# 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: 2 DECEMBER 2021

SIGNATURE

In the matter between:

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| **EAST RAND MEMBER DISTRICT OF CHARTERED ACCOUNTANTS** | First Applicant |
| **JAROSLAV CERNY** | Second Applicant |

and

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| **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 |
| **MINISTER OF FINANCE** | Fourth Respondent |

# JUDGMENT

*This matter has been heard on a virtual platform and disposed of in the 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

In 2016 the Independent Regulatory Board for Auditors (IRBA) resolved to introduce a Mandatory Audit Firm Rotation regime in South Africa. This decision was refined and a final rule in this regard was promulgated in 2017. The East Rand Members District of Chartered Accountants and another accountant in his personal capacity as second applicant, seek to have the decision(s) whereby the regime was implemented, reviewed and set aside. This resulted in the present application and the delivery and exchange of papers exceeding 5 500 pages.

[2] The Mandatory Audit Firm Rotation regime (the MAFR)

2.1 The IRBA's deponent points out in her answering affidavit that "*various scandals, the details of which appear from the record, have hit the audit profession, both locally and internationally. The majority of these have received considerable news coverage, including those involving Enron (in the United States of America), Fidentia, KPMG, African Bank, Steinhof and VBS (in South Africa). Most of those involve audit failures in the largest scale*".

2.2 The IRBA is a national public entity established in terms of the Auditing Profession Act 26 of 2005 (the APA).

2.3 Section 2 of the APA, apart from the establishment of the IRBA, provides that the objects of the APA are, inter alia, to improve the development and maintenance of internationally comparable ethical standards, to advance the implementation of appropriate standards of competence and good ethics in the auditing profession and to protect the public by regulating audits performed by registered auditors.

2.4 The functions of the IRBA are formulated in section 4 of the APA in a fashion seeking to achieve the objects of the APA. It includes the obligation to take steps to promote the integrity of the auditing profession by, not only monitoring and prosecuting improper conduct, but by taking "*steps it considers necessary to protect the public in their dealings with registered auditors*" (section 4(1)(b)) and by prescribing "*standards of professional competence, ethics and conduct of registered auditors*" (section 4(1)(c)). In terms of section 4(2)(d) the IRBA is authorised to "*take any measures it considers necessary for the proper performance and exercise of its functions or duties to achieve the objects*" of the APA.

2.5 In terms of section 10 of the APA the IRBA may, by notice in the Gazette prescribe rules in connection with any of the aspects mentioned above but, in terms of section 10(2)(a), before any rule is prescribed, a draft thereof must first be published, calling for public comment thereon in writing within 30 days of publication. Alterations to a proposed rule as a result of such comment, need not be re-published for comment (section 10(2)(b)).

2.6 The IRBA's deponent stated, with reference to a submission made by Omnia Holdings Ltd to the Johannesburg Stock Exchange during 2013,

that since that time already discussions within the audit profession started on the need for regulatory measures such as the MAFR. The following year at various events, both locally and internationally calls for the strengthening of the regulatory environment of the auditing profession were made. This included reports from the World Bank regarding the MAFR, mandatory audit tendering (MAT) and joint audits (JA).

2.7 From 2015, when the World Economic Forum had ranked South Africa as number one out of 148 countries for its auditing standards, the IRBA as the leading regulatory authority for the enforcement of these standards pursued its research in its "Strategic Pillars", being the MAFR, the MAT and JA. The record of proceedings in this application contains findings of such research with reference to academic articles, media releases, examples of global sanctions or audit failures and impact analyses of various measures aimed at strengthening auditor independence, increasing market competition and facilitating transformation of the auditing profession. The MAFR in particular, encompasses all three these elements.

2.8 In furtherance of its research, the IRBA resolved that all audit reports should disclose the number of years which an audit firm had been the auditor of an entity, to enable investors and the public to determine whether there has been a long association between an audit firm and its client. This resulted in the promulgation of an Audit Tenure Rule in December 2015. Since the promulgation of the Audit Tenure Rule, shareholders began appreciating the extent of long audit tenure (which in one extreme case was 114 years). This "shareholders effect" was included in a slide during one of the IRBA presentations referred to hereinlater.

2.9 The IRBA explained that its approach to the investigation of the preferred implementation of its "strategic pillars", followed a three-phase approach:

- Phase 1 entailed an exploratory study into countries that have implemented any or all of the three "pillars";

- Phase 2 entailed a more specific investigation on the measures identified by the IRBA after a presentation of the findings of phase 1 at a workshop held on 16 July 2015;

- Phase 3 entailed a consultative process, undertaken to engage key stakeholders in dialogue. This consultative process took place over the period of a year from the second half of 2015 to the first half of 2016 and concluded on 9 June 2016. The stakeholders engaged included the Competition Commission, the Ministry of Finance, National Treasury, the Financial Services of Board, South African Institute of Chartered Accountants, the South African Reserve Bank, ABASA and African Women Chartered Accountants, Association for Savings and Investment in South Africa, Johannesburg Stock Exchange, Companies and Intellectual Property Commission, Public Investment Corporation, Institute of Directors of South Africa, non-Executive and Executive directors of the top 100 JSE listed companies, the King Committee, the Auditor General of South Africa, Global Public Policy Committee and representatives from the top 15 audit firms in South Africa.

2.10 During July 2016 the IRBA produced a research report, recording the outcomes of the three phases mentioned above.

2.11 On 28 July 2016 the Board of the IRBA, based on the above report, published a "Consultation paper" and approved the MAFR as its preferred

measure. The IRBA refers to this as a "policy decision". This is the first decision which the applicants seek to have reviewed.

2.12 The rationale for having adopted this policy decision, has been recorded as follows: "*The primary consideration of the Board was to weigh which of the options, as a primary solution, would best bring about the application of a "fresh pair of eyes" from a different audit firm to enhance auditor independence, whether real or perceived. As MAT could potentially result in the same firm being appointed indefinitely, MAFR was the viable option*". The board also directed that further consultations should take place "on the implementation of the MAFR".

2.13 On 29 August 2016 the IRBA issued a press statement wherein it announced that it will begin a process to implement the MAFR regime. This was followed by similar further announcements on various media platforms in September 2016. Significantly, this fact had been acknowledged by the applicants in this application.

2.14 On 1 November 2016, the IRBA gave notice of the proposed MAFR rule in the Government Gazette. In the publication, the IRBA invited written comments and provided a link to the Consultation Paper referred to above, which had been re-issued on 25 October 2016. A second notice, quoting the wording of the draft MAFR rule was published on 6 December 2016. This second notice extended the time period for the submission of comments to 25 January 2017.

2.15 Section 7 of the Consultation Paper invited comments on a number of issues, including whether the scope of the MAFR should be extended beyond listed companies to "other entities that operate in the public interest". In the applicants' papers, these entities are also referred to as

PIEs. This accords with the media statement made on 25 September 2016 to be effect that the MAFR requirements "are likely to affect JSE-listed and other public interest entities". Again noteworthy, is that the applicants acknowledged receipt of this media statement.

2.16 The IRBA received no less than 185 comments, seventy of which were from members of the first applicant in this application, including the second applicant.

2.17 Pursuant to the consultation process which concluded in January 2017, a report was prepared for the Board. It, inter alia, referred to the practice in some foreign jurisdictions, such as the Netherlands, India, China, Turkey and Abu Dhabi where MAFR was also made applicable to PIEs as well the comments of stakeholders regarding the inclusion of these entities in the MAFR regime.

2.18 Prior to the Board meeting of 23 March 2017 a "Board pack" was distributed to members of the Board, both in "hard" and in electronic format, which included the abovementioned report.

2.19 At the special Board meeting of 23 March 2017, six of the 7 members of the Board were present. The sixth, Mr Lesejane, had however not signed the attendance register, having arrived a few minutes late.

2.20 During the meeting, the Chief Executive Officer of the IRBA gave a presentation regarding the MAFR regime to the Board. The minutes of the meeting (the compilation, recovery and production of which have caused much delay, interlocutory skirmishes and controversy between the parties in this application, including a big dollop of mud-slinging, particularly

from the applicants) record the following items requiring the Board's consideration regarding the "final decision":

- Scope;
- Term;
- Effective date;
- Cooling-off period;
- Additional provisions;
- Exemptions/concessions if any;
- Phasing-in terms of roll out if any;
- Interim measures.

2.21 The management committee of the Board was also invited to make comments to the Board. The transcript of the meeting recorded the reason for this the following:

> "*... The invite to the directors for today was really so we can get an understanding on where you are at on the MAFR and what are your inputs to the implementation. I think the discussion around the decision on whether MAFR, MAT or joint auditors ... that decision has been made. But what I suspect will come of today's sessions is that we probably my even look at a hybrid. So we may decide that for all public interest entities, we will look at MAFR; for certain industry groups there may be joint audits etcetera ...*" (my emphasis).

2.22 The MAFR was widely supported by the IRBA management and by the Chairperson, who, after his presentation, inter alia, concluded with the

following: "... *I think what has come up key, was the issues around transformation. When we were lobbying various stakeholders, the one thing that did come out was transformation, because transformation has not voluntarily happened in some areas, it is going to be legislated*". This is apparently a reference to the MAFR, which, despite being aimed primarily at enhancing auditory independence, also constitutes a transformatory tool.

2.23 Thereafter the Board proceeded in "closed" session at which the submissions received through the consultation process, including those from the applicants, were discussed and considered. It was as a result of these submissions that the Board decided to include public interest entities (as defined in sections 290.25 and 290.26 of the amended IRBA Code of Professional Conduct for Registered Auditors) in the scope of the MAFR regime. A long list of implementation steps was also minuted, leading up to the full implementation of the MAFR.

2.24 One of these steps included the formal publication of the "final" rule in Government Gazette No 40888 of 5 June 2017.

2.25 As will be seen below, the three decisions targeted by the applicants in their review application are those mentioned in paragraph 2.11, 2.23 and 2.24 above.

[3] <u>The review application</u>

3.1 The applicants, by way of the present review application, seek the following relief in their amended notice of motion:

"1. *Reviewing and setting aside, alternatively declaring unlawful:*

*1.1 the decision by the first respondent ("IRBA") taken on or about 28 July 2016 to introduce mandatory audit from rotation ("MAFR");*

*1.2 the decision by IRBA taken on or about 23 March 2017 or 28 March 2012 on a final rule in relation of MAFR; and*

*1.3 the promulgation of the final rule in relation to MAFR on or about 5 June 2017.*

*2. Ordering the first to third respondents to pay the costs of the application on a scale as between attorney and own client including the costs of two counsel".*

[4] Nature of the review

4.1 In their founding affidavit, the applicants labelled their application as primarily a PAJA-review (after their Promotion of Administrative Justice Act, 3 of 2000) but in the alternative relied on it being a legality review. Their deponent put it as follows:

> *"I demonstrate below that IRBA first took an "in principle" decision to adopt and implement a rule on MARF, without having consulted the public on the decision, then consulted the public on the modalities of the implementation of MAFR ... thereafter took a decision on the specifics of the final rule and thereafter promulgated the final rule. I am advised that separately and in combination, these decisions constitute administrative action (as defined in ... PAJA) because they involve the exercise of public power, adversely affect the rights of members of the public (including the first applicant's members) and have a direct external legal effect. I am moreover advised that even if any of the decisions or the final rule does not*

*constitute administrative action under PAJA, each of them remains reviewable (separately and in combination with each other) in terms of the constitutional principle of legality ...".*

4.2 When the spectre of undue delay in launching the review application was squarely raised by the IRBA, the applicants changed their stance, notably in a belatedly filed "Note of argument" which, after the delivery by the parties in excess of the aforementioned 5 500 pages, became the applicants' actual argument. Therein, the applicants were at pains (even using bold font to capture the court's attention) to state their (new) position to be as follows:

*"The following should be noted ...*

*It is **not** the applicants' case that:*

*1.1 each of the decisions has distinct and separate existence in fact and in law and were thus separately reviewable and ...*

1.2 *the first decision was reviewable as far back as 2016 ...".*

4.3 Whether the decisions referred to individually in the Notices of Motion (initial and amended) were separate decisions or various stages of a single or composite decision (as more forcefully claimed in the applicants' replying affidavits), the applicants were still adamant that it (or they) constitute administrative action.

4.4 For this contention, the applicants referred to the seven components of administrative action as defined in section 1of PAJA as set out in *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) at para 33: *"There must be (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or*

*performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under the listed exclusions*".

4.5 The IRBA labelled its first decision a policy decision (and therefore not an administrative act) and suggested that it did not adversely affect anyone's rights but was an instance of subordinate rule-making.

4.6 In response hereto, the applicants argued that the definition of administrative action in section 1 of PAJA does not require that the litigant who brings the review application must be the person whose rights must be affected for a decision to constitute administrative action, but that it is enough if "any person's rights have been adversely affected". With reference to *Grey's Marine Hout Bay (Pty) Ltd v Minister of public Works* 2005 (6) SA 313 (SCA) at paras 23 and 24, it was argued that the phrase "*adversely affected the right of any person*" should not be interpreted too literally but should be taken to mean that the administrative action "*has the capacity to affect legal rights*". The applicants then further argued that the rights of members of the profession to the proper and lawful regulation of the profession and the legitimate expectations of companies (and other PIEs) enjoyed prior to the MAFR regime to freely (and indefinitely) choose their auditors constitute rights which were adversely affected. The applicants contended that many of their members practice in smaller to medium-sized firms and that the MAFR rule adversely affects those firms who have clients who qualify as PIEs.

4.7 Having regard to these arguments and the seven elements quoted in paragraph 4.4 above, I find that, in the circumstances of this case, the

actions sought to be reviewed indeed constitute administrative action as contemplated in PAJA, despite their quasi-legislative nature. Similar findings had been made in respect of subordinate legislation or regulation in *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA) and *Esau v Minister of Co-operative Governance and Traditional Affairs* 2021 (3) SA 593 (SCA), although this may not always be the case, as pointed out in *Mostert v Registrar of Pension Funds* 2018 (2) SA 53 (SCA).

[5] Undue delay?

5.1 In terms of section 7(1) of PAJA, a review application to court 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, became aware of the action and the reasons for it* ..." (my emphasis).

5.2 It is immediately obvious that more than 180 days have elapsed in respect of each of the three decisions referred to in the applicant's notice of motion. The first decision was on 28 July 2016 and the 180 days period lapsed on 25 January 2017; the second decision was on 23 March 2017 and the 180 day period lapsed around 20 September 2017. The promulgation of the final MAFR rule in the Government Gazette of 5 June 2017 is not actually, in my view, a decision as such but rather a necessary consequence of the second decision but, insofar as the applicants claim that the slight change in formulation of the rule in the publication constitutes a decision on its own, or insofar as it may constitute the final step in a composite process, the 180 day period in respect thereof lapsed around 4 December 2017. The application was accordingly launched just short of two years after the first

decision, 14 months after the second decision and some 11 months after the third decision.

5.3 The applicants can also not claim ignorance of the decisions or lack of knowledge thereof before the expiry of the respective 180 day periods:

5.3.1 After the two announcements of the first decision on 29 August 2016 and 26 September 2016, the second applicant and a Mr John Henning on behalf of the first applicant, met the CEO of the IRBA to discuss the decision. The applicant's founding affidavit says that these two gentlemen "... *mentioned the disruption the MAFR would cause, both to auditors and their clients* ...".

5.3.2 The above meeting further followed the publication of the first decision on 1 November 2016, which the IRBA contends was in compliance with its obligations in terms of section 10(2) of the APA as referred to in paragraph 2.5 above.

5.3.3 It took the applicants three months after the publication of the second decision to ask for reasons. This was apparently done to comply with section 5(1) of PAJA which provides that any person whose rights have been materially and adversely affected may request the furnishing of reasons within 90 days after the decision. No reasons had been requested in respect of the first decision. This is despite the fact that the applicants' case in their founding papers was that "*each of them [the decisions] is unlawful, procedurally unfair and vitiated by irregularities*".

5.3.4 The reasons were provided on 1 December 2017. The application was launched 179 days later.

5.4 Before proceeding further in considering the delays, it must be pointed out that the 180 day period, insofar as the applicants seek to rely on the argument that their application had been launched before the expiry thereof (by one day) after the reasons have been furnished, is not of itself determinative. The 180 day period merely involves the statutory predetermination of the unreasonableness of a delay beyond that period. This does not detract from the fact that a court must still determine whether the delay itself (even if for a period of 179 days, as the applicant argue is the case) was unreasonable or not. As it was put in *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others* [2013] 4 All SA 639 (SCA) at paragraph 26: "... *before the effluxion of 180 days, the first enquiry in applying section 7(1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is pre-determined by the legislature, it is unreasonable per se ...*".

5.5 The one day short of 180 day period calculating backwards from the date of the launching of the review application is therefore of little consequence in this matter. It must still, having regard to the time periods mentioned in paragraph 5.2 above, be determined whether the application was launched without unreasonable delay. For this purpose it is necessary to have regard to the applicant's response to this issue which has squarely been raised by the IRBA.

5.6 The first response is that, contrary to their initial assertions of there actually being three distinct decisions, the applicants in reply contend that the three decisions were part of a composite whole albeit "consisting of a multi-stage decision-making process" (for which purpose they rely on the decision in *Rhino Oil and Gas Exploration SA (Pty) Ltd v Normandien Farms (Pty)*

*Ltd* 2019 (6) SA 400 (SCA) at paragraphs 29 to 33) and that they had therefore been entitled to wait until the conclusion of the process. The further reason why the applicants say they had to wait for the conclusion of the process, was that the MAFR rule has no "external effect" until it was published. The external effect relied on is the fact that section 10 of the APA empowers the IRBA to "prescribe" rules and "prescribe" has been defined in section 1 of the APA as being "prescribed by notice in the Gazette". The argument is then further that "*up until the point of publication, the impugned decisions were internal decisions, without direct, external legal effect and part of a larger multi-stage decisionmaking process*".

5.7 In making the above submission (quoted from the applicants' heads of argument) the applicants blow hot and cold in their arguments: when they sought to characterize the first decision as administrative action (and to justify or assert their *locus standi* to review it) they cast the net of external effects very widely, as described in paragraph 4.6 above and by arguing that the potential affecting of rights, even common-law rights of legitimate expectation, would satisfy the test. When the shoe pinched due to their failure to have taken that decision on review within any reasonable time, it compelled them to argue that that decision did not have any effect until it was followed by the second and third decisions. Their own actions and the facts are, however against the latter proposition: already in December 2016 the applicants were so concerned about the decision to implement the MAFR and how that may impact on the first applicant's members, that they implored the CEO of the IRBA not to proceed therewith. The applicants then already, saw a decision to introduce the MAFR as having been taken. This accords with the IRBA's own views as explained by its chairman as

described in paragraph 2.21 above. That would have been the time to launch a review application.

5.8 What is a prerequisite for the applicants' reviews, is the issue of unreasonableness of a delay to do so. In this case, the unreasonableness is sourced in the consequences of the failure to launch such an application timeously and separately in respect of the first decision: The first decision was published for comment, extensive stakeholder consultations took place (at the expense of time and costs). By the time the second decision came about, all that was left was a decision on the scope and method and date of implementation of the MAFR. Its imminent enforcement was a foregone conclusion since the date of the first decision – and the applicants knew this.

5.9 The case is therefore distinguishable from the circumstances in *Normandien Farms* (above) where it has been held that planning, research, investigation and similar preparatory steps prior to the taking of a decision is not reviewable. In the present case, all those steps were those referred to in paragraphs 2.6 to 2.10 above. Once the preparatory steps, research and reporting had been completed, the decision to implement the MAFR had been taken on 28 July 2016. All that was left, was to obtain comments and do consultations as to whether the MAFR was to be implemented alone or in conjunction with joint audit requirements and its scope. It was therefore wrong and unreasonable for the applicants not to have the first decision separately and timeously reviewed.

5.10 Even if I am wrong in this and even if the applicants may have been entitled to wait until the determination of the scope of the MAFR before reviewing the decision of the IRBA to implement this regime, then the time to do so,

would have been without delay after the date of the second decision. There is no explanation why this was not done.

5.11 And even if the applicants were correct in their contention that they had been entitled to wait until publication of the rule, then one would have expected them to have acted with alacrity thereafter and immediately take steps to have the implementation of the impugned rule reviewed. In view of the long preceding history and their own concerns about how the rule may affect them personally, voiced since the latter part of 2016 already, waiting until the very last day of the permissible 90 day period to request reasons, constitute an undue delay.

5.12 Even if the above delay was not unreasonable in itself, the dilatory conduct is exacerbated when, after having received the reasons, to again delay for almost a full 180 day period before launching their review application. This, I find, does not satisfy the requirements of PAJA to institute review proceedings "without unreasonable delay".

5.13 Dealing with the requirement to launch a review application without unreasonable delay, the Supreme Court of Appeal held as follows in *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA): "*It is important for the efficient functioning of public bodies ... that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule – reiterated most recently by Brand JA in Associated Institutions Pension Fund and Others v Van Zyl 2005 (2) SA 302 (SCA) at 321 is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more importantly, there is a public interest element in the finality of*

*administrative decisions and the exercise of administrative functions*". The learned judges of appeal went on to refer to that court's decision in *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41E – F where public interest considerations and the prejudice thereto were reiterated. This latter judgment predates PAJA and confirms the principal requirement of an absence of undue delay in all matters of this nature. The *Gqwetha* – judgment then continued to find as follows: "*Underlying the latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the public body and those who rely upon its decisions, if the validity of decisions remain uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay ...*".

5.14 In the present instance, apart from the above principle, the IRBA claims actual prejudice 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 the JSE-listed entities had already implemented the MAFR principles and the initiative has been widely accepted by the profession as a whole. The uncertainty caused by the belated attack on the validity of the rule and the transformatory impact thereof is therefore more real even than the potential prejudice referred to in *Gqwetha* (above).

5.15 Insofar as the applicants argue that they did not exceed the 180 day period(s) and that therefore the predetermined unreasonableness created by section 7(1) and as described in paragraph 5.4 above, has not "kicked-in", the *Outa* decision (above) refers to a two-stage enquiry regarding the reasonableness of such a delay as it applied in common law. This involves

the following: "*First, whether there was an unreasonable delay and second, if so, whether the delay should in all the circumstances be condoned*". Although doubt has been expressed whether this common-law enquiry applies in all instances to PAJA considerations of undue delay, I shall in favour of the applicants, conduct such an enquiry.

5.16 As already pointed out above, I found that the delay was unreasonable in the circumstances of this case. The applicants have therefore failed the first stage of the enquiry. Should the dilatory conduct be condoned? That is the second stage of the enquiry.

5.17 Relevant to the second stage of the enquiry, is an evaluation of the applicants' attitude to the time periods. The applicants have ignored the requirement of section 7(1) of PAJA and the whole concept of launching review proceedings "without unreasonable delay". They have in an oversimplified manner, pinned their colours to the 180 day calculation. This was stated in their affidavits and repeated in heads of argument filed on their behalf as follows when they calculated the period from date of the furnishing of reasons on 1 December 2017 as follows: "... *which means they would have had until 30 May 2018 to institute the review application*". They also wrongly contended that the reasonableness of conduct short of 180 days would only be applicable to a legality review (and not to a PAJA review).

5.18 It is probably for this reason that the applicants' explanation of what had happened since 1 December 2017 was dotted with references to various meetings of the first applicant, postponements and the like, still leaving unexplained gaps of some months. This was, apparently, gauging from

counsel's argument and the heads of argument, due to the matter "requiring considerable research and reflection".

5.19 The applicants' attitude to the lapse of time is perhaps best evinced by the applicants' assertion that, due to actual enforcement of the MAFR only in 2023, the matter "is not time-sensitive" (paragraph 73 of the initial heads of argument, with reliance on the replying affidavits). This attitude not only loses sight of the principles regarding the absence of reasonable delay set out above, but displays a callous disregard for the rights of the remainder of the industry and its clients who, in many instances, would have to go through a tender or selection processes prior to 2023 in order to ensure adequate audit rotation (including issues of transformation).

5.20 In *Associated Pension Funds* (above) the duty of an applicant in applications such as this one, was found to be a "*duty ... not to take an indifferent attitude but rather to take all reasonable steps available to them to investigate the reviewability of administrative decisions adversely affecting them as soon as they are aware of the decision. These considerations are, in my view, also reflected in both section 7(1) of PAJA and in the provisions of section 12(3) of the Prescription Act 68 of 1969. Whether the applicants in a particular case have taken all reasonable steps available to them in compliance with their duty, will depend on the facts and circumstances of each case*". Our courts have, however, repeatedly found that one should not ignore failures of duty which results in delays which may have adverse consequences for other parties. See: *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) and *Mostert N O v Registrar of Pension Funds* (above).

5.21 Having already found that the delay itself was unreasonable, due to the timing thereof, I further find that the applicants have failed in their duty to launch the review application timeously, which caused the unreasonable delay. They have not taken "all reasonable steps available to them" as required by law.

5.22 This failure and the almost cavalier attitude to the lapsing of time alone, should disqualify the applicants' delays from being condoned. Is there such a glaring prospect of success on the merits or any other public interest involved that, dispite the applicants' failure to comply with their duties, condonation should in any event be granted? In my view, not. I have scrutinised the thousands of pages filed of record as well as the heads of argument and carefully listened to extensive argument presented, particularly on behalf of the applicants, and could not find a proverbial "smoking gun". All the contentions were meticulously met and are, on a best case scenario for the applicants, highly contestable, particularly when the Plascon-Evans rule is applied in respect of the substantial answer given by the IRBA. For these reasons I find it unnecessary to traverse the contentions, including the attacks on the IRBA and its staff, the record and even the attempted application to strike out the IRBA's defence. None of the aspects raised were sufficiently weighty to overcome the failures referred to above so as to justify the granting of condonation. Significantly, the applicants have themselves not even asked for such condonation.

[6] Conclusion

The conclusion is therefore that the applicants have failed to satisfy the requirements of Section 7(1) of PAJA and this court therefore declines to entertain the review application.

[7] Costs

I find no cogent reason why costs should not follow the event.

[8] Order

The application is refused with costs including costs of two counsel.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 10 August 2021

Judgment delivered: 2 December 2021

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 1st to 3rd 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 4th Respondent.