



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

Case Number: **64848/19** and **46298/20**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE: 11 APRIL 2022

SIGNATURE: *N. JANSE VAN NIEUWENHUIZEN*

In the matter between:

**EAST RAND MEMBER DISTRICT OF
CHARTERED ACCOUNTANTS**

First Applicant

BRITS, RUDOLF JOHANNES

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
REGULATORY BOARD FOR AUDITORS**

Third Respondent

MINISTER OF FINANCE

Fourth Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

1. The applicants brought two applications for the review and setting aside of certain fees prescribed by the first respondent, the Independent Regulatory Board ("IRBA") in terms of the provisions of the Auditing Profession Act, 26 of 2005 ("the Act"). The review is based on the Promotion of Administrative Justice Act, 3 of 2000 (PAJA) *alternatively* on the constitutional doctrine of legality.
2. The 2019 application ("2019 review") seeks the review and setting aside of the decisions in respect of the following five categories of new fees or fee increases for the 2020 financial year:
 - 2.1. the payment of so-called "*assurance fees*" by registered auditors doing so-called Category C assurance work ("the Category C assurance fees");
 - 2.2. the payment of three categories of fees connected to registered auditors' selection of IRBA as their "*recognised controlling body*" ("RCB") as tax practitioners ("the tax practitioner fees");
 - 2.3. the imposition of penalties for two categories of transgressions of IRBA's regime regarding assurance fees ("the penalties");
 - 2.4. the increase of two categories of existing fees by more than consumer price inflation ("CPI"), being increases of 35% in respect

of registration renewal and 50% in respect of the re-registration ("the drastic increases in existing fees"); and

- 2.5. the removal of the concession to registered auditors over the age of 65 in the form of a 50% discount on their annual fees ("the removal of the fee concession").

3. Save for the assurance fee category, the 2020 application ("the 2020 review") concerns the same categories of fees in respect of the 2021 financial year and is sought on the basis, primarily, that:

- 3.1. the decisions to prescribe these categories display the same infirmities as in the 2019 application; and

- 3.2. the relevant fee decisions are premised (and thus dependent) on the validity of the decisions in respect of the 2020 financial year.

PARTIES

4. The first applicant is East Rand Member District of Chartered Accounts, a voluntary association with approximately 1 600 members. The members of the first applicant are "*registered auditors*" in terms of the Act.
5. The second applicant passed away prior to the hearing of the matter and the executor of his deceased estate indicated that the estate does not wish to persist with the application.
6. In the result, the first applicant will be referred to as "the applicant".

7. The first defendant, IRBA, is a juristic person established in terms of section 3 of the Act and must, in terms of section 3(1)(a), exercise its functions in accordance with the Act and any other relevant law.

OPPOSITION

8. In opposing the relief claimed by the applicant, IRBA:

- 8.1. raised three points *in limine*;

- 8.2. alleged that the impugned decisions are not administrative action as envisaged in PAJA;

- 8.3. alleged that the 2019 review was launched outside the 180 days prescribed in terms of PAJA, and

- 8.4. maintained that no grounds exist for the review and setting aside of the impugned decisions.

POINTS IN LIMINE

9. IRBA raised the following points *in limine*:

- 9.1. *lis pendens*;

- 9.2. impermissible incorporation; and

- 9.3. non-compliance with rule 16A.

10. At the commencement of the hearing IRBA indicated that it will only proceed with the non-compliance with rule 16A point, which point is only raised in respect of the notice in the 2020 review.

Rule 16A notice

11. Rule 16A(1)(a) of the Uniform rules of court compels any person who raises a constitutional point in an application to give notice thereof to the registrar.
12. It is common cause that the applicant issued a notice in compliance with the provisions of rule 16A(1)(a).
13. IRBA, however, maintains that the contents of the notice do not comply with rule 16A(1)(b) due to the fact that it lacks particularity. Rule 16A(1)(b) reads as follows:

"Such notice shall contain a clear and succinct description of the constitutional issue concerned."

14. The introductory paragraph of the 2020 notice reads as follows:

***"TAKE NOTICE THAT** the first and second applicants' notice of motion and founding affidavit in the above matter raise the following constitutional issues:*

Whether the following decisions taken by the first respondent ("IRBA") ought to be reviewed and set aside pursuant to the Promotion of Access to

Administrative Justice Act, 2000 (Act 3 of 2000) ("PAJA"), alternatively the constitutional doctrine of legality."

15. Although the words "Access to" do not appear in PAJA, the number of the Act makes it clear that the applicant is relying on PAJA.
16. The introduction is followed by a full description of the various decisions that form the subject matter of the 2020 review.
17. Both parties relied on *Shaik v Minister of Justice and Constitutional Development* 2004 (3) SA 599 CC in which the Constitutional Court held at para 24, that:

"The purpose of the Rule is to bring to the attention of persons (who may be affected by or have a legitimate interest in the case) the particularity of the constitutional challenge, in order that they may take steps to protect their interests."

18. The first enquiry entails establishing who "*the persons who may be affected or have a legitimate interest in the case*" are. In *casu* the persons who may have a legitimate interest in the 2020 review are "*registered auditors*" as defined in the Act.
19. Secondly, the notice must contain "*the particularity of the constitutional challenge, in order (for registered auditors) to take steps to protect their interests.*"

20. The constitutional challenge is specified to be the right to administrative action that is just and fair. This right is enshrined in section 33 of the Constitution and given effect to by the provisions of PAJA.
21. It is clear from the notice that the applicant in the *alternative* relies on the constitutional doctrine of legality.
22. The decisions forming the subject matter of the constitutional challenge is, furthermore, set out in detail in the notice.
23. Having regard to the purpose of a Rule 16A notice, I am satisfied that the notice contains sufficient particularity to enable a reasonable registered auditor to assess the impact of the challenge on his/her interests. The point *in limine* is, accordingly, dismissed.

DO THE DECISIONS CONSTITUTE ADMINISTRATIVE ACTION UNDER PAJA?

24. “*Administrative action*” is defined in section 1 of PAJA as follows:

“...means any decision taken, or failure to take a decision, by –

(a) an organ of state, when

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of legislation; or

(b)

which adversely affects the rights of any person and which has a direct, external effect, but does not include-"

A list of nine categories that are excluded from the definition follows. IRBA does not fall within one of the stated categories.

25. IRBA does not deny that it is an organ of State and that the impugned decisions adversely affect the rights of registered auditors and has a direct, external effect.
26. IRBA, however, maintains that in making the impugned decisions it formulated policy and/or that the decisions are at least "*policy-laden or polycentric*" as defined in *Minister of Transport NO v Prodiba (Pty) Ltd* [2015] ZASCA 38 ("*Prodiba*") and therefore not administrative action. [Also see: *Shokela and Others v MEC for Agricultural and Environmental Affairs (KwaZulu-Natal) and Others* 2010 (5) SA 574 KZP para 61]. I pause to mention that the subject matter of the dispute in *Prodiba* was the validity of a contract entered into consequent to a policy decision by Cabinet to migrate from old drivers' licences to a new card system. The policy decision was not translated into legislation.
27. At para [26] of the *Prodiba* judgment, the Supreme Court of Appeal held as:

[26] ...The decision to migrate to new technology on the scale envisaged in the agreement in question is typically a policy-laden or polycentric decision. The Constitutional Court and this court have recognised the importance of appreciating the proper role and functions of the legislature, the executive and the judiciary within the Constitution. In this regards see Bato Star

Fishing (Pty) Ltd v Minister of Environmental Affairs [2004] ZACC 15; 2004 (4) SA 490 (CC) paras 46–48, *Logbro Properties CC v Bedderson NO* and 2003 (2) SA 460 (SCA) para 20 and also Cora Hoexter 'The future of Judicial review in South African administrative law' (2000) SALJ 484 at 501. See also *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA) paras 57-59. Policy making is traditionally primarily the task of the highest ranking officials in government, namely, the Cabinet or its constituent Ministers or, at provincial level, the executive council or its individual members."

28. Although the Supreme Court of Appeal stated in *Prodiba* that policy normally falls within the function of the Executive, the court emphasised in *Motala v Master, North Gauteng Court* 2019 (6) SA 68 SCA, at para [67], that a case to case approach should be followed:

"[67] There is no simple litmus test to determine when an action or decision is of an 'administrative nature'. It is therefore necessary, in the light of the facts of each particular case, to embark on 'a close analysis of the nature of the power or function and its source or purpose' — per Wallis J in *Sokhela*, cited with approval by this court in *Scalabrini*. In doing so, it should be remembered, as was stressed by the Constitutional Court in *SARFU*, that the source of the power, albeit not necessarily decisive, is an important factor in this regard. Also important are the nature of the power, its subject-matter, whether it involves the exercise of a public duty, and how closely it is related, on the one hand, to policy matters which are not

administrative and, on the other, to the implementation of legislation, which is...

29. In determining whether the impugned decisions are administrative action it is, therefore, apposite to first of all have regard to the source of the power. The following sections of the Act provides for the fees that were charged in terms of the impugned decisions:

29.1. Section 25 of the Act regulates the funding of IRBA and provides for the following sources of funding:

- “(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.”*

29.2. Insofar as the source of funding from prescribed fees is concerned, the relevant portions of section 8 of the Act provides as follows:

“8 Functions with regards 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 part of a year;*

.....

(2) The Regulatory Board may prescribe-

(a) any fees payable for the purpose 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.

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

29.3. Section 47 referred to in section 8(2)(b) and more specifically 47(1)(a) reads as follows:

"47(1)(a) The Regulatory Board, or any person authorised by it, may at any time inspect or review the practice 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 No. 71 of 2008).

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

30. In the result, the nature of IRBA's power to prescribe fees is to be found in the enabling legislation and the purpose of prescribing the fees is to implement the sections that provides for IRBA's funding. In deciding the tariff for each type of

fee, IRBA is not formulating policy, but is merely implementing the provisions of the Act.

31. The authority in *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 SCA relied upon by the applicant in support of its contention that the impugned decisions are administrative action, aptly explains the difference between the execution and formulation of policy, to wit:

"Administrative action is ... in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals."

"There will be few administrative acts that are devoid of underlying policy – indeed, administrative action is most often the implementation of policy that has been given legal effect – but the execution of policy is not equivalent to its formulation."

32. The impugned decisions are the implementation of policy that has been given legal effect and not the formulation of policy. Consequently, the impugned decisions fall within the ambit of section 1(a)(ii) of the definition of administrative action and PAJA is applicable.

DID THE APPLICANT INSTITUTE THE 2019 REVIEW WITHIN 180 DAYS?

33. Section 7(1)(b) of PAJA, provides, in 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.”

34. In *casu* the 2019 review was launched on 28 August 2019, which implies that the applicant would be in breach of the time period in section 7(1)(b) of PAJA, if it had been informed of the decisions or had become aware of the decisions and the reasons for them before 1 March 2019.

35. The traditional approach to determining when the 180-day period commences, is to ask the question: When did the clock start ticking?

36. The applicant contends that the clock started ticking once the fees were published in the Gazette. The dates of publication are:

36.1. 5 June 2019, for the Category C assurance fees; and

36.2. 1 March 2019, for the other impugned fee categories.

37. In support of the aforesaid contention, the applicant relies on the following passage in *Esau v Minister of Co-operative Governance and Traditional Affairs* 2021 (3) SA 593 SCA (*Esau*):

“[45] 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 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.”

38. IRBA, however, maintains that the clock started ticking on the date when the applicant was informed of the decisions and the reasons for the decisions, which date precedes the publication in the Gazette.
39. In *Esau* the court did refer to an exception to the general rule referred to *supra*. At para [46], the court stated the following;

“[46] I accept, however, that the mere fact that the impugned conduct involves the formulation or adoption of policy does not necessarily mean that it is not justiciable. If the application of a policy infringes or threatens rights, it may be challenged on review. That was the case in Minister of Health and Others v Treatment Action Campaign and Others (No 2), in which a policy not to dispense a drug that prevented mother-to-child transmission of Hiv/Aids was found to violate fundamental rights.”

40. The question is therefore whether the decision in itself, prior to publication, threatened any rights of the members of the applicant. This issue was discussed in *Rhino Oil and Gas Exploration South Africa (Pty) Ltd v Normandien Farms (Pty) Ltd and Another* 2019 (6) SA 400 SCA from para [32] onwards, as follows:

“[32] The situation is clear: Normandien's rights have not been adversely affected by the process so far, and it can point to no prejudice on its part at this stage.

[33] As a general rule, a challenge to the validity of an exercise of public power that is not final in effect is premature. An application to review the action will not be ripe, and cannot succeed on that account. Hoexter explains the concept thus:

“The idea behind the requirement of ripeness is that a complainant should not go to court before the offending action or decision is final, or at least ripe for adjudication. It is the opposite of the doctrine of mootness, which prevents a court from deciding an issue when it is too late. The doctrine of ripeness holds that there is no point in wasting the courts' time with half-formed decisions whose shape may yet change, or indeed decisions that have not yet been made.

There is a close connection between prejudice and ripeness. Baxter states that 'the appropriate criterion by which the ripeness of the action in question is to be measured is whether prejudice has already resulted or is inevitable, irrespective of whether the action is complete or not'.”

41. In *casu* the Act makes it clear when any decision on “prescribed” fees will take effect. The Act defines “prescribe” as meaning “prescribe by notice in the Gazette...”. Prejudice can as a result only be suffered by registered auditors once publication of the decision in respect of fees takes place. Prior to publication there is not an infringement or a threat of an infringement of any fundamental right.
42. The approach in respect of prejudice is in accordance with the finding of the Constitutional Court in *Camps Bay Ratepayers’ and Residents’ Association and Another v Harrison and Another* 2011 (4) SA 42 CC at para [57]:

[57] Whether or not the Supreme Court of Appeal was correct in its approach, first raises the issue regarding the interpretation of s 7(1)(b) of PAJA. In terms of the section, the 180-day period starts to run when the ‘person concerned . . . became aware of the action and the reasons for it’. Before ‘the action’ nothing happens. In the final analysis it is awareness of ‘the action’ that sets the clock ticking. That raises the question: what ‘action’ did the legislature have in mind? The answer, I think, is the ‘administrative action’, and, according to the definition of that term in PAJA, ‘the decision’ that is challenged in the review proceedings. What that decision entails is a question that cannot be answered in the abstract. It must depend on an evaluation of the facts.”

43. Bearing in mind that an “administrative action” in PAJA encompasses two distinct concepts to wit, firstly a “decision” and secondly “which adversely affects the rights of any person and which has a direct, external effect”, the determination of fees by IRBA does not amount to an administrative action until the fees have been prescribed i.e. published.

44. In the result, the clock started ticking once the fees were published in the Gazette, which entails that the 2019 review was brought within the 180-day time limit contained in section 7(1)(b) of PAJA.

IMPUGNED DECISIONS: 2019 REVIEW

45. The following decisions form the subject matter of the 2019 review:

- 45.1. the payment of “*assurance fees*” by registered auditors doing Category C assurance work;
- 45.2. tax practitioner fees;
- 45.3. “the penalties”;
- 45.4. the drastic increases in existing fees;
- 45.5 the removal of the fee concession.

Category C assurance work

46. On 5 June 2019 IRBA published Board Notice 82 of 2019 in the Government Gazette. The notice was given in accordance with the provisions of Section 8(2)(b) of the Act and the heading of the notice refers to “***Assurance Fees Payable to the IRBA with Effect from 1 April 2019***”
47. The methodology for calculating the fees is set out as follows:

“1. For all fees categorised as assurance, assurance fees are billed twice a year 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.”

As set out *supra* section 8(2)(b) of the Act provides for fees payable for an inspection or review undertaken by IRBA in terms of section 47.

48. Section 47(1)(b) provides for a mandatory inspection or review every three years in respect of registered auditors that audit a public company as defined in section 1 of the Companies Act, 71 of 2008.
49. In respect of registered auditors that do not fall in the aforesaid category, section 47(1)(a) provides that IRBA may “*at any time inspect or review*” their practices.
50. Section 47(2) empowers IRBA to recover “*the costs of an inspection under this section from the registered auditor concerned.*”
51. In order to differentiate between registered auditors that fall in section 47(1)(a) and those falling under 47(1)(b), IRBA created the following categories:
 - 51.1 Category A (high risk audits and related assurance work), which refers to audits required by law, which includes the audit of public companies, referred to in section 47(1)(b) of the Act;
 - 51.2 Category C (low risk) is assurance work not included in Category A, like voluntary audits, reviews that are required by the Companies Act, and other assurance work. It includes audits of non-public companies, per section 47(1)(a) of the Auditing Act.
52. The 2019 review only pertains to registered auditors falling within Category C.

53. Insofar as Category C auditors are concerned, there are a few glaring inconsistencies between IRBA's Board Notice and the provisions of the Act, namely:

53.1 the Act does not provide for "*assurance*" fees;

53.2 section 8(2)(b) provides for fees payable for an inspection or review, which entails that the fee would be payable once an inspection or review has been conducted; and

53.3 Section 47(2) provides for the recovery of "*the costs*" of an inspection from the registered auditor, which implies that the "*fee*" in section 8(2)(b) must at least be connected to the actual costs incurred in inspecting the practice of a registered auditor.

54. In view of the aforesaid, the applicant contends that the percentage fee model, as distinct to the method of recovering costs from particular registered auditors for work done – is not authorised by the enabling statute, is accordingly *ultra vires* the Act and, therefore, unlawful and invalid.

55. Mr Solomon SC, counsel for IRBA, to his credit, conceded that the percentage fee model for "*assurance work*" does not accord with the empowering provisions of the Act.

56. In the premises, the decision to impose a percentage fee model in respect of registered auditors that fall in Category C is *ultra vires* the Act and the applicant is entitled to an order confirming that the decision is unlawful and invalid.

Tax practitioner fees

57. The context of the introduction of the tax practitioner fees for the 2020 financial year is as follows:

57.1. All tax practitioners are in terms of section 240 of the *Tax Administration Act*, Act 28 OF 2011 ("the Tax Act") required to be registered with a recognised controlling body ("RCB").

57.2. Whilst the South African Institute for Chartered Accountants ("SAICA") had applied to the South African Revenue Service ("SARS") to be recognised as an RCB, IRBA was, by virtue of section 240A of the Tax Act, an RCB and did not have to apply to SARS for recognition. Whilst the IRBA does not – unlike SAICA and other organisations – have to meet any requirements for recognition by SARS as an RCB and does not have similar administrative responsibilities, including the submission of reports to SARS and continuous professional development requirements for tax practitioners.

57.3. SAICA decided to levy a separate subscription fee on its members (all chartered accountants in South Africa) for those who decided to elect SAICA to be their RCB

57.4. As a result of the fee now levied by SAICA, some registered auditors who were both members of SAICA and tax practitioners, had decided to indicate to SARS that IRBA was their RCB and not SAICA, so as to avoid the fee charged by SAICA.

58. In Board Notice 24 of 2019, dated 1 March 2019, IRBA prescribed the following new fees for the 2020 financial year:
- a. R1 050.00 in respect of an application for recognition as a tax practitioner with IRBA as RCB;
 - b. R2 100.00 as an annual renewal fee payable by registered auditors who are recognised as tax practitioners with IRBA; and
 - c. R1 050.00 as an administration fee for reinstatement of a tax practitioner recognition.
59. In a notice dated 21 August 2018, IRBA explained that “[t]he fee is to cover the costs of administration, including the strengthening and monitoring of compliance with IRBA’s Continuing Professional Development requirements in relation to tax practitioners.”
60. In determining the empowering provisions for the imposition of tax practitioner fees, it is prudent to, first of all, have regard to section 8(1)(a) of the Act:
- “8(1) The Regulatory Board must prescribe-*
- (a) Accreditation, registration, registration renewal and re-registration fees;”*
61. Such fees relate to the functions of IRBA as provided for in section 6 of the Act, which is to register persons as registered auditors (or registered candidate auditors).

62. The Act does not contemplate the imposition of any fees in relation to IRBA's statutorily conferred position as RCB for tax practitioners.
63. Notwithstanding the aforesaid, IRBA contends that the tax practitioner fees were imposed to cover administration costs in relation to tax practitioners and that the imposition of such fees is accordingly justified by section 8(2)(c) of the Act. Section 8(2)(c) provides as follows:

"8(2) The Regulatory Board may prescribe-

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

64. The applicant contends that IRBA's reliance on section 8(2)(c) of the Act is not borne out by the facts.
65. In this regard, the applicant refers to a meeting of MANCO on 18 July 2018, at which the current acting CEO of IRBA (Mr Nagy) explained that IRBA needed to charge the tax practitioner fee to remove the possibility of "*arbitrage*" with SAICA, i.e. to discourage registered auditors from indicating IRBA as their RCB. He noted that the agreement seems to be that "*we want to rather avoid the people registering with us as Tax Practitioners... I do not think we have the appetite to take this on.*"
66. The director of standards (Ms Bailey) noted that "*[t]hese Tax Practitioners can find another body*" whilst the director of operations (Ms de Jager) stated that they should not "*come to us*". Mr Nagy expressed the view that "*we actually want to get out of having to deal with non-assurance Tax stuff.*"

67. In the 2019 record, functionaries of IRBA discussed the limited effort required to regulate auditors who choose IRBA as their RCB, as follows:

67.1. All that is required is uploading a form to the SARS website, for the process is "*all automated*";

67.2. In this regard, IRBA's finance director explained that "*[i]t is all automated basically. So they do one tick and then Flow Centric does the rest*". From this remark, the applicant maintains that if a registered auditor "*ticks*" on his or her registration form that they choose IRBA as RCB for tax practitioner purposes, the rest of the process is carried out, without manual intervention, by IRBA's information technology system;

67.3. In a discussion as to why IRBA has application and reinstatement fees for tax practitioners, while SAICA only has an annual fee, IRBA's director: standards remarked that "*SAICA does not have [application and reinstatement fees], but that is to provide an addition[al] disincentive I suppose*". According to the applicant it is clear that the real reason for the imposition of the fees is to discourage registered auditors from choosing IRBA as their RCB.

68. In the result, the fees imposed by IRBA do not correlate with a "*service rendered*" by it.

69. Whilst IRBA admitted that it must justify the tax practitioner fee with reference to services rendered, it, however, failed to provide any evidence to support its contention that expenses are incurred in relation to tax practitioner registrations.
70. Without a section in the empowering Act that makes provision for the imposition of tax practitioner fees in their current form, the imposition of the fees is *ultra vires* the Act and similarly unlawful and invalid.

Penalties

71. The penalties imposed by IRBA, consist of:
- 71.1 a fixed penalty for late submission of the assurance work affidavit and supporting documents, introduced for the 2020 financial year at R2 500.00; and
 - 71.2 a percentage penalty for under-declaration of assurance fees, introduced for the 2020 financial year at 5% of additional fees due as a result of under-declaration.
72. The penalties are, as a result, depended on the imposition of assurance fees which fees have already been found to be *ultra vires* the Act. No other provision in the Act provides for penalties to be imposed and the penalty decision suffers the same fate as the decision in respect of assurance fees.
73. Mr Solomon, once again to his credit, conceded that the imposition of penalties for two categories of transgressions of IRBA's regime regarding assurance fees is not authorised by the Act.

74. This concession entails that imposition of penalties *ultra vires* the Act is.

The drastic increases in exiting fees

75. In Board Notice 24 of 2019, the following increased fees were prescribed as payable from 1 April 2019:

75.1 the annual renewal of registration fee increased from R6 000.00 to R8 100.00 (a 35% increase); and

75.2 the administration fee for reinstatement increased from R2 720.00 to R4 050.00 (an almost 50% increase).

76. The applicant submitted that the decision falls to be set aside on the grounds that it was taken:

76.1 for reasons not authorised by the Auditing Act;

76.2 for an ulterior purpose or motive;

76.3 after taking into account irrelevant considerations;

76.4 irrationally; and

76.5 within a proper notice and comment procedure i.e. procedurally unfair.

77. I propose to, first of all, deal with the ground of procedural unfairness:

78. It is common cause that IRBA did not afford registered auditors the opportunity to comment on the decision to drastically increase the annual renewal and reregistration fees.

79. IRBA, however, contends that:

79.1 the Act does not require a consultative process; and

79.2 that sufficient notice has at all times been furnished to registered auditors appraising them of changes in policy and fee structures.

80. In support of its contention that the ambit and source of a consultative process is to be found in the enabling legislation, IRBA relies on the following passage in *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) (“*Du Preez*”) at p 231 H – 232C:

“What does the duty to act fairly demand of the public official or body concerned? In answering this question useful guidance may be derived from some of the English cases on the subject: In Doody v Secretary of State for the Home Department and Other Appeals [1993] 3 All ER 92 (HL) Lord Mustill stated the following in a speech concurred in by the remaining members of the Court (at 106d-h):

‘What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the Courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive the following. (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make

representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.'

IRBA maintains that the Act creates the context in which the fairness of the decision to prescribe fees should be considered. In this regard, only section 10 of the Act, which provides for the making of rules by IRBA, provides for a consultative process. Absent any provision in the Act for a consultative process in respect of decisions pertaining to fees, such process is, according to IRBA, not a prerequisite for a valid fee determination.

81. On a clear reading of the *Du Preez* matter, IRBA's contention is, however, not supported by Corbett CJ. At p 231 C – F, the learned Chief Justice stated the following:

"The audi principle was described in the South African Roads Board case supra (at 10G-I) as being

'... a rule of natural justice which comes into play whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his liberty or property or existing rights, or whenever such an individual has a legitimate expectation entitling him to a hearing, unless the statute expressly or by implication indicates the contrary; ... '.

*This formulation treats the principle as a rule of natural justice which comes into play when the circumstances stated above exist and is contrary to the view which requires the audi principle, if it is to apply, to be impliedly incorporated by the statute in question. The latter view, which was followed in, for instance, the majority judgment in South African Defence and Aid Fund and Another v Minister of Justice 1967 (1) SA 263 (A) at E 270B-H, has also been discarded (see Attorney-General, Eastern Cape v Blom and Others 1988 (4) SA 645 (A) at 661C-662I; South African Roads Board case *supra* at 10H-I).*

In R v Ngwevela 1954 (1) SA 123 (A) at 131H Centlivres CJ stated that the audi principle should be enforced unless it is clear that Parliament has expressly or by necessary implication enacted that it should not apply or that there are exceptional circumstances which would justify the Court's not giving effect to it."

82. In view of the aforesaid authority, IRBA's stance that a consultative process in compliance with the *audi alterem partem* principle was not a legal imperative for a valid fee determination, is untenable, devoid of any legal justification and falls to be set aside in terms of section 6(2)(c) of PAJA.
83. In view of the aforesaid finding, it is not necessary to consider the remaining grounds of review.

Removal of the senior practitioner concession

84. The final fee category that the applicant seeks to review and set aside concerns the removal of concessions that had – since the inception of IRBA in 2006 – been given to auditors over 65. The concession was in the form of a 50% discount on their individual annual fees.

85. In a notice dated 14 December 2018, IRBA advised as follows in respect of the concession granted to registered auditors over the age of 65:

“In terms of section 8 of the Auditing Profession Act, 2005, the Regulatory Board must prescribe various fees payable to the Regulatory Board.

In previous years, the IRBA granted a concession to RAs over the age of 65 in the form of a 50% discount on their individual annual fees.

The IRBA’s inspections have shown a continued decline in audit quality. This increased risk requires to extent the scope of its work. As a result, the IRBA has resolved to remove any fee concessions.

With effect from 1 April 2019, all RAs will be invoiced for the same annual fee, the amount of which will be communicated to RAs in 2019.”

86. The applicant attacked the decision on various grounds but, once again, the failure by IRBA, which failure is common cause, to engage in a consultative process prior to gazetting the decision, renders the decision, for the same reasons stated *supra*, reviewable on the ground that it was procedurally unfair.

2020 REVIEW

87. On 20 March 2020 IRBA published Board Notice 47 of 2020 in the Gazette.
88. The Notice prescribes the same fees in respect of tax practitioners, imposes the same penalties, but changed the description of the penalties to “*administrative fees*”. Needless to say, the “*administrative fees*” remain punitive in nature.
89. Although the annual renewal of registration fee and the administration fee for reinstatement were only increased by 8%, the base number to which the increases were added reflects the drastic increases for the 2019 financial year.
90. A third category of fee, to wit a reinstatement fee for tax practitioner status, was increased by 400%, without any consultative process and suffers the same fate as the 2019 drastic increases of the annual renewal of registration fee and the administration fee for reinstatement.
91. The removal of the concession for senior registered auditors has been carried through to the 2021 financial year.
92. Although IRBA has failed to prescribe any “*assurance fees*” for the 2021 financial year, registered auditors were informed via an email from a certain Ms Naicker send on 29 May 2020, that the same rates for assurance work as those published in Board Notice 82 of 2019 will be imposed.
93. The applicant maintains that the failure by IRBA to prescribe assurance fees, in accordance with the provisions of section 8 of the Act, for the 2021 financial year entails that IRBA is not legally empowered to collect any assurance fees for the

2021 financial year. In the result the applicant prays for an order declaring that the collection of the fees is unlawful.

94. In the heads of argument filed on behalf of IRBA and in the address by Mr Solomon, this further ground of review was not addressed. In its heads of argument IRBA maintained that the only difference between the 2019 and 2020 applications is the year in respect of which the fees were prescribed.
95. The assurance fees prescribed in Board Notice 82 of 2019 stated that the fees were *"payable from 1 April 2019 to 31 March 2020"*. The applicant is in the result correct that the obligation to pay assurance fees seized on 31 March 2020. Absent a further gazetted fee determination in respect of assurance fees, IRBA is not legally entitled to collect assurance fees.

REMEDY

96. Once the decisions in respect of the fees are set aside, the court is enjoined by Section 8(1) of PAJA to grant any order that is just and equitable.
97. The applicant contends that repayment of the unlawfully levied fees would be the natural consequence of the unlawfulness of the prescription of the fees levied against it. This, according to the applicant, will undo the consequences of the unlawful actions as if they have never existed – which is the default remedy for exceeding public powers.
98. IRBA did not suggest any remedy but stated that the repayment of fees will create financial havoc.

99. The applicant indicated that it is for this very reason that it does not seek an order directing IRBA to repay the money unlawfully levied against them, but rather for credits to be passed which can be set-off against future liabilities owed to IRBA.
100. The applicant contended that the passing of credits will vindicate its rights and afford effective constitutional relief, whilst it would also acknowledge IRBA's economic reality
101. Although the applicant initially sought an order in both applications that IRBA pass credits, within one month of being ordered to do so, Mr Oosthuizen SC, counsel for the applicant, during his address indicated that the applicant is prepared to set the date for the passing of credits to commence with the inception of new financial year, to wit 1 April 2023. This will allow IRBA enough time to budget for and implement a system for the passing of credits.
102. Mr Solomon agreed that the time afforded to IRBA will be fair and reasonable.
103. In the result, I am satisfied that the remedy proposed by the applicant is just and fair in the prevailing circumstances and such an order will follow.

COSTS

104. The applicant urges this court to award costs on a punitive scale against IRBA.
105. In support of its request for a punitive costs order, the applicant submitted that the following special considerations should be taken into account:

- 105.1 the vexatious nature of IRBA's opposition to the relief sought in the applications; and
- 105.2 the improper motive of certain of the impugned decisions.
106. In justifying a punitive cost order on the basis that the opposition is vexatious in nature, the applicant relied on the following passage in *Re Alluvial Creek Limited* 1929 CPD 532 at 535"
- "Now sometimes such an order is given because of something in the conduct of a party which the court considers should be punished, malice, misleading the court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet those proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear."*
(Emphases added)
107. Bearing the aforesaid in mind, the applicant submits that IRBA resisted both the applications on "*quite unjustified*" grounds, which implies that it has put the applicants to unnecessary trouble and expense. [See: *Bergmann v Kontrakteur Reynecke* (Edms) Bpk 1973 (4) SA 35 SWA at 38D].
108. The points *in limine* raised by IRBA was no doubt unjustified and only served to add to the already voluminous papers and to protract and prolong the time spend on preparing for the hearing of the matter. The decision not to proceed with two

of the points *in limine* at the hearing, only serves to confirm the lack of merits in the points taken.

109. The grounds on which the court upheld the review, to wit, the decisions being *ultra vires* the Act and procedurally unfair, are the most basic cornerstones of fair administrative action. It should have been clear to IRBA that the opposition of the applications is a futile exercise.

110. The following sentiment expressed by the Constitutional Court in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 CC at para [82], aptly applies to the opposition in *casu*:

” [82] there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. 46 Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly.”

111. Bearing the aforesaid standard imposed on an organ of state in performing administrative actions in mind as well as the unnecessary costs occasioned by opposition of the applications and thereby defending the undefendable, I agree that a punitive cost order is called for.

ORDER

112. The following order is made:

112.1. The first respondent's determination of assurance fees, payable from 1 April 2019 to 31 March 2020 by registered auditors, as prescribed in Board Notice 82 of 2019 contained in the Government Gazette dated 5 June 2019, is reviewed and set aside.

112.2. The first respondent's determination of the following further categories of fees, payable from 1 April 2019 to 31 March 2020 by registered auditors, as prescribed in paragraphs 1.3, 2.1, 2.2, 2.3, 2.4, 8.1 and 8.2 of Board Notice 24 of 2019 contained in the Government Gazette dated 1 March 2019, is reviewed and set aside:

112.2.1 application for recognition as a tax practitioner with the first respondent as recognised controlling body;

112.2.2 annual renewal of tax practitioner status payable by all registered auditors who are recognised as tax practitioners with the first respondent as recognised controlling body;

112.2.3 administration fee for reinstatement of tax practitioner recognition;

112.2.4 penalties for late submission of assurance work affidavit and supporting documents and for the under-declaring of assurance fees; and

112.2.5 the annual renewal of registration and the administration fee for reinstatements insofar as it was increased with more than consumer price inflation compared to the equivalent fees during the period 1 April 2018 to 31 March 2019.

113. The decision taken by the first respondent, as published in Board Notice 24 of 2019 contained in the Government Gazette dated 1 March 2019, in terms of which the concession to registered auditors over the age of 65 in the form of a 50% discount on their individual annual fees was removed, is reviewed and set aside.

114. It is declared that the first respondent did not prescribe assurance fees payable from 1 April 2020 to 31 March 2021 by registered auditors on the same basis as previously published in Board Notice 82 of 2019 in the Government Gazette on 5 June 2019 and it was, accordingly, not entitled to claim payment of such fees from registered auditors.

115. The first respondent's determination of the following further categories of fees, payable from 1 April 2020 to 31 March 2021 by registered auditors, as prescribed in paragraphs 1.3, 2.1, 2.2, 2.3, 8.1 and 8.2 of Board Notice 47 of 2020 contained in the Government Gazette dated 20 March 2020, is reviewed and set aside:

115.1. application fee for the first respondent to be a tax practitioner's recognised controlling body, payable on application;

- 115.2. annual renewal fee payable by tax practitioners who elected the first respondent as their recognised controlling body; and
 - 115.3. administration fee for reinstatement of tax practitioner recognition;
 - 115.4. administration fees for late submission of assurance work affidavit and supporting documents and for the under-declaring of assurance fees; and
 - 115.5. the annual renewal of registration and the administration fee for reinstatements insofar as it was increased with more than consumer price inflation compared to the equivalent fees during the period 1 April 2018 to 31 March 2019.
116. The decision taken by the first respondent, as published in Board Notice 47 of 2020 contained in the Government Gazette dated 20 March 2020, in terms of which it failed to reverse its previous decision to remove the concession to registered auditors over the age of 65 in the form of a 50% discount on their individual annual fees, and instead prescribing payment of the full individual annual fees, is reviewed and set aside.
117. The first respondent is ordered to pass credits by no later than 1 April 2023 to all registered auditors in respect of the following fees and penalties which were levied on them pursuant to Board Notice 82 of 2019 (contained in Government Gazette dated 5 June 2019) and Board Notice 24 of 2019 (contained in Government Gazette dated 1 March 2019):
- 117.1. all assurance fees which were calculated on Category C assurance work;

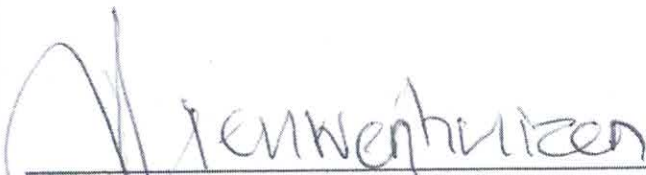
- 117.2. all fees in regard to the recognition of tax practitioners with IRBA as recognised controlling body;
- 117.3. all penalties in respect of assurance fees, insofar as such credits have not already been passed;
- 117.4. that portion of the fees, set out in paragraphs 2.1 and 2.3 of Board Notice 24 of 2019, which represents an increase of more than consumer price inflation compared to the equivalent fees during the first respondent's 2018/2019 financial year as contained in **Annexure "JC14"** to the founding affidavit under case no. 64848/19.
118. The first respondent is ordered to pass credits by no later than 1 April 2023 to all registered auditors over the age of 65 years as of 1 April 2020 of 50% of the fee, set out in paragraph 2.1 of Board Notice 24 of 2019 after the reduction of such fee pursuant to paragraph 7.4 above.
119. The first respondent is ordered to pass credits by no later than 1 April 2023 to all registered auditors in respect of the following fees and penalties which were levied on them pursuant to Board Notice 82 of 2019 (contained in Government Gazette dated 5 June 2019) and Board Notice 47 of 2020 (contained in Government Gazette dated 20 March 2020):
- 119.1. all assurance fees which were calculated on Category C assurance work;
- 119.2. all fees in regard to the recognition of tax practitioners with IRBA as recognised controlling body;

119.3. all administration fees in respect of assurance fees; and

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

120. The first respondent is ordered to pass credits by no later than 1 April 2023 to all registered auditors over the age of 65 years as of 1 April 2021 of 50% of the fee, set out in paragraph 2.1 of Board Notice 47 of 2020 after the reduction of such fee pursuant to paragraph 9.4 above.

121. The first to third respondents are ordered to pay the costs of the applications under case no. 64848/19 and 46298/20 including the costs of two counsel, on an attorney and client scale.



N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES: 02 March 2022
DATE DELIVERED PER COVID19 DIRECTIVES: 11 April 2022

APPEARANCES

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