

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: 15 August 2022
SIGNATURE: *N. JANSE VAN NIEUWENHUIZEN*

In the matter between:

**INDEPENDENT REGULATORY BOARD
FOR AUDITORS**

First Applicant

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

Second Applicant

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

Third Applicant

and

**EAST RAND MEMBER DISTRICT OF
CHARTERED ACCOUNTANTS**

Respondent

In re –

**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 first to third applicants seek leave to appeal against the orders set out in : - paragraphs 112.1, 112.2, 112.2.1 – 112.2.3. 112.2.5, 113 – 115.3, 115.5, 117 – 117.2, 117.4, 118 – 121 of the judgment handed down by this court on 11 April 2022.

Grounds of appeal

Assurance fees

2. In paragraph 56 of the judgment I found that the decision to impose a percentage fee model in respect of registered auditors that fall in Category C is *ultra vires* the Act.
3. Having considered the grounds on which the applicants rely in support of the submission that the court erred in arriving at the aforesaid conclusion, I am of the

view that this ground of appeal does not have a reasonable prospect of success as envisaged in section 17(1)(a)(i) of the Superior Courts Act, 10 of 2013.

4. In the result, leave to appeal this finding of the court is refused.

Just and Equitable remedy

5. This ground of appeal appears to be mainly directed at paragraphs 117.4 and 119.4 of the court order. Prior to addressing the essence of the ground of appeal, a few preliminary remarks is apposite.
6. In the heads of argument filed by the respondent, the respondent with reference to *NERSA v PG Group Pty) Ltd* 202 (1) SA 450 CC (*NERSA*), referred to the default position once administrative action is declared unlawful.
7. The first to third applicants did not content otherwise, which resulted in the finding in paragraph 97 of the judgment.
8. The passing of credits in respect of the fees in paragraphs 117.1 – 117.3 and 119.1 – 119.3 represent the default position as envisaged in *NERSA, supra*. The financial difficulties of the first applicant were taken into account, which resulted in the order that credits will only be passed in the next financial year.
9. In respect of the annual renewal fee, the court decided that the increases should be in accordance with the Consumer Price Index, which was the norm for increases prior to the unlawful increases.

10. The applicants submit that the court erred in not referring the increase of the annual registration fees back to IRBA. The court, however, has a wide discretion in tailoring a remedy that is just and equitable in the circumstances, which discretion should include the practical implementation of the order.
11. The calculation of the credits in respect of the annual registration fees is set out in the order and the calculation thereof should not present any difficulty, especially not for professional auditors. In the result, this ground similarly has no prospect of success and leave to appeal is refused.

16A Notice

12. The grounds relied upon in support of the submission that the court erred in finding that the Rule 16A notice contains sufficient particularity to enable a reasonable registered auditor to assess the impact of the challenge on his/her interests, are unconvincing and does not overcome the threshold for finding that the grounds would have a reasonable prospect of success.
13. Leave to appeal against the aforesaid finding is refused.

Delay in terms of PAJA

14. The finding on the delay issue only pertains to the institution of the 2019 review.
15. In finding that the "*clock started ticking*" once the fees were published in the Gazette, the court referred to various authorities in respect of application of the definition of administrative action on the facts in *casu*. The finding in paragraph

43 of the judgment is based on an analysis of the prevailing legal position as applicable to the facts of the case.

16. The grounds of appeal do not deal with the authorities or the reasons why the legal principle were incorrectly applied to the facts of the matter.
17. In the result, this ground of appeal does not have a reasonable prospect of success and leave to appeal is refused.

Applicability of PAJA

18. It appears that this ground of appeal is premised on the fact that the court erred in not taking the decision of *Motala v Master*, North High Court 2019 (6) SA 68 SCA into account when determining whether PAJA was applicable.
19. It is not evident from the application in which manner the decision would have altered the finding that PAJA was applicable. The ground is extremely vague and does not support any recognisable ground of appeal.
20. The reference to the dicta by O'Regan J in *Permanent Secretary of the Department of Education of the Government of the Eastern Cape province and Another v Ed-U-College* 2001 (2) 1 CC, does not alter the legal position contained in the authorities referred to in the judgment.
21. In the result, this ground of appeal does not have a reasonable prospect of success and leave is refused.

Tax Practitioners

22. The investigation of complaints and the initiation of disciplinary hearings in respect of auditors are functions that IRBA must perform in terms of the statutory framework. These functions are not tax practitioner specific.
23. The registration process of tax practitioners has been dealt with in paragraph 67 of the judgment. IRBA's own functionaries referred to the limited effort required to regulate auditors who choose IRBA as their RCB.
24. This admission is in stark contrast to the alleged costs IRBA incurs in registering auditors who choose IRBA as their RCB.
25. The ground has similarly no reasonable prospect of success.

Obligation to consult

26. For the reasons contained in the application for leave to appeal in respect of this ground of appeal, I am satisfied that the applicants do have a reasonable prospect of success on appeal and leave is accordingly granted.

Failure to Gazette the 2020 Assurance Fees

27. The fact that assurance fees prescribed in Board Notice 82 of 2019 was only payable until 31 March 2020, has been dealt with in paragraph 95 of the judgment.
28. The reasons in support of the submission that the court erred in this regard, does not deal with the contents of the Gazette.

29. In my view, there is no reasonable prospect of success that this ground of appeal will succeed.

Attorney and client costs

30. In exercising its discretion in respect of an appropriate cost order, a court may take various factors into account.
31. A court of appeal will interfere with a cost order in very defined and limited circumstances. The applicants have not relied on any of these circumstances, and I am of the view that there is no reasonable prospect of success on this ground of appeal.

CONCLUSION

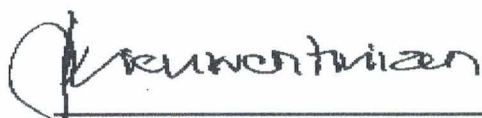
32. The applicants submitted that due to the importance of the matter to the auditing profession leave to appeal to the Supreme Court of Appeal should be granted. I agree.

ORDER

The following order is issued:

1. Leave to appeal to the Supreme Court of Appeal against this court's finding that the first applicant has an obligation to consult, which ground is contained in paragraph 21 to 24 of the application for leave to appeal, is granted.

2. Costs to be costs in the appeal



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

DATE HEARD PER COVID19 DIRECTIVES:

01 August 2022

DATE DELIVERED PER COVID19 DIRECTIVES:

15 August 2022

APPEARANCES

Counsel for the 1st to the 3rd applicants:

Advocate R A Solomon SC

Advocate P B Khoza

Instructed by:

Mothle Jooma Sabdia Inc.

Counsel for the respondent

Advocate H F Oosthuizen SC

Advocate D Smit

Instructed by:

Serfontein, Viljoen & Swart