DISPUTE RESOLUTION
ALERT

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FOR THE PURPOSES OF THIS ARTICLE

High Court dismisses challenge to mandatory audit firm rotations

On 2 December 2021, the Pretoria High Court handed down judgment in the case of E*ast Rand Member District of Chartered Accountants and Others v Independent Regulatory Board for Auditors and Others* (case no. 37249/2018). The successful party, the Independent Regulatory Board for Auditors (IRBA), was represented by Mongezi Mpahlwa, a Director in our Dispute Resolution practice

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The judgment was in respect of a review application by the East Rand Member District of Chartered Accountants, a voluntary association of chartered accountants and registered auditors, challenging the IRBA's "*in principle*" decision of 28 July 2016 to adopt and implement a rule on mandatory audit firm rotations (MAFR). Following the "*in principle*" decision, the IRBA then consulted the public on the modalities of the implementation of MAFR, and took a decision on the specifics of the final rule on 23 March 2017. This was followed by the promulgation of the MAFR as a final rule on 5 June 2017.

Essentially, the rule on MAFR provides that an audit firm may not serve as the auditor of a public interest entity (including a listed company) for more than 10 years. Once 10 years have elapsed, the audit firm may not serve as that entity's auditor until a period of five years has passed. For the purposes of this alert, (i) the "in principle" decision taken on 28 July 2016 is referred to as the "*first decision*"; (ii) the declaration on 23 March 2017 to introduce MAFR as a final rule is referred to as the "*second decision*"; and (iii) the promulgation of MAFR on 5 June 2017 as a final rule is referred to as the "third decision".

In opposing the review application, the IRBA pointed out that the audit profession had been inundated with various scandals, both locally and internationally, the details of which appeared in the record filed before court. Many of these scandals received widespread media coverage, including those involving Enron (in the US), Fidentia, KPMG, African Bank, Steinhoff and VBS Mutual Bank (in South Africa). Most of these scandals involved large-scale audit failures which the IRBA, as the regulatory body with a duty to protect the public, could not ignore.

The association challenged the three decisions in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and in the alternative, on the grounds of the constitutional principle of legality. From the outset, the court found that the decisions sought to be reviewed constituted an administrative action in terms of PAJA because they involve the exercise of a public power, adversely affecting the rights of members of the public (including members of the association), and have a direct external legal effect.

UNDUE DELAY IN LAUNCHING THE REVIEW APPLICATION

In making a determination, the court first dealt with the issue of the undue delay in launching the review application, which was raised squarely by the IRBA. In terms of section 7(1) of PAJA, a review application has to be instituted without unreasonable delay and not later than 180 days after the date on which the person concerned was informed of the administrative action and the reasons for it.

The issue of undue delay was viewed from two different perspectives, namely whether (i) there were three distinct decisions which were reviewable separately or (ii) the three decisions were part of a composite whole, albeit consisting of a

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multi-stage decision-making process. The association contended that it was entitled to wait until the conclusion of the entire process (being until the publication of the rule on 5 June 2017) before reviewing the decision.

WERE THE DECISIONS REVIEWABLE SEPARATELY OR IN COMBINATION?

During argument, the association "*blew hot and cold*" as to whether the decisions constituted three individual and separate reviewable decisions or whether they were various stages of a single or composite decision that was reviewable in terms of PAJA.

In the first instance, the court was of the view the third decision (the promulgation of MAFR as a final rule) was a foregone conclusion since the date of the first decision was well known to the association. Regarding the second decision, the court found that it was a procedural one in that it concerned the scope, method and date of implementation of the MAFR.

DID THE ASSOCIATION HAVE TO WAIT UNTIL THE PROMULGATION OF THE FINAL RULE?

On the issue of whether the association was entitled to wait, the court found that on either interpretation of whether there were three distinct decisions or various stages of a single decision, the review application was not launched within a reasonable time period as prescribed by PAJA. The court did not accept a claim of ignorance or lack of knowledge of the three decisions (or the various stages of a single decision) before the expiry of a reasonable period. The court's principal finding was that the review application ought to have been launched after the date that the first decision was made due to the grave concern that the association had already shown at that stage.

In an attempt to show that there had not been an undue delay, the association argued that the date from which the 180 day period began was the day that the IRBA provided reasons for the second decision. The court did not accept this argument. Instead, the court found that, even if its principal finding was incorrect, the time it took to launch the application was still unreasonable and the application should have been launched after the date of the second decision. It is common cause that the association waited until the very last day permissible to request reasons for the second decision. It is further common cause that the review application was launched 14 months after the date of the second decision and 179 days after the reasons for the second decision were provided by the IRBA.

Ultimately, the court found the association had not discharged the onus of showing why the application was not launched outside of a reasonable period and this issue was decided in favour of the IRBA. The court was further unconvinced that there was any justifiable reason for the delay.

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PREJUDICE TO THE IRBA

Apart from the unreasonable delay, the IRBA raised the issue of actual prejudice (if the review application were to be granted) in that audit firms and entities who may be affected by the MAFR have already started adjusting their affairs in anticipation of the enforcement of the rule. In fact, the IRBA pointed out that 38% of JSE-listed entities had already implemented the MAFR principles and the initiative had been widely accepted by the profession as a whole. The IRBA argued that the uncertainty caused by the belated attack on the validity of the rule and the transformatory impact of it caused substantial prejudice to the IRBA, which outweighed the issues raised by the association in challenging the decisions.

PROSPECTS OF SUCCESS OF THE REVIEW APPLICATION

Having found that there was an undue delay, the court moved on to assess the prospects of success of the review application as well as the public interests, if any, that were involved in the matter. Such an assessment was necessary for determining whether the undue delay could be condoned. The court found that such condonation could not be granted. The court found that the association's contentions mounted against the IRBA could not overcome the former's own failures, as outlined above.

Ultimately, the court refused to entertain the review application, and dismissed it with an order as to costs, including the costs of two counsel. The association has taken this judgment on appeal to the Supreme Court of Appeal (SCA), its application for leave to appeal having been dismissed by the High Court. Whether the SCA will grant the association direct access for the leave to appeal is a matter of pure speculation at this point.

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