IN THE NORTH GAUTENG HIGH COURT, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED. ✓

18/12/2012 DATE

In the matter between:- SIGNATURE

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 15928/2012

18/12/2012

ADVANTAGE A.C.T. (PTY) LTD	Applicant
and	
THE SOUTHERN AFRICAN AUDITOR AND TRAINING CERTIFICATION AUTHORITY	First Respondent
ADRIE DU PLESSIS N.O.	Second Respondent
STEPHEN JORDAN N.O.	Third Respondent
CHRIS SHIELLS N.O.	Fourth Respondent
ROD DUARTE N.O.	Fifth Respondent

REASONS FOR JUDGMENT

DE KLERK, AJ

[1] On 6 December 2012 I granted the following order in this application:

"*1) I set aside the decision of the Appeal Tribunal of the first*

respondent on the 27th of October 2011 and the decision of the Technical Management Board of the first respondent on the 31st of March 2012;

2) *I substitute the following decision for the decision of the Appeal Tribunal and such decision to read as follows: This decision recognises Advantage ACT (Pty) Ltd's practical audit sessions, consisting of no more than two groups, in turn consisting of no more than six candidates per session, supervised by one or more lead auditors and strictly complying with ISO19011 and the first respondent's Generic Criteria or Revised Criteria, such sessions to be of a duration of no less than six hours and preferably extending to eight hours."*

[2] I indicated at the time of granting the above order that I shall supply my reasons for the said order in due course and as part of my reasons make a suitable order as to costs.

[3] The order quoted above was granted in an application to review and set aside certain decisions taken by the first respondent ("SAATCA").

[4] The applicant ("Advantage") is in the business of providing occupational safety, health, environmental and quality training services, auditing services and consulting services to various clients in the mining, construction and other industries.

[5] The first respondent "SAATCA" is a certification authority established in terms of the Accreditation for Conformity Assessment, Calibration and Good Laboratory Practice Act, Act No 19 of 2006, as amended.

[6] The second to fifth respondents were the members of an Appeal Tribunal composed by the first respondent of whom the fifth respondent was the convenor. The second respondent was the lead member or chairperson of the Appeal Tribunal, whereas the third and fourth respondents were ordinary members of the said Appeal Tribunal.

[7] On or about 11 June SAATCA's Technical Management Board ("TMB") had a meeting at which the technical queries were discussed and the following was recorded in its minutes:

"*Group audits of less than six hours on site audit activity, with*

large groups – WdC gave feedback on the EC and QMS and EMS feedback that 25% of the 120 hours 9 (i.e. 30 hours, max) were approved.

When other scheme chairs present were asked, they did not agree with such approval in their schemes.

Requested that BF submit a position paper on these 'group audits' for the TMB consideration and benchmarking."

The abbreviations WdC and BF stands for Wendy da Cruz whilst BF stands for Ben Fouche. Ben Fouche and his wife, Christel Fouche, are the directors of the applicant. Ms Christel Fouche is also a registered lead auditor with SAATCA, the first respondent. In a document entitled "Auditing Sessions – A solution to the auditing days dilemma", appended as annexure "C14" (at p 324 of the papers) to the founding affidavit, Mr Ben Fouche complied with the request at the meeting of 11 June 2011.

[8] It is clear from the wording of what was recorded in the minutes during the meeting of 11 June 2011 that no formal decision was actually taken.

[9] During September 2011 one of the trainees taking part in the training course provided by the applicant submitted an application to be certified as an auditor in terms of the first respondent's requirements for certification, which application was eventually rejected by the Evaluation Committee during or about November 2011. There were telephone conversations between Ms da Cruz, Mr and Mrs Fouche during the course of which Ms da Cruz, an evaluator, indicated that the applicant could attack the "decision" of the TMB, but that it would run the risk of the Appeal Tribunal providing even less recognition than the 25% concession referred to previously. This discussion between Ms da Cruz and the Fouches was followed by an electronic mail communication, dated 19 September 2011 and appended to the founding affidavit as annexure "C15". The document constituted the appeal submissions made by the applicant to the first respondent.

[10] On 4 November 2011 the SAATCA chairperson, H F Pretorius, wrote the following to Ms Christel Fouche:

"*Further to your appeal to SAATCA 2011.09.19, herewith the Appeal Committee's decision.*"

Contained in the said document was a section headed "Conclusion", containing two parts, the first being "**Decision**: Committee rejected the **decision** to allow 25% of the time spent by auditors on group auditing sessions, to contribute towards the total of 120 audit hours required for initial auditor registration with SAATCA". Under the heading "**Justification**" the following was stated:

"*The TMB decision was rejected on the basis that the on-site group auditing performed by individual applicants was not of sufficient completeness to substantiate acceptance of 25% of group auditing sessions time, and to allow for meaningful oversight and guidance of individual auditors.*"

The document contained a further section reading as follows:

"*After serious deliberation at the board meeting of 2011-11-01, the SAATCA Board has accepted without alteration the Appeals Committee recommendation regarding the concession, as follows:*

Recommendation

One (1) hour of the time spent by auditors on group auditing sessions per audit day, to contribute towards the total of 120 audit hours required for initial auditor registration."

No reasons were advanced for the recommendation (*accepted by the first respondent's Board*) **that only one hour**(*1 of 6 hours*) **of the time spent by auditors on group auditing sessions per audit day would contribute towards the total of 120 audit hours required for initial auditor registration**.

[11] At the technical board meeting of 31 March 2012, the following was recorded in its minutes as regards "technical queries – group audits":

"*From 2011-10-22 – the Appeal Committee outcome on group audits was to accept one hour per day of group audits, with recommendations to consider for clarifying the size of the groups. Refer new item.*"

Under the item "New matter" the following appears:

"Appeals Committee Recommendation:	TMB Decisions:
The maximum number of participating auditors in group auditing sessions, per guiding/overseeing lead auditor. **Recommendation** – Two (2) participants together, overseen by a registered lead auditor. Larger than this – accept the one hour as per scheme.	**TMB Decision** – The maximum number of participating non-certificated auditors in audits qualifying towards SAATCA certification overseen by a registered lead auditor is 4 (four), thereby, creating a ratio of 4:1, and assuming that adequate auditing time and experience can be gained by all participants. For groups larger than this – revert to accepting 1 hour per audit as per the Appeal Committee decision".

[12] It is against the decisions of the Appeal Tribunal, dated 27 October 2011 and the decision of the TMB on 31 March 2012 that the applicant launched the present review application. In application papers running into some 564 pages and supported

by complete and thorough heads of argument by counsel on behalf of both parties, the applicant and the first respondent aired their views in this regard.

[13] In short, the grounds of review on which the applicant relied can be summarised as follows:

13.1 The Appeal Tribunal's decision of November 2011 is reviewable because the Appeal Tribunal was not empowered to take the decision, the decision was procedurally unfair and the decision was inconsistent with the first respondent's own criteria for registration of applicants as auditors and is therefore reviewable under sections 6(2)(a)(i), 6(2)(c), 6(2)(e)(iii) and 6(2)(f)(i) of the Promotion of Administrative Justice Act, Act No 3 of 2000, as amended ("PAJA").

13.2 The TMB's decision of March 2012 is reviewable in terms of section 6(2)(a)(i) of the Promotion of Administrative Justice Act, 2000, in that in terms of the first respondent's own internal procedure the Technical Management Board has no power to vary the decision of the Appeal Tribunal given on 27 October 2011 and to

the extent that the TMB purported on 31 March 2012 to alter the Appeal Tribunal's decision, its decision falls to be reviewed and set aside.

[14] Ms van Rooyen appearing on behalf of the first respondent was constrained to concede that the fact that there is no explanation on the papers or any reasons advanced as to how the Appeal Tribunal arrived at its decision of accepting only one hour out of a minimum of six hours, but preferably eight hours, of practical training. She honestly, frankly and correctly conceded this shortcoming. The end result of this concession is that the Appeal Tribunal's decision was arrived at arbitrarily and perhaps also capriciously. That being so, the Appeal Tribunal's decision is subject to review and to be set aside in terms of both sections 6(2)(a)(i) and 6(2)(e)(vi) of PAJA.

[15] The TMB's decision of 31 March that there should be a ratio of 4:1 non-certified auditors to a registered lead auditor and the accepting of the recommendation of only one hour per audit for a group larger than four auditors suffers the same fate, as no reasons were given for these decisions. It is in any event unthinkable how a subordinate board can differ from the Board of Directors, who accepted the Appeal Tribunal's decision in

their meeting of 1 November 2011.

[16] The point has already been made previously in this judgment that on a proper interpretation of the minutes of 11 June 2011, it cannot be said that there was any or an unambiguous meeting of the minds of those present. The second and third sentences as recorded in the minutes and quoted previously from the minute would indicate that there was no **decision** to appeal against. The document supplied by Mr Fouche as a result of this meeting was not an appeal or submissions towards an appeal. The electronic mail communication of 19 September 2011 was prompted by the comment of Ms da Cruz and this led to the Appeal Tribunal's decision of 27 October 2011. It would appear that the Appeal Tribunal did not comply with paragraph 4.3.1 of their own appeal procedure (as it appears at p 335 of the papers) and if they have not complied with it, then their decision was not a procedurally fair action. Sections 6(2)(b) and 6(2)(c) of PAJA would then find application.

[17] During argument, both in the parties' heads and in court, there was criticism and justification of the fact that the first respondent's recommendations as recorded in the minutes of the meeting of the TMB on 31 March 2011 and quoted

hereinbefore, imported requirements of the Code of Conduct for Witnessing Auditors to be read with and of the same status as the ISO19001 provisions, and/or the first respondent's own Generic Criteria and/or Revised Criteria. Obviously what is stated in the Code of Conduct for Witnessing Auditors must be subject to what is stated in ISO19011 and/or the first respondent's own Generic Criteria and/or any Revised Criteria.

[18] In view of the aforegoing, I was convinced that both the decision of the Appeal Tribunal, dated 27 October 2011, and the decision of the Technical Management Board, dated 31 March 2011, should be reviewed and set aside.

[19] It was the first respondent's request that the matter be referred back to the first respondent as this was not a proper case for substitution. As previously stated, this application was properly aired by both parties and in view of the decisions of the bodies referred to, it was submitted by the applicant that substitution is the appropriate remedy for two reasons, namely:

19.1 the decision to recognise the applicant's practical audit sessions is a foregone conclusion; and

19.2 the court has all the information necessary to make this decision.

[20] Section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act, 2000, empowers the court, in addition to setting aside an invalid decision, to substitute its own decision for that of the administrator who arrived at the invalid decision. The court was referred to the decision of the Supreme Court of Appeal in ***Commissioner, Competition Commission v General Council of the Bar of South Africa and Others* 2002 (6) SA 606 (SCA)** and especially the following quote from Baxter, *Administrative Law*, at 682-4, ending with the following words:

"*... fairness to the applicant may demand that the court should take such a view.*"

During the course of the papers it was stated by the applicant that it has diminished the size of the groups to consist of only 12 members it is training and as a result of that, that the group has been divided into two groups of six candidates each.

[21] There does not appear to be any dispute between the parties about the extent of the experience gained by the applicants

who attended the applicant's practical audit sessions, nor was there any dispute that these sessions met the requirements of the first respondent's own criteria and ISO19011. I have already dealt with what appeared to be the only dispute between the parties, relating to the applicability of the Code of Conduct for Witnessing Auditors, where it prescribes that an applicant auditor should be under the constant supervision of a witnessing lead auditor when participating in audit sessions. However, I am of the view that one witnessing lead auditor would certainly be capable of supervising two groups each consisting of six members in a proper manner so as to provide proper technical training to such applicant auditors. In the result, I made the order which I granted when the matter was heard on 6 December 2012.

[22] There remains the question of costs. There is no doubt that the applicant was substantially successful. When a party is substantially successful, the usual order is that a party is entitled to its costs. The fact that the first respondent is a statutory body does not make any difference to the usual order as to costs. Too much emphasis was placed by the first respondent on the fees charged by its certified training course provider, the applicant. The first respondent itself levies fees

annually for registering its members. There is no reason to deviate from the normal costs order.

[23] The first respondent is ordered to pay the costs of the applicant.

[24] As the second to fifth respondents were cited in their official capacity and no-one personally opposed the application and the fifth respondent actually acted as deponent on behalf of the first respondent, no order as to costs would be made against the said respondents.

L S DE KLERK
ACTING JUDGE
NORTH GAUTENG HIGH COURT
PRETORIA
13 DECEMBER 2012

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