



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 37249/2018

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 31 JANUARY 2022

SIGNATURE

In the matter between:

**EAST RAND MEMBER DISTRICT OF
CHARTERED ACCOUNTANTS**

First Applicant

JAROSLAV CERNY

Second Applicant

and

**INDEPENDENT REGULATORY BOARD
FOR AUDITORS**

First Respondent

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

Second Respondent

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

Third Respondent

J U D G M E N T (Application for leave to appeal)

This matter has been heard on a virtual platform and disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J**[1] Introduction**

On 2 December 2021 this court found that the applicants have failed to satisfy the requirements of section 7(1) of PAJA in that they had unduly delayed in launching a review application against the decision(s) of the Independent Regulatory Board for Auditors (the IRBA) whereby a mandatory audit firm rotation (MAFR) regime was implemented in South Africa. The applicants now seek leave to appeal to the Supreme Court of Appeal against this court's judgment and order, including the costs order made against the applicants.

[2] The grounds for leave to appeal

2.1 The grounds on which the applicants seek to rely in their application for leave to appeal were introduced in their notice of application by an allegation that this court has "misunderstood" their case in the main application. The respondents were quick to point out that the applicants' case had mutated from their founding affidavit to their replying affidavit and then further to their initial heads of argument (comprising 228 pages), ending with the applicants' belatedly filed "Note for Argument". The applicants' senior counsel had confirmed during oral argument of the main

application, that the “Note for Argument” constituted the applicants’ actual case and that the founding affidavit was premised on errors of law. These changes in stance are primarily reflected in paragraphs 4 and 5.7 of the judgment.

- 2.2 The judgment also reflected however, that even if the decision sought to be taken on review did not comprise of three district decisions (as initially contended by the applicants in their notice of motion and founding affidavit) but a composite decision, culminating in the promulgation of the MAFR rule, as more forcefully argued in the “Note for Argument”, even that alternative fell foul of the requirement to proceed without undue delay. See, for example paragraphs 5.6, 5.7, 5.10 and 5.10 of the judgment.
- 2.3 Nothing about the applicants’ (alternative) case was therefore “misunderstood” and the applicants were afforded the benefit of doubt in the consideration of each version of their case. The only deviation from the applicants’ argument, was that applicant’s later disavowal of the matter being a PAJA review, was not upheld (see paragraph 4.7 of the judgment). This aspect was, however, not persisted with in their argument for leave to appeal.
- 2.4 After the introduction relating to the alleged “misunderstanding” of the applicants’ case, the applicants listed 24 further “grounds” as well as the invocation of the *Biowatch*-principle in an attack on the costs order. The respondents, in heads of argument, dealt with this aspect (after stressing that the applicants’ argued case differed from their pleaded case) by referring to the following quotation from *Hing v Road Accident Fund* 2014 (3) SA 350 (WCC) at paragraph 4, borrowing from Aldisert, *Opinion writing*, (1990) at 89, commended to Australian counsel by McHugh J in

Tame v New South Wales [2002] HCA 35 at paragraph 70: “the manifestly indiscriminate formulation of the grounds on which the applicant for leave to appeal was brought, brings to mind the observation of a US Appeals court judge that when he sees an appellant’s brief containing seven to ten points or more, a presumption arises that there is no merit to any of them”.

2.5 This observation appeared to be particularly apposite in this application as, in the end, argument centered primarily (if not exclusively), around the following four points:

- The judgment is wrong insofar as it imposed on an applicant in a PAJA review an obligation to make out a case in its founding affidavit that there was no undue delay;
- The issue of an undue delay was not sufficiently raised by the respondents in their answering papers and the applicants did not have sufficient opportunity to deal with this aspect;
- Even if there was an undue delay, the court has not found that it was a “manifestly inordinate” delay and therefore wrongly concluded that the requirements of section 7(1) of PAJA had not been satisfied;
- Costs should not have been awarded against the applicant, as “all review applications” involve Constitutional issues, resulting in the *Biowatch* principle being applicable, which principle had been ignored by this court.

The relevant chronology has been dealt with in paragraph 2 of the judgment but, as chronology is crucial to the notion of delay, undue or otherwise, it is useful to remind the parties of the following crucial aspects thereof:

- 28 July 2016 – the decision is taken to approve the MAFR as the IRBA’s preferred measure to enhance auditor independence (the so-called first decision, referred to in paragraph 24 of the founding affidavit as “a final decision to introduce MAFR”).
- 29 August 2016 - the IRBA issues a press statement announcing the commencement of a process to implement the MAFR regime.
- 1 November 2016 – Notice is given of the proposed MAFR rule and public participation is invited.
- 6 December 2016 – the applicants meet with the CEO of the IRBA in order to prevent the introduction of the MAFR which the applicants claim would cause “disruption”.
- 31 January 2017 – the consultation process involving the public and stakeholders is completed after having received 185 comments, seventy of which were from the applicants.
- 23 March 2017 – the IRBA resolves to implement the MAFR in terms of a certain timeframe and to include public interest entities in its scope (the so-called second decision).

5 June 2017 – the “final” MAFR rule is published in the Government Gazette (the so-called third decision).

22 September 2017 – the applicants request reasons in terms of section 5(1) of PAJA for the implementation of the MAFR.

1 December 2017 – the requested reasons are furnished.

29 May 2018 – the review application is launched.

[4] Ad the founding affidavit issue

Counsel for the applicants argued that this court has found that an applicant in a review application must in its founding affidavit address the issue of an undue delay. It was further argued that, if this finding is left unchallenged, it would have wide-ranging implications for numerous review applications “in South Africa”. A simple reading of the judgment confirms that there was no such finding made. In fact, in considering the issue of whether the review application was launched without unreasonable delay, it was stated in paragraph 5.5 of the judgment that “*it is necessary to have regard to the applicants’ response to this issue which has squarely been raised by the IRBA*”. This point is therefore without foundation.

[5] The raising of the issue of delay

5.1 The applicants allege that the issue of undue delay was not sufficiently (or “squarely”) raised by the respondents and that the applicants had no obligation to deal therewith.

- 5.2 This submission is also not borne out by the papers. The respondents have in numerous instances raised the issue (see, for example paragraphs 7.2, 122 and 132 – 135 of the answering affidavit).
- 5.3 The applicants argued that the above complaints of delay were based on an erroneous calculation of the time periods, i.e just short of two years after the first decision, 14 months after the second decision and 11 months after the third decision (as mentioned in paragraph 5.2 of the judgment) and without taking into account that reasons had only been furnished on 1 December 2017. This argument is only partially correct: the time-periods referred to by the respondents were based on the applicants' "pleaded" case in the founding affidavit based on three distinct decisions, but, even if it was a composite decision, or a legality review (and even with knowledge of the date of the furnished reasons), the respondents had answered that the review application was "in any event" unduly delayed. The respondents labelled the applicant's dilatory conduct "egregious".
- 5.4 Where section 7(1) of PAJA imposes a duty on an applicant in a review application to launch such an application "without undue delay", I find it difficult to contemplate how another court may find that the "spectre of undue delay" (as it was called in the judgment) had not been sufficiently raised by the respondents.
- 5.5 The opportunity to deal with this spectre was in the replying affidavit. The issue of undue delay was also dealt with in the applicant's' initial heads of argument. The difficulty that the applicants faced at the hearing of the matter, as evinced by their "Note for Argument" was not in actual fact that the issue had not been raised, but the attitude the applicants had displayed towards the 180 day period mentioned in section 7(1). It was almost treated

as a target or deadline and any application launched before that day was “safe”. As explained in paragraph 5.4 of the judgment, this approach is incorrect. The 180 day period merely invokes the statutory predetermination of the unreasonableness of a delay beyond that period. This is what the Supreme Court of Appeal has found in *Outa v SANRAL* (also referred to in paragraph 5.4 of the judgment) and this court is bound by that decision. The finding of this court need not be revisited by the Supreme Court of Appeal.

5.6 In order to bolster their argument that the issue of undue delay had not squarely enough been raised by the respondents in this case, the applicants accused this court of having ignored the judgment of the SCA in *Mostert v Registrar of Pension Funds*, save for the reference thereto contained in paragraph 4.7 of the judgment. In particular, counsel for the applicants placed reliance on paragraph 38 of that judgment, which reads as follows: “*I do not consider that in those circumstances the learned judge erred in allowing argument on the section 7 point. It does not follow that every applicant for judicial review in terms of PAJA has to demonstrate in the founding papers that there has been no unreasonable delay. If there is no indication in the papers that there may have been such a delay, the position may well be that it is up to the respondent to raise the point in the answering affidavit. This does not arise in this case and we need not decide that point*”.

5.7 In the present matter, the time periods mentioned in paragraph 5.3 above cried out for them to have been dealt with, if not in the founding affidavit (the absence of which had not been held against the applicants), then certainly in the replying affidavit once they have been pointed out by the respondents. Having regard to the facts of this matter, it is almost facetious

of the applicants to argue that the issue of unreasonable delay, although raised, has not “sufficiently” been raised.

5.8 In argument, counsel for the applicants correctly conceded that a court may *mero motu* raise the point of unreasonable delay itself, but then the applicant should be afforded the opportunity to deal with it. Reference was in this regard made to *Camps Bay Ratepayers and Residents Association v Harrison and Another* 2011 (4) SA 42(CC). This judgment was also referred to in *Mostert’s* case where, as in this matter, the respondents have raised the “defence” of non-compliance with section 7 of PAJA. It was dealt with by the SCA as follows: “*This is not raising a defence – it is a submission that, on the applicant’s own papers, the court has no power to entertain the review. If the court is entitled to raise the point mero motu, then there can be no reason why the respondent should not be allowed to raise it. It was in any event deal with by both parties in their heads of argument and the appellant elected not to seek leave to file a further affidavit*” (the fact that *Mostert* dealt with a period beyond 180 days does not detract from the approach to disputes regarding undue delays in general).

5.9 In the present matter, the applicants had already filed an amended notice of motion and a supplementary founding affidavit and had not, neither at the hearing of the matter, nor during the application for leave to appeal, sought leave to file any further affidavit. The matter was accordingly dealt with in line with the SCA judgments on the papers before the court and not, as the applicants contend, contrary thereto. There is, yet again, no reason for those judgments nor the present matter to be revisited on appeal. The point is simply that the facts of this case brought the question of undue delay to the fore and the applicants have failed to deal with it, despite their dilatory

conduct having been labelled “egregious” by the respondents in answering papers.

[6] “Manifestly inordinate”

- 6.1 In a last-ditch attempt, the applicants argued that, because this court has not expressly found that the delay had been “manifestly inordinate”, another court would come to a different conclusion.
- 6.2 The judgment has clearly set out the long periods that have elapsed since the taking of the three decisions which the applicants have attacked in their Notice of Motion and in their application. It also set out that, even assuming that the decisions comprised composite administrative action or only had direct external legal effect from the last date of promulgation, then it was unduly unreasonable for a limited number of auditors, who had been clamouring against the implementation of the MAFR to wait more than 100 days to request reasons and, once the reasons had been furnished, to tarry until the second last day of another 180 day period before launching their review application. This, while the rest of the industry and the IBRA had begun adjusting their audit lives in anticipation of the commencement date of the MAFR. All the considerations mentioned in the judgment, particularly in paragraphs 5.14 and 5.20 thereof and in the judgment of the Supreme Court of Appeal in *Gqwetha* mentioned in paragraph 5.13 of the judgment had come into play. Excuses such as that the matter was “complex” and required “considerable research and reflection”, as mentioned in the applicants’ initial heads of argument under the heading “*There was in any event no unreasonable delay*” simply do not pass muster, irrespective of whether the words “inordinate delay” had been used in the judgment or not.

[7] The costs issue

- 7.1 The court has found that there were no cogent reasons why the customary rule that costs should follow the event, should not apply.
- 7.2 The applicants argued that this was not so and that the *Biowatch*-principle should apply. In fact, they argued that every review application constituted a Constitutional matter and that unsuccessful applicants should always be afforded the benefit of being spared the liability of costs under the *Biowatch*-principle.
- 7.3 The gross generalisation of the applicants' argument is untenable. While it is so that the *Biowatch*-principle militates against the "chilling effect" the issue of costs might have on litigants who wish to vindicate their constitutional rights (as mentioned in numerous cases, such as *South Durban Community and Environmental Alliance v MEC for Economic Development and Tourism, Kwa-Zulu Natal* 2020 (4) SA 453 (SCA) at para [58]) costs have, depending on the circumstances, been awarded against unsuccessful review applicants, even in the Constitutional Court. See for example *Electronic Media Network Ltd and Others v e.tv (Pty) Ltd and others* 2017 (9) BCLR 1108 (CC).
- 7.4 In the present matter, whatever Constitutional rights may have been involved, they could not have been dealt with on their merits as a result of the review being precluded due to an undue or unreasonable delay in the launching thereof by the applicants. The costs order, and the court's exercise of its discretion, was based on that finding and not on the merits of an unsuccessful pursuit of the vindication of a constitutional right.

[8] The test for leave to appeal

- 8.1 The applicants disavowed any reliance on section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013 and limited their application to the contention that an appeal "... would have a reasonable prospect of success" as contemplated in section 17(1)(a)(i) of the Act.
- 8.2 In opposition, the respondents relied on *Mount Cheveaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325 (LCC), *S v Smith* 2012 (1) SACR 567 (SCA) and *MEC Health, Eastern Cape v Mkhitha* (1221/15) [2016] ZASCA 176 (25 November 2016), all of which confirm that there must be a "*sound rational basis for the conclusion that there are prospects of success on appeal*" and that leave to appeal, especially to the Supreme Court of Appeal (which is what the applicants apply for), "*... must not be granted unless there truly is a reasonable prospect of success*" and that a "*mere possibility of success, an arguable case or one that is not hopeless, is not enough*".
- 8.3 Having regard to the applicants' arguments as to why leave to appeal should be granted, as dealt with in paragraphs 2, 4, 5 and 6 above, I find that there are insufficient prospects of success on appeal to warrant the granting of leave.
- 8.4 In respect of the issue of costs, it is trite that the award of costs is ultimately in the discretion of the trial court and, unless exercised in a biased or capricious manner or without any grounds "*... on which a reasonable person could come to the conclusion arrival at*", it will not be interfered with on appeal. See inter alia *Logistic Technologies (Pty) Ltd v Coetzee and others* 1998 (3) SA 1071 (WLD) and the cases referred to at 1074 A – F. Even in respect of the issue of the *Biowatch*-principle, which argument

I have dealt with in paragraph 7 above, I find that there is no prospect of success in respect of the costs order.

- 8.5 Again, in exercise of my discretion, I find that the application for leave to appeal is primarily, if not exclusively, concerned about the issue of the applicants' undue delay in launching their review application. For the consequences brought about by this, the applicants have only themselves to blame and I find it inimical to the interests of justice that the IRBA should be out of pocket in respect of an unsuccessful application for leave to appeal, dealing with the same issue. Reliant on the cases referred to in paragraph 7.3 above, I further find that the *Biowatch*-principle should not be applied to this unsuccessful application. Consequences brought about by litigant's own dilatory conduct do not have the same "chilling effect" as the possibility of an adverse costs order in timeously launched, but unsuccessful, applications for the vindication of constitutional rights. The latter should be afforded the benefits of the *Biowatch*-principle, while the former would not automatically be entitled thereto. Unsuccessful litigation as a result of own dilatoriness should fall in the "normal" considerations regarding costs. Costs should follow the event.

[9] Order

The application for leave to appeal is dismissed with costs, including costs of two counsel.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 25 January 2022

Judgment delivered: 31 January 2022

APPEARANCES:

For the Applicants:	Adv H F Oosthuizen SC together with Adv D Smit
Attorney for the Applicants:	Warrener De Agrela & Associates Inc, c/o Prinsloo – Van der Linde Attorney, Pretoria
For the 1 st to 3 rd Respondent:	Adv L T Sibeko SC together with Adv S Tshikila and Adv R V Mudau
Attorney for the Respondent:	Cliffe Dekker Hofmeyer Inc, c/o Friedland Hart Solomon & Nicolson, Pretoria
No appearance for the 4 th Respondent.	