding affidavit the respondent alleged that a fair administrative procedure, at a minimum, requires that an administrator proposing to make an administrative decision must afford everyone likely to be adversely affected by that decision, a fair opportunity to make representations on the issue. The Board failed to comply with the procedure laid down in s 3 of the PAJA.[33] It was further alleged that the Board failed to follow a notice and comment procedure under s 4 of the PAJA as it was obliged to do, given that the administrative action materially and adversely affected the rights of a group or class of the public.[34]

[86] The respondent also challenged the Board's decision to increase for 2020, the annual renewal of registration fee by 35% and the administration fee by some 50%. Since the more moderate increases for the 2021 financial year were based on the 35% and 50% increases in the 2020 financial year, the validity of the 2021 fees is dependent on the validity of the earlier increases.

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[33] Section 3(2)*(b)* of the PAJA reads:
'In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-
(i) adequate notice of the nature and purpose of the proposed administrative action;
(ii) a reasonable opportunity to make representations;
(iii) a clear statement of the administrative action;
(iv) adequate notice of any right of review or internal appeal, where applicable; and
(v) adequate notice of the right to request reasons in terms of section 5.'

[34] Section 4(1) of the PAJA provides inter alia:
'**Administrative action affecting public**
(1) In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether-
(a) to hold a public inquiry in terms of subsection (2);
(b) to follow a notice and comment procedure in terms of subsection (3);
(c) to follow the procedures in both subsection (2) and (3);
. . .
(3) If an administrator decides to follow a notice and comment procedure, the administrator must-
(a) take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them;
(b) consider any comments received;
(c) decide whether or not to take the administrative action, with or without changes; and
(d) comply with the procedures to be followed in connection with notice and comment procedures, as prescribed.'

[87] Consequently, the decisions to prescribe assurance fees, tax recognition fees, the increase in the annual renewal of registration fees and administrative fees in excess of consumer price inflation, and the removal of the fee concession, fell to be reviewed and set aside.

[88] In the answering affidavit, the Board contended that the impugned decisions do not constitute administrative action as defined in the PAJA. For this reason, the notice and comment procedure contemplated in s 4 of the PAJA does not apply. In any event, the respondent was time-barred from seeking to review and set aside the impugned decisions. These contentions fail: as stated above, the impugned decisions constitute administrative action.

[89] It follows that the submissions on behalf of the Board that the requirements of s 3 of the PAJA, insofar as they applied, had been satisfied in a way that was practical and context appropriate; that adequate notice of the decisions was given; and that affected parties were given a reasonable opportunity to make representations, are unsustainable on the evidence. So too, the submission that even if the minimum requirements of s 3(2) of the PAJA had not been met, it was reasonable and justifiable for the Board to depart from those requirements, given the factors listed in s 3(4) of the PAJA.[35] No such case was made out in the answering papers. On the contrary, the Board's stance was that the impugned

[35] Section 3(4) of the PAJA states:
'**Procedurally fair administrative action affecting any person**
(4) *(a)* If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).
(b) In determining whether a departure as contemplated in paragraph *(a)* is reasonable and justifiable, an administrator must take into account all relevant factors, including-
(i) the objects of the empowering provision;
(ii) the nature and purpose of, and the need to take, the administrative action;
(iii) the likely effect of the administrative action;
(iv) the urgency of taking the administrative action or the urgency of the matter; and
(v) the need to promote an efficient administration and good governance.'

decisions do not constitute administrative action; therefore, the procedural fairness requirements in s 3(1) and s 4(1) of the PAJA were inapplicable.

[90] The Board also submits that the requirement of procedural fairness was met in that a notice was distributed to registered auditors in a COVID-19 communiqué, informing them of the fee increases approved by the Board for the 2021 financial year, which solicited feedback. This submission has no foundation in the evidence. The communiqué was focused on the Board's arrangements for the COVID-19 lockdown and provided an email address soliciting feedback regarding those arrangements.

[91] The Board's functionaries appreciated that in prescribing the 35% and almost 50% increases in registration and administration fees, registered auditors had to be given a proper explanation. The Board itself states that in the light of developments in the profession, when drafting its Strategic Plan, 'drastic measures were called for in the form of increased fees'. The fee concession was removed on the basis that the Board has a discretion under s 8(3) of the Act to grant an exemption from payment of any fees, without more.

[92] These decisions taken by the Board plainly affected the rights of the respondents and in particular, the legitimate expectations of auditors receiving the benefit of the fee concession, materially and adversely, as envisaged in s 3(1) and s 4(1) of the PAJA. Therefore, the respondents had to be given an opportunity to make representations so as to influence the outcome of those decisions. This safeguard not only signals respect for their dignity, but is also likely to improve the quality, rationality and legitimacy of administrative decision-making.[36]

[36] C Hoexter and G Penfold *op cit* fn 5 at 302, approved in *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) para 42.

[93] The respondents' complaint is essentially that the Board should have followed a notice and comment procedure in terms of s 4 of the PAJA. There is no reason why an order to that effect should not be made, given that the impugned decisions materially and adversely affect a group of the public – registered auditors and tax practitioners, albeit that s 4(1) does not include legitimate expectations. However, this does not mean that ss 3 and 4 of the PAJA are mutually exclusive.[37]

[94] The impugned decisions were thus correctly reviewed and set aside on the ground of procedural unfairness, save that consultation with the respondents was not required. By reason of the conclusion to which I have come, it is unnecessary to consider the challenge to the removal of the fee concession on the grounds of bias, arbitrariness, ulterior purpose or irrationality.

The failure to gazette the assurance fees in the 2021 financial year

[95] The High Court found that the Board's failure to gazette the assurance fees in the 2021 financial year resulted in the obligation to pay such fees ceasing on 31 March 2020.

[96] The Board contends that the Act does not require it to publish fees every year in the Gazette if they remain unchanged. Since assurance fees had already been prescribed by notice in the Gazette the previous year, so it is contended, it was not necessary for the Board to prescribe those fees again in the 2021 financial year – the same fees merely continued to apply as before.

[97] The short answer to these contentions is that the prescription of annual fees – continuing for the period of one year – is a peremptory requirement under s 8(1)*(b)* of the Act. In other words, fees prescribed in a particular year relate to

[37] *Esau* fn 20 paras 90 and 91; C Hoexter and G Penfold *op cit* fn 5 at 558-9.

only that year. That is why Board Notice 82 of 2019 states that the fees prescribed in that notice are payable from 1 April 2019 to 31 March 2020. The obligation to pay those fees ceased on 31 March 2020.

[98] The High Court was thus correct in holding that the Board's failure to gazette the assurance fees in the 2021 financial year resulted in the cessation, on 31 March 2020, of the obligation to pay those fees.

Is the remedy appropriate?

[99] The Board submits that the High Court should have remitted the decisions on both the quantum of the fee increases and the manner in which credits should be dealt with to the Board, for the following reasons. The decision to prescribe fees is policy-driven and polycentric and the High Court was not in as good a position as the Board to take this decision. The court limited the fee increases to the Consumer Price Index (CPI) without considering their impact on the Board. The respondent adduced no evidence of exceptional circumstances to justify non-remittal for the Board to take the relevant decisions afresh.

[100] The respondent contends that the High Court did not substitute its decision with that of the Board: it merely reversed the consequences of the invalid decisions. Then it is contended, on the authority of *NERSA*,[38] that there is no compelling reason to depart from the default remedy that unlawful administrative action ceases to have any effect, is regarded as if it never existed and that the Board should pay back the fees it had unlawfully prescribed.

[101] The respondent is however mistaken. In terms of the PAJA a court may grant any order that is just and equitable and, in exceptional cases, substitute the

[38] *National Energy Regulator of South Africa and Another v PG Group (Pty) Ltd and Others* [2019] ZACC 28; 2019 (10) BCLR 1185 (CC); 2020 (1) SA 450 (CC) paras 89 and 91.

administrative action.[39] But as the Constitutional Court held *Trencon,*[40] substitution is an extraordinary remedy; remittal 'is still almost always the prudent and proper course'; and the principle of separation of powers dictates that 'courts are ordinarily not vested with the skills and expertise required of an administrator'. Further, two weighty factors concerning remittal are whether the court is in as good a position as the administrator to substitute the administrative action; and whether the decision is a foregone conclusion.[41]

[102] The High Court should have remitted the matter to the Board by virtue of its expertise, experience and access to sources of relevant information.[42] The unchallenged evidence is that the impugned decisions were made in the light of the Board's budgetary needs to ensure effective delivery of its statutory mandate and strategic objectives. The decisions were informed by the Treasury's decision to reduce the Board's budgetary allocation by R8.7 million and the need for the Board to increase its oversight responsibilities, and engage in additional activities to restore public confidence in the profession.

[103] In addition, the mandatory functions of the Board in s 4(1) and s 8(1) of the Act involve policy questions. These relate to the protection of the public in their dealings with registered auditors; determining a regulatory strategy for performing its functions in terms of s 4(1);[43] and prescribing accreditation, registration and annual fees, and fees payable for inspections or reviews undertaken by the Board.

[104] All of this shows that the High Court was nowhere near in as good a position as the Board. This is particularly so given that the collection of prescribed

[39] Section 8(1)*(c)*(ii) of the PAJA.
[40] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) paras 42, 43 and 47.
[41] *Trencon* fn 40 para 47.
[42] *Gauteng Gambling Board v Silverstar Development Ltd and Others* 2005 (4) SA 67 (SCA) para 29; *Trencon* fn 40 para 42.
[43] Section 4(3)*(a)* of the Act.

fees is one of the main sources of the Board's funds, which, in turn, has a direct impact on its budget and its ability to carry out its statutory functions. Moreover, the Board presented evidence that a CPI-linked increase in fees would be wholly inadequate and posed a threat to its financial viability. Despite this, and in the absence of any countervailing evidence, the High Court limited the fee increases to the CPI without considering the financial impact on the Board.

[105] Moreover, the Board demonstrated – and the respondent accepted – that the Board is in dire financial straits. The effect of the High Court's order is that the Board will have to anticipate and budget for additional deductions from the fees it may prescribe in future, to fulfil its statutory mandate. And the unchallenged evidence is that as a public entity, the Board may not budget for a deficit or accumulate any surplus.

[106] Further, it cannot be said that the appropriate remedy is a foregone conclusion, *a fortiori* as regards the decision to impose tax practitioner fees and to withdraw the fee concession – plainly issues of policy. In any event, the courts have held that a legitimate expectation is procedural: it does not give rise to a substantive benefit.[44]

[107] For these reasons, remittal was the prudent and proper course. The High Court did not have the skills and expertise of the Board. The remedy was not a foregone conclusion. The court was simply in no position to make the orders in paragraphs 117 to 120 of its judgment. Consequently, they must be set aside.

[108] It goes without saying that the Board must repay to, or credit the accounts of the respondent's members with, all amounts paid by them in respect of fees that the Board was not authorised to prescribe under the Act. This applies in

[44] *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC) para 96; *South African Veterinary Council and Another v Szymanski* 2003 (4) SA 42 (SCA) para 14.

particular to the Board's decision to prescribe assurance fees based on a percentage of the fees earned for assurance work and to extend such assurance fees to Category C assurance work, purportedly in terms of s 8(2)*(b)* of the Act.

[109] In the result, the following order is issued:

1 The appeal succeeds in part.

2 Paragraphs 117 (save for paragraph 117.3), 118, 119 and 120 of the High Court's order are set aside and replaced with the following:

'1. The decisions taken by the first respondent:

1.1 published under Board Notice 24 of 2019 in Government Gazette No 42258 dated 1 March 2019, in terms of which it removed the concession to registered auditors over the age of 65 in the form of a 50% discount of their individual annual fees (the fee concession); and

1.2 published under Board Notice 47 of 2020 in Government Gazette No 43110 dated 20 March 2020, in terms of which it failed to reverse its previous decision to remove the fee concession,

are remitted to the first respondent for a decision to be taken afresh, by no later than 31 March 2025, after it has given effect to the right of registered auditors to procedurally fair administrative action, as contemplated in the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

2. The decisions taken by the first respondent to prescribe the following fees published under: (a) Board Notice 24 of 2019 in Government Gazette No 42258 dated 1 March 2019; (b) Board Notice 82 of 2019 in Government Gazette No 42511 dated 5 June 2019; and (c) Board Notice 47 of 2020 in Government Gazette No 43110 dated 20 March 2020, namely:

(i) all assurance fees prescribed in respect of Category C assurance work;

(ii) all fees regarding the recognition of tax practitioners by the first respondent as the registered controlling body;

(iii) all administration fees in respect of assurance fees; and

(iv) that portion of the fees set out in paragraphs 2.1 and 2.3 of Board Notice 24 of 2019 and Board Notice 47 of 2020, which represents an increase of more than consumer price inflation compared to the equivalent fees during the first respondent's 2018/2019 financial year,

are remitted to the first respondent for these decisions to be taken afresh, by no later than 31 March 2025, after it has given effect to the right of registered auditors, and tax practitioners whose registered controlling body is the first respondent, to procedurally fair administrative action, as contemplated in the PAJA.

3. The Board is directed to repay or pass credits to the first applicant's members in respect of Category C assurance fees for the 2020 and 2021 financial years, calculated on the difference between the assurance fees charged by the Board and the amounts recoverable based on the costs of inspections under s 47(2) of the Auditing Profession Act 26 of 2005, that would have been due had the Board charged for inspections actually conducted.

4. Save as aforesaid, the appeal is dismissed with costs including the costs of two counsel.'

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A SCHIPPERS
JUDGE OF APPEAL

Appearances:

For appellants:	I V Maleka SC (with R A Solomon SC, P B Khoza and I B Currie)
Instructed by:	Mothle Jooma Sabdia Inc, Pretoria Matsepes Inc, Bloemfontein

For first and second respondent:	H F Oosthuizen SC (with D J Smit and M Viljoen)
Instructed by:	Serfontein, Viljoen & Swart, Pretoria Van der Berg Van Vuuren Attorneys, Bloemfontein