HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 46856/13

(1)	REPORTABLE: Yes
(2)	OF INTEREST TO OTHER JUDGES: No.
(3)	REVISED.

23-12-2016 P. H. Weyer
DATE SIGNATURE

In the matter between:

LOUIS EDWARD DEFRIES	Applicant

and

THE INDEPENDENT REGULATORY BOARD FOR AUDITORS	First Respondent
ISAAC VINCENT MALEKA SC N.O.	Second Respondent
LUCIEN XAVIER PIERCE N.O.	Third Respondent
RENE AMBER VAN WYK N.O.	Fourth Respondent
HUSSAN GOGA N.O.	Fifth Respondent
HORTON GRIFFITHS N.O.	Sixth Respondent
CHARLES FRANCIS REID N.O.	Seventh Respondent

Case Summary: **Administrative Law - Promotion of Administrative Justice Act 3 of 2000 – Application to review and set aside decision by disciplinary committee of the Independent Regulatory Board for Auditors – committee found senior accountant and auditor guilty on four charges of improper conduct, and sanctions were imposed upon him - Jurisdictional challenge that the committee did not have power to conduct disciplinary hearing in respect of complaint, because applicant not acting *qua* registered auditor in performing functions as court appointed liquidator under a divorce order, dismissed - Although degree of deference is afforded to a decision-maker, its decision will be reviewed if it is one that a reasonable decision-maker could not reach – committee rendered a decision that is not rationally connected to the information before it and so unreasonable that no reasonable decision-maker would have made it as a result of errors of law and other errors - each finding of guilt and the sanctions imposed reviewed and set aside - Would serve no purpose to remit matter to committee – also not fair and practical – time lapse of about eight years from time of complaint to judgment of this court – Unsuccessful special litigant litigating in course of fulfilling its statutory duties and acting in public interest ordinarily not mulcted in costs - no special circumstances warranting adverse costs order against Independent Regulatory Board for Auditors.**

JUDGMENT

MEYER J

[1] This is an application in terms of s 7 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) to review and set aside a decision by a disciplinary committee of the first respondent, the Independent Regulatory Board for Auditors (IRBA), issued on 28 June 2013, in terms whereof the applicant, Mr Louis Edward Defries, a senior accountant and auditor, was found guilty on four charges of improper conduct. Mr Defries also seeks the review and setting aside of the sanctions which the committee imposed upon him pursuant to finding him guilty.

[2] IRBA was established in terms of the Auditing Profession Act 26 of 2005 (the Act) (s 3) and its functions include taking steps to promote the integrity of the auditing profession by investigating alleged improper conduct, conducting disciplinary hearings and imposing sanctions for improper conduct (s 4). 'Improper conduct' is defined to mean any non-compliance with the Act or any rules prescribed in terms thereof or any conduct prescribed by notice in the Government Gazette as constituting improper conduct (s 1). IRBA, in terms of the powers granted to it under the Act, prescribed rules stipulating acts and omissions that constitute improper conduct in 2007 (the old rules) and it replaced those rules with a revised set of rules with effect from 1 January 2011 (the revised rules).

[3] IRBA is required to establish a permanent investigating committee (s 20(2)(e)) and a permanent disciplinary committee (s 20(2)(f)). It must refer a complaint to the investigating committee if it on reasonable grounds suspects that a registered auditor committed an act which may render him or her guilty of improper conduct (s 48(1)(a)), or is of the opinion that a complaint or allegation of improper conduct which has been made against a registered auditor by any person appears to be justified (s 48(1)(b)), or receives a record from a court or report from a regulator to whom it appears that there is *prima facie* proof of improper conduct on the part of a registered auditor (s 48(2)(c)). The function of the investigating committee, in turn, is to investigate complaints referred to it by IRBA (s 48(3)) and it must, after the conclusion of the

investigation, submit a report stating its recommendations to IRBA (s 48(7)). If it recommends that sufficient grounds exist for a charge of improper conduct to be preferred against such a registered auditor then IRBA must charge the auditor with improper conduct, furnish a charge sheet to the auditor (s 49(1) and (2)) and refer the charge sheet and any plea delivered to the disciplinary committee, which must conduct a disciplinary hearing (s 49(5)). The disciplinary committee must decide whether the auditor is guilty as charged of improper conduct (s 51(1)(a)) and, if it finds the auditor guilty, impose one or more of the sanctions set out in s 51(3)(a). No appeal, internally or externally, lies against the decision of the disciplinary committee. The second to seventh respondents were the members of the disciplinary committee which decided that Mr Defries was guilty of four charges of improper conduct and, as a result, imposed certain sanctions on him (the committee).

[4] Twelve charges of improper conduct were preferred against Mr Defries by IRBA (as pro-forma complainant). They all relate to the execution by Mr Defries of his duties as court-appointed receiver and liquidator of the joint estate of Dr Aubrey Maxwell Goldman and his wife, Mrs Maureen Goldman, who had been engaged in divorce proceedings, and were brought against Mr Defries after Dr Goldman had lodged a complaint against him.

[5] Dr and Mrs Goldman had been married in community of property for 40 years when their marriage broke down and divorce proceedings were instituted. Dr Goldman was a very wealthy man at the time of the divorce, with the joint estate valued at between R80 and R110 million. The relevant assets for purposes of this application included the old JSE building in Diagonal Street, Johannesburg (the old JSE building), which is an asset owned by Valortrade 116 (Pty) Ltd (Valortrade). The old JSE building was valued by the City of Johannesburg at R97,6 million in 2007, which building Mr Defries described as the 'jewel in the crown' of the joint estate. It was managed for a time by Hostprops 85 (Pty) Ltd (Hostprops). There was cash in the amount of approximately R18 million, which was repatriated from Switzerland by Dr Goldman at the beginning of 2003 on the instruction of the South African Reserve Bank (the repatriated funds). The joint estate owned a residential property at 44 Coronation Road, Sandhurst (the Sandhurst property), which property fetched an auction price of R17,5 million in 2005. It also owned four motor vehicles, a Rolls Royce and three Mercedes Benz cars (the cars).

[6] The divorce proceedings were acrimonious and lasted for several years, resulting *inter alia* in the appointment by the court of a referee, Mr Alistair Bruce, to locate and value the assets of the joint estate. The marriage was terminated by a decree of divorce on 14 March 2001, incorporating an agreement of settlement (the divorce order). In terms of the divorce order, Dr and Mrs Goldman were to agree on the appointment of a person to divide the joint estate, failing which a person was to be appointed by the Executive President of the South African Institute of Chartered Accountants. The appointed person was to have the powers set out in annexure 'A' to the divorce order. The appointment of Mr Bruce was extended for a number of months to enable the parties to settle the division of the joint estate, but they were unable to do so and, with effect from 2 July 2003, Mr Defries was appointed by the Executive President to act as receiver and liquidator of the joint estate.

[7] Mr Defries thus is a court appointed receiver and liquidator to divide the joint estate of Dr and Mrs Goldman between them. He was appointed in the context of their matrimonial dispute. The divorce order defines his role and status, his powers and obligations. Clause 5 of annexure A to the divorce order provides as follows:

'The Liquidator is hereby appointed in the joint estate of the above Plaintiff [Mrs Goldberg] and Defendant [Dr Goldberg], to realise the whole of the joint estate, movable and immovable, and for that purpose to sell them or any part of them by public auction or private agreement, as may seem most beneficial, with leave to both parties to bid; to collect debts due to the joint estate unless the same be disposed of by sale, to deal with such assets in his discretion, including freezing of any accounts, to pay and/or allocate the liabilities of the joint estate, to prepare a final account between the Plaintiff and Defendant and to divide the assets of the joint estate after payment of its liabilities in accordance with the account.'

[8] The powers of Mr Defries as receiver and liquidator include the powers 'to distribute and allocate the movable assets of the joint estate between [Dr Goldman] and [Mrs Goldman] and he will not be obliged to realise/sell the assets of the joint estate' (clause 6.9), to 'institute action against [Dr Goldman] and [Mrs Goldman], or any other person, to obtain possession of the assets of the joint estate or the proceeds thereof, or any assets acquired in substitution thereof, and in order to finalize the division of the joint estate' (clause 6.12), and 'to apply to this Court for any further directions that he shall or may consider necessary' (clause 6.23) and the obligations 'to give both parties a first right of refusal for a period of 10 (ten) Court days to purchase

any assets of the joint estate on the same terms and at the same price as they are able to obtain from any *bona fide* third party' (clause 6.20) and to 'prepare such interim and/or final accounts between the parties as he may deem necessary from time to time, and in preparing the final account he shall divide the assets of the joint estate after payment of any liabilities thereof . . .'.

[9] The evidence establishes overwhelmingly that Dr Goldman was intent on ensuring that Mrs Goldman did not receive her rightful share of the former marital joint estate. Dr Goldman, in the words of counsel who appeared for IRBA, Mr JPV McNally SC, 'was obstinate, obdurate and would not co-operate with any party seeking to realise assets of the joint estate'. From the outset and over the following five years, Dr Goldman adopted an extremely obstructionist and litigious stance towards Mr Defries. Between 2003 and 2009, Mr Defries and Dr Goldman litigated against one another on numerous fronts in relation to the execution by Mr Defries of his duties as receiver and liquidator. Mr Defries succeeded in all these proceedings that had thus far been finalised. The ineluctable inference is that Dr Goldman was resolved to ensure that there would be no progress made by Mr Defries. During Mr Defries' administration of the estate, Dr Goldman never relinquished control of the estate assets, other than the cars, the share certificates and the repatriated funds.

[10] Prior to accepting his appointment, Mr Defries met with Mr Bruce and he reviewed Mr Bruce's first and second interim reports, dated 8 November 2002 and 31 January 2001, replete with the history of Dr Goldman's obstruction. The reports *inter alia* identified the assets of the joint estate, except for further banking accounts and investments which might be held overseas, and included valuations. The financial information in respect of the corporate entities as well as the Aubrey Goldman Family Trust, in the form of financial statements up to 2003 (and, in respect of Valortrade up to 2004), was made available to Mr Defries during 2004 by Dr and Mrs Goldman's accounting experts, Messrs Jan and Schalk Strydom. Messrs Strydom were also available to discuss any aspect of the financial information in respect of the corporate entities and trust with Mr Defries.

[11] Mr Defries expended a great deal of effort in procuring control and possession of the cars, including specifically requiring their delivery in an application to this court in 2004 to which I return. By May 2005, Mr Defries obtained control of the cars and

he had them stored at Park Village's premises from 2005 onwards. He informed Dr Goldman in 2005 of his decision to sell the cars by public auction. Dr Goldman wished to purchase them. The cars were, however, not realised, and remained stored at Park Village. The joint estate has incurred storage costs of about R143 749.00 from 2005 to June 2009. Despite his endeavours, Mr Defries could not obtain the relevant registration papers from Dr Goldman, which Dr Goldman conceded he had in his possession, and none of the cars even appeared on the NATIS system. Mr Bruce received four valuations for the cars from the respective experts of Dr and Mrs Goldman, but the values in each valuation were materially different and the descriptions of the cars also differed. Mr Defries obtained further valuations from Park Village that again differed from the other valuations. Park Village established the value of the Rolls Royce at R60 000, while the Bruce Report valued it at R200 000 and Dr Goldman considered it to be worth R300 000. Mr Defries attempted to engage with Dr Goldman to resolve these material discrepancies, writing him letters in July and August 2005 and again in February 2008, but Dr Goldman never responded. Mr Defries also issued a notice in terms of rule 35(12) of the Uniform Rules of Court calling on Dr Goldman to provide documents relating to the cars, but Dr Goldman did not respond to the notice either.

[12] Mr Defries only obtained possession of the share certificates and share transfer forms in respect of the joint estate shares in each of the relevant corporate entities, including Valortrade and Hostprops, by May 2005 once he had obtained an order for their delivery to him in an application to this court to which I return. Dr Goldman, however, refused to place Mr Defries in possession or control of the companies. Valortrade incurred substantial tax liabilities (more than R6,5 million) and was unable to obtain a tax clearance certificate which was essential for it continuing to lease out the old JSE building to government tenants. Several requests were addressed to Mr Defries by Dr Goldman and his legal representatives for the joint estate to satisfy the tax liability before tax penalties and interest were incurred. Dr Goldman adopted the stance that Mr Defries ought to settle these outstanding liabilities with joint estate funds. Valortrade had to cease doing business and the leases were transferred to Hostprops, the shares of which entity was also considered to be owned by the joint estate until Dr Goldman in 2005 in *volte face* claimed that they were not.

[13] Mr Defries *inter alia* appointed Mr Trakman, a liquidator, to assist him in the operational aspects of the liquidation. He also appointed attorneys. In 2003 Dr Goldman objected to Mr Defries appointing advisors to assist him in the fulfilment of his duties as receiver and liquidator. Mr Defries, therefore, launched an application in 2004 for this court to determine his powers under the divorce order. Mr Defries also sought, in the same application, orders directing Dr Goldman to hand over the share certificates of the various companies in which he held shares, to permit access of the Sandhurst property, one of the main assets of the joint estate, to potential purchasers and for the delivery of the cars (the 2004 application). Dr Goldman opposed the 2004 application and brought a counter-application, in which he sought the dismissal of Mr Defries as liquidator (the 2004 counter-application). Mr Defries was successful in the application and in his opposition to the counter-application. An order was granted by Woodward AJ, on 14 December 2004, inter alia ordering Dr Goldman to pay 80% of the costs of the application and the costs of the counter-application on the scale as between attorney and own client (the Woodward AJ order).

[14] In her judgment, Woodward AJ said that-

'. . . there is little in the voluminous correspondence that persuades me that the attitude of [Dr Goldman] has been reasonable or that he truly intends [Mr Defries] to carry out his mandate. On the contrary there appears to be merit in the complaints of [Mr Defries] that his ability to carry out his mandate has been frustrated by the approach and the conduct of [Dr Goldman] (albeit that, or perhaps because he acted under the advice of his attorney).'

[15] By May 2005 Mr Defries was also given access to the Sandhurst property, only to the extent that it was necessary to dispose of it. Mr Defries had offered the Sandhurst property for sale by public auction and received an offer to purchase the property for R17 million. In August 2005, Dr Goldman launched an application to prevent Dr Defries from realising the Sandhurst property (the Sandhurst application). Clause 6.20 of annexure A to the divorce order provides that Dr Defries is obliged to give Dr and Mrs Goldman a first right for a period of ten days to purchase any asset of the joint estate on the same terms as the offer he had received. When Dr Defries notified Dr and Mrs Goldman of the offer he had received, Dr Goldman claimed that in terms of clause 6.20 he had a right to offer to pay one half the purchase price, because he was the owner of the other half by virtue of his share in the joint estate, and for such indebtedness to be discharged by set-off. Mr Defries disputed his claim and Dr

Goldman then launched the Sandhurst application to obtain an order confirming his interpretation of clause 6.20. In December 2008, Nicholls AJ dismissed the Sandhurst application and ordered Dr Goldman to pay the costs of thereof.

[16] In her judgment, Nicholls AJ said that-

'. . . for several years [Mr Defries] has been attempting to realise cash for the joint estate by selling the property. [Dr Goldman] has done everything possible to thwart him in his endeavour.'

and-

'[Mr Defries], with some justification, accuses [Dr Goldman] of adopting a course of conduct designed to frustrate him in realising the assets of the joint estate for the purpose of gaining a financial advantage.'

In June 2009, Dr Goldman applied for, and was granted, leave to appeal the Nicholls AJ order. The appeal lapsed in December 2009.

[17] In 2005, Dr Goldman, contrary to his earlier acknowledgment, disputed that the shares he held in a number of companies (including the Valortrade and Hostprops shares) formed part of the joint estate. He then claimed that the shares in Valortrade and Hostprops were owned by the Aubrey Goldman Family Trust. The issue that arose regarding the ownership of the shares resulted in Mr Defries launching an application to confirm that the shares were owned by the joint estate and that he was entitled to wind up the companies to realise the estate. Mr Defries launched this application as a counter-application to the Sandhurst application (the shares counter-application). By agreement, the shares counter-application was referred to trial. Mr Defries delivered a declaration in September 2008 (the shares action). It was enrolled for trial in October 2009, but postponed after Dr Goldman had delivered notice on 23 September 2009 of his intention to amend his plea and institute a counterclaim.

[18] In September 2006, Dr Goldman caused Valortrade to institute an action against Mr Defries and himself in relation to the repatriated funds. Valortrade claimed that it was the owner of the repatriated funds and sought payment of the funds from the joint estate or an order against Mr Defries personally for payment of a certain amount and interest (the Valortrade action). The Valortrade action has not yet been finalised.

[19] Dr Goldman did not only withhold the joint estate from Mrs Goldman, but he also failed to maintain her. She, therefore, requested a subsistence allowance from

Mr Defries, but he insisted that she bring an application to court before he would provide her with such an allowance. Paragraph 10 of the Woodward AJ order in the 2004 application reads thus:

'Empowering [Mr Defries] to make advance partial payments of cash in the joint estate to either [Dr Goldman or Mrs Goldman] as considered appropriate by [Mr Defries] from time to time, provided only that [Mr Defries] is satisfied that the release of such cash will not adversely affect the ability of the joint estate to meet any liability.'

[20] Mr Defries tendered to make a direct payment of up to R2 million for the purchase of a property by Mrs Goldman and also a monthly release of funds to enable her to meet her normal needs, subject to Mrs Goldman providing him with a full and appropriate submission of her needs. This offer was contained in Mr Defries' letter to Mrs Goldman's attorney at the time, dated 19 July 2005. Mrs Goldman's attorney refused the offer, because, according to Mr Defries, he did not wish for funds to be released directly to the seller of the property, but only through him.

[21] Mrs Goldman's request was for a subsistence allowance in the form of a lump sum payment of between R3 – 5 million plus a monthly allowance of approximately R31 000.00. Mr Defries informed her attorney that he required 'far more information about the present financial situation' of his client, including the assets under her control, her current income and means of maintenance and what her accommodation needs were. Upon being provided with such submission, he notified Mrs Goldman that a 'full and appropriate submission as if you were dealing with an application under Rule 43 of the Rules of Court, setting out precisely what Mrs Goldman's monthly income is, and precisely what are her reasonable needs and what monthly expenditures she has in order to continue her way of life' was required to consider any subsistence allowance to meet Mrs Goldman's living expenses. An affidavit to this effect was provided to him in early 2006, and, according to Mr Defries, drafted in such a manner as to convey that if he did not accede to the requests or demands set out therein, Mrs Goldman would apply to court for an order compelling him to do so. On receipt of this affidavit Mr Defries' attorney advised Mrs Goldman's attorney that, in order to adequately protect Mr Defries, an application ought to be served formally on him and on Dr Goldman and she should make application to court for such an order. Mrs Goldman never launched such an application.

[22] Dr and Mrs Goldman concluded a settlement agreement in relation to the joint estate, which agreement was signed on 17 August 2009. In terms of the settlement agreement they 'released' Mr Defries from his duties as liquidator, but subject to certain obligations they sought to impose on him. Because he had been appointed by this court and because he did not agree with the conditions sought to be imposed on him, Mr Defries requested Dr and Mrs Goldman to apply to court for his release as receiver and liquidator. When they failed to bring the application, he launched one in May 2011 (the release application). Dr Goldman opposed the release application, and it is yet to be determined by this court .

[23] Other than a schedule of payments that he had made from the repatriated funds which was made available to Dr and Mrs Goldman at the offices of Mr Defries' attorneys and an account of his administration of the joint estate from 2 July 2003 to 15 May 2011, which forms part of the release application, Mr Defries did not prepare any interim or final account between the parties. He took legal advice on the issue and believed that the divorce order, properly interpreted, did not require him to furnish an interim account. But all his disbursements were accounted for.

[24] In November 2008, Dr Goldman submitted a complaint against Mr Defries to IRBA. Mr Defries responded and Dr Goldman replied on 4 February 2010. In September 2011, IRBA decided to refer the charges against Mr Defries to the committee. IRBA delivered a charge sheet or schedule of charges on 18 November 2011, which was subsequently amended. The hearing took place during March 2012 and continued in January 2013. The committee delivered its decision on 28 June 2013 and a revised one on 9 July 2013.

[25] The committee found Mr Defries guilty of contravening: (a) rules 2.1.5, 2.1.20 and 2.1.21 of the old rules up to 31 December 2010 and rules 2.6, 2.7 and 2.17 of the revised rules after 1 January 2011, by failing to realise the joint estate, and to reasonably deal with its assets, including the shares in Valortrade and Hostprops, the cars and the Sandhurst property (charge one); (b) rules 2.1.5, 2.1.20 and 2.1.21 of the old rules up to 31 December 2010 and rules 2.6, 2.7 and 2.17 of the revised rules after 1 January 2011, by failing to act with appropriate care and diligence to ensure that the Valortrade shares and the cars maintained their value (charge two); (c) rules 2.1.5, 2.1.20 and 2.1.21 of the old rules up to 31 December 2010 and rules 2.6, 2.7 and 2.17

of the revised rules after 1 January 2011, by failing to furnish an interim account to the parties when he had a legal duty to do so under the divorce order (charge three); and (d) rules 2.1.2, 2.1.5, 2.1.20 and 2.1.21 of the old rules up to 31 December 2010 and rules 2.2, 2.6, 2.7 and 2.17 of the revised rules after 1 January 2011, by failing to provide Mrs Goldman with a subsistence allowance from the joint estate, when he had the power to do so in terms of paragraph 10 of the court order granted by Woodward AJ, and requested to do so by Mrs Goldman (charge ten).

[26] Thus, presently relevant are rules 2.1.2, 2.1.5, 2.1.20 and 2.1.21 of the old rules and rules 2.2, 2.6, 2.7 and 2.17 of the revised rules. The acts or omissions which rule 2 of the old rules proscribe as constituting improper conduct, include those of 'any practitioner'-

'. . . if he/she-

. . .

2.1.2 contravenes or fails to comply with any provision of any other Act with which it is his/her duty to comply in his/her capacity as accountant and auditor to an undertaking or in doing work of a type commonly performed by a registered accountant and auditor;

. . .

2.1.5 without reasonable cause or excuse, and subject to the proviso to section 20(8) of the Act, fails to perform any work or duties commonly performed by a practitioner with such a degree of care and skill as in the opinion of the Board may reasonably be expected, or fails to perform the work or duties at all;

. . .

2.1.20 without reasonable cause or excuse, contravenes or fails to observe any of the provisions of the Code; or

2.1.21 conducts him/herself in a manner which is improper or discreditable or unprofessional or dishonourable or unworthy on the part of a practitioner or which tends to bring the profession of accounting into disrepute.'

[27] Rule 2 of the revised rules inter alia provides that-

'. . . a registered auditor shall be guilty of improper conduct if such registered auditor without reasonable cause or excuse-

. . .

2.2 contravenes or fails to comply with any provision of any other Act with which it is the registered auditor's duty to comply in providing professional services;

. . .

2.6 contravenes or fails to comply with any requirements in the Code;

2.7 fails to perform any professional services or duties with such a degree of professional competence, due care and skill as in the opinion of the Regulatory Board may reasonably be expected, or fails to perform the professional services or duties at all;

. . .

2.17 behaves in a manner which tends to bring the auditing profession into disrepute.

. . .'.

[28] On 10 March 2014, the proceedings before the committee resumed for the imposition of sanctions. The proceedings were postponed to 26 June 2015. The committee considered the findings of guilt in respect of charges two, three and ten to be less serious than the finding of guilt on charge one. It considered a fine of R75 000.00 to be appropriate in respect of charge one, and one of R50 000.00 in respect of each of the other charges. The penalty imposed is the following:

(a) 'Mr Defries is ordered to pay the fine of R225 000.00.'

(b) 'Mr Defries is directed to pay a cost contribution in the sum of R400 000.00.'

(c) 'The name of Mr Defries, but not the name of the firm in which he practices, together with the summary of the charges preferred against him, the finding of guilty made by the Committee and the sentence imposed on him be published in IRBA news or an equivalent publication.'

Mr Defries has delivered an amended notice of motion and supplementary affidavit in which he also seeks the review and setting aside of the sanctions on the grounds that the findings of guilt are to be reviewed and set aside. There is no dispute that the committee's decision is reviewable under PAJA.

[29] Rules 2.1.2, 2.1.5, 2.1.20 and 2.1.21 of the old rules and rules 2.2, 2.6, 2.7 and 2.17 of the revised rules are in substance similar and I accordingly need not to consider whether the revised rules found any application in this matter. On charges one, two, three and ten the committee, in essence, found Mr Defries guilty that he, without reasonable cause or excuse, failed to perform his duties with such a degree of care and skill as might reasonably be expected or that he failed to perform his duties at all, that he contravened or failed to observe any provision of the Code, that he conducted himself in a manner that is improper or discreditable or unprofessional or dishonourable or unworthy on his part or which tends to bring the profession of accounting or auditing into disrepute. On charge ten, Mr Defries was also found to have contravened or failed to comply with any provision of any other Act with which it was his duty to comply.

[30] A most unsatisfactory feature of the committee's judgment and order is that the committee failed to indicate, in respect of each finding of guilt, which of the alternative acts or omissions listed in rules 2.1.5 and 2.1.21 of the old rules and rule 2.7 of the revised rules, Mr Defries was found to have committed. Also, there is no indication of which provisions of the 1997 Code of Professional Conduct, referred to in rule 2.1.20 of the old rules, and the 2011 Code of Professional Conduct referred to in rule 2.6 of the revised rules, Mr Defries was found to have contravened or failed to observe. Moreover, in convicting Mr Defries on charge ten, the committee found that he failed to provide Mrs Goldman with a subsistence allowance when he had the power to do so in terms of paragraph 10 of the Woodward AJ order. He was not found to have contravened or failed to have complied with any provision of any other Act as envisaged in rule 2.1.2 of the old rules and rule 2.2 of the revised rules. Yet, he was also found guilty for having contravened these two rules. I also agree with Mr A Subel SC, who appeared with Mr Rudolph for Mr Defries, that the decision of the committee is not reasoned and essentially sets out its conclusions.

[31] Mr Defries contends that the committee, in arriving at its decision, exceeded its jurisdiction, was materially influenced by errors of law, took into account irrelevant considerations and failed to take into account relevant ones. The result of these errors and irregularities, so he contends, was that the committee rendered a decision that is not rationally connected to the information before it, that is arbitrary and so unreasonable that no reasonable decision-maker would have made it.

[32] Section 6 of PAJA provides that administrative action may be judicially reviewed if the action is not authorised by the empowering provision (s 6(2)(f)), the action was materially influenced by an error of law (s 6(2)(d)), the action was taken because irrelevant considerations were taken into account or relevant considerations were not considered (s 6(2)(e)(iii)), the action was taken arbitrarily (s 6(2)(e)(iv)), the action was procedurally unfair (s 6(2)(c)), the action is not rationally connected to the information before the administrator (s 6(2)(f)(ii)(cc)) and the exercise by the administrator of the power or the performance by the administrator of the function authorised by the empowering provision is so unreasonable that no reasonable person could have so exercised the power or performed the function (s 6(2)(h)).

[33] An error of law is material if it affects the outcome of the decision, in other words if the decision-maker would not have reached the same decision if he had not made the error of law. (See *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC), para 91.) A decision may be set aside where it is made ignoring facts that are material to the decision, where such facts are uncontentious and objectively verifiable. (See *Dumani v Nair and Another* 2013 (2) SA 274 (SCA), paras 29-32.)

[34] Although a degree of deference must be afforded to the decision-maker, in this instance the committee, its decision will be reviewed if it is one that a reasonable decision-maker could not reach (*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC), para 44). O'Regan J continues to say the following about what will constitute a reasonable decision and about judicial deference:

'[45] What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.

[46] In the SCA Schutz JA held that this was a case which calls for judicial deference. In explaining deference he cited with approval Professor *Hoexter's* account as follows:

'(A) judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention. Above all, it

ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.'

(Footnotes omitted.) Schutz JA continues to say that '[j]udicial deference does not imply judicial timidity or unreadiness to perform the judicial function'. I agree. The use of the word 'deference' may give rise to misunderstanding as to the true function of the review Court. This can be avoided if it is realised that the need for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself.'

[35] The jurisdictional challenge, raised by Mr Defries, is that the committee did not have the power to conduct a disciplinary hearing in respect of Dr Goldman's complaint against him, because Mr Defries was not acting in the capacity of a registered auditor in performing his functions as a court appointed receiver and liquidator under the divorce order. Mr Defries argues that there are limits to the powers of IRBA to prescribe any conduct it deems fit as 'improper conduct' and, since no guidance is provided in the Act itself as to the nature of the conduct which may be prescribed as improper conduct, the rules pertaining to misconduct must be interpreted in the light of the objects of the Act, which include the protection of the public, investors and the profession, and applicable principles. Reliance is placed on *Incorporated Law Society, Transvaal v Mandela* 1954 (3) 105 (T), at 107B-108F, for the proposition that it is in general only misconduct committed by an auditor in his professional capacity as auditor that can form the subject of disciplinary action. To this must be added, so it is argued, misconduct by an auditor other than in his professional capacity as auditor which is of such a nature so as to render him unworthy and dishonourable and accordingly not fit to be trusted to protect the interests of the public at large, clients and investors.

[36] This jurisdictional challenge was also raised before the committee, which found Mr Defries subject to its jurisdiction for the following reasons. First, Mr Defries was appointed as liquidator having regard to his professional qualifications and expertise as a practising chartered accountant and he was nominated on this basis. Second-

'. . . , in the performance of his functions and duties as a liquidator, Mr Defries was required to display a degree of professional competence, due care and skill which is required and expected of a chartered accountant. After all, that is the very expertise that predicated the basis of his appointment. The old Code and the revised Code of IRBA make it clear that

liquidation work falls within the scope and ambit of professional services regulated in terms thereof.'

Third, even if an auditor is appointed to act as a liquidator by an order of court, such appointment, through a court, does not relieve the auditor of the-

'. . . obligation to provide such professional services without regard to the professional standard, care and skill, as well as integrity expected of him or her under the Codes'.

And fourth, the authority relied upon by Mr Defries (*Law Society v Mandela* (supra)) does not oust IRBA's jurisdiction, but rather supports it.

'In that case, the conduct about which The Law Society complained had no bearing at all on the professional capacity or character of the respondent to be and remain as an attorney. In the present proceedings, the conduct of Mr Defries relating to the charges are vitally connected to his expertise which gave rise to the fulfilment of his functions and duties as liquidator.'

[37] I agree with the committee's findings on Mr Defries' jurisdictional challenge. If his position on the committee's jurisdiction were to prevail, it would create the untenable situation that auditors performing professional duties would be exempt from adhering to the standards of conduct expected of auditors (and prescribed under the Act) in all professional pursuits other than the attest function, even where such pursuits are commonly undertaken by auditors as professionals in whom the public reposes trust. IRBA is mandated, in terms of s 4 of the Act, to take steps to protect the public in respect of 'their dealings with registered auditors' and such protection is not limited to the receipt of auditing services *per se*. IRBA is further mandated to 'prescribe standards of professional competence, ethics and conduct of registered auditors.' Mr Defries' position is contrary to the clear provisions of the Act, the Code and the old and revised rules. Each of the rules has its own internal definition of what conduct constitutes misconduct. Mr Defries was appointed as receiver and liquidator *qua* auditor. Dr and Mrs Goldman, and the high court, cognisant that auditors and accountants frequently undertake work of this nature, required the receiver and liquidator to be, in the absence of agreement, a practising chartered accountant nominated by the Executive President of the South African Institute of Chartered Accountants. Mr Defries himself argues that the exercise by him of his powers under the divorce order cannot be second-guessed as-

'[t]hat is precisely the reason why a Court appointed someone of [his] standing and qualifications'.

[38] I now turn to Mr Defries' substantive challenges to the committee's findings of guilt on charges one, two, three and ten. Mr Defries' defence to charge one - that he had not realised or distributed the assets of the joint estate (whether by *in specie* awards to Dr and Mrs Goldman, private treaty or public auction) by the time of the committee hearing - was that he had been prevented from realising the joint estate, first by Dr Goldman's obstructive and litigious behaviour and ultimately by the conclusion of the settlement agreement, and not as a result of any failure by him to perform his professional duties or any disgraceful conduct on his part. The committee accepted that Dr Goldman's 'uncooperative conduct' made the process of realisation 'difficult'. The committee held that 'Mr Defries had the necessary power and legal machinery at his disposal to deal with the difficulties which Dr Goldman presented to him' and that he had 'elected' not to invoke the power. It held that '[t]he joint estate remains unrealised because of his failure to exercise the powers conferred upon him in terms of the Court Order'.

[39] Central to the committee's conclusion of guilt on this charge was its finding that Mr Defries had elected not to exercise the powers conferred on him in terms of the divorce order. The existence of such powers, though, was at the centre of the dispute between IRBA and Mr Defries, with Mr Defries denying that he had such powers. In order to reach its conclusion, the committee accordingly had to accept IRBA's contention that Mr Defries had such powers. Regrettably, however, the committee did not identify those powers in its decision, also not in this application, and neither has IRBA.

[40] The evidence clearly established that Mr Defries had been prevented from realising the joint estate by the conduct of Dr Goldman, and in particular Dr Goldman's launch of the Sandhurst application, subsequent noting of an appeal against the Nicholls AJ order and his *volte face* denial that the various shares, including the Valortrade and Hostprops shares, were owned by the joint estate. Whatever powers Mr Defries had arose from the divorce order. The Sandhurst application related to the ambit of the divorce order and the rights and duties it conferred. Dr Goldman claimed that he had rights under the same court order that conferred powers on Mr Defries as receiver and liquidator, which rights he contended limited Mr Defries' powers. Once Dr Goldman had instituted the Sandhurst application, Mr Defries was practically precluded from dealing with the assets of the joint estate until the application had been

finally determined. Once Dr Goldman had raised a dispute in relation to the ambit of the divorce order that governed Mr Defries' powers, Mr Defries could not, as a reasonable receiver and liquidator, assert his powers and proceeded to act unilaterally in the face of those pending court proceedings based on his own interpretation of his powers under the divorce order. The Sandhurst application affected not only the Sandhurst property, but the realisation of all the assets of the joint estate, because the right claimed by Dr Goldman - to offer to pay one half of the purchase price obtained from a third party and for such indebtedness to be discharged by set-off – would apply equally to the disposal of any other asset.

[41] Furthermore, Mr Defries cannot be faulted for referring the dispute as to the ownership of the Valortrade and Hostprops shares (as well as shares in several other companies) to court in the shares counter-application wherein he sought an order confirming that the shares were owned by the joint estate and that he was entitled to wind up the companies to realise the estate, particularly in the light of Dr Goldman's opposition to that counter-application. As was held in *Brighton v Clift (2)* 1971 (2) SA 191 (R), at 193-

'With regard to the powers to be conferred on the liquidator . . . it is not this Court's function to act as a liquidator and anticipate problems which may present themselves to the liquidator at a later stage. Doubtless, these will arise in any liquidation, but they are matters of the liquidator to decide and, in doing so, he may seek the parties' concurrence in any course he takes. Failing their agreement, his decisions are open to objection by either party with recourse to the Courts.'

In this instance, Mr Defries too had the power 'to apply to this Court for any further directions that he shall or may consider necessary'.

[42] Neither the Sandhurst application nor the shares counter-application had been finally determined by the time when Dr and Mrs Goldman concluded the settlement agreement in August 2009. Once Mr Defries had been notified that Dr and Mrs Goldman had divided the assets of the joint estate by agreement between themselves, he could obviously not proceed to realise or distribute the assets, whether by *in specie* award to Dr and Mrs Goldman, private treaty or public auction. He then approached this court for his release on the basis that the function he had been appointed by this court to perform was no longer required. In finding him not guilty on charges seven and eight, the committee found that his conduct in this regard was proper.

[43] On charge two - Mr Defries' alleged failure to maintain the value of the Valortrade shares and the cars – the committee held that Mr Defries ought to have taken the necessary steps to investigate the liabilities of Valortrade, allocate them, and if necessary, settle them, with a view of ensuring that the value of the assets of the joint estate is not diminished. The committee acknowledged that Mr Defries could not have sold the cars to any third party because he could not obtain the relevant registration papers from Dr Goldman, but it held that he ought to have sold them to Dr Goldman, thereby avoiding storage costs and depreciation.

[44] Clause 5 of annexure A to the divorce order provides for the receiver and liquidator 'to deal with the assets of the joint estate 'in his discretion'. Clause 5 did not impose a rigid duty upon Mr Defries to ensure that the assets of the joint estate maintained their value. His discretion was a flexible one that was governed by the criterion of reasonableness. He was required and expected to exercise his own individual judgment and it cannot be said that the way he dealt with the Valortrade shares and cars was not reasonable. Furthermore, there was no evidence that either the cars or the Valortrade shares diminished in value or of the extent of any diminution in value.

[45] Mr Defries explained the reasons why he could not sell the cars fully to the committee. He could not obtain the relevant registration papers from Dr Goldman, the cars did not appear on the NATIS System and he could not establish their value without Dr Goldman providing him with the necessary information. He also could not sell them until the Sandhurst application had been determined, since the issue of Dr Goldman's alleged right of first refusal applied equally to the cars.

[46] In 2005, Dr Goldman disputed that the Valortrade shares formed part of the joint estate. He opposed Mr Defries' application for a declarator confirming this. He also maintained his stance during the committee hearing. If Dr Goldman is to be believed, the Valortrade shares fell outside Mr Defries' authority. Mr Defries was also never in possession or control of the companies, including Valortrade, and he attempted to gain access through the first court proceedings before Woodward AJ. Furthermore, Dr Goldman's contention that Mr Defries ought to have settled the liabilities of Valortrade with funds from the joint estate ignores the fundamental principle that it is the duties of the directors of a company to settle its liabilities, not the

shareholders. Hostprops, which took over the business of leasing the old JSE building from Valortrade, was also an asset owned by the joint estate and the joint estate thus does not appear to have suffered any loss through the transfer of business. Moreover, the transfer of the business from Valortrade to Hostprops had already taken place by the time Mr Defries was appointed as receiver and liquidator. In not paying Valortrade's debt, Mr Defries accordingly cannot be said to have acted unreasonably.

[47] On charge three – Mr Defries' alleged failure to prepare and furnish interim and final accounts – the committee found that, on a proper interpretation of the divorce order, Mr Defries had an obligation to furnish an interim account 'in the circumstances of the present case' because the process of realisation had taken several years and had not been completed and the joint estate had been exposed to substantial expenditure. The committee did not consider the substance of the account furnished by Mr Defries. It held that that account could not satisfy Mr Defries' obligation because his version was that he had no duty to furnish an account and nothing he had done could therefore be construed as compliance with his duty.

[48] It must on the evidence presented to the committee be accepted that Mr Defries' belief that the divorce order, properly interpreted, did not require him to furnish an interim account, was held *bona fide*. He took legal advice on the issue. Once it is accepted that Mr Defries acted *bona fide* based on his interpretation of the divorce order, he ought to have been found not guilty of this charge. It can then not be said that he acted without reasonable cause in not rendering an interim account, regardless of whether the committee ultimately agreed with his interpretation of the divorce order or not.

[49] In *Attieh v The Commissioner for the South African Revenue Service* ((SGJ case no A5024/2015) delivered on 11 August 2016), paras 27-28, a full court of this division approved the following *dictum* in *Estate of Spruill v Commissioner* (88 TC 1197 (1987)), which is a decision of the Tax Court in the United States of America:

'When an accountant or attorney advises a taxpayer on a matter of tax law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice.

The full court (paras 34-35) also approved the following passage in the commentary by Dennis Davis *et al* on s 89*quat*(3) of the Income Tax Act 58 of 1962 in *Juta's Income Tax* Vol 2:

'The test as to whether the grounds are reasonable, is objective, in relation to actions of the taxpayer. A mere subjective belief by the taxpayer that a deduction should be allowed, without taking advice on the matter, is unlikely to be reasonable. On the other hand, the reliance by the taxpayer on expert advice, even if this is wrong, will in most cases constitute reasonable grounds for the action taken.'

There appears to me no reason in principle or in logic why the same should not hold true in the case of Mr Defries, who obtained expert legal advice on the interpretation of the divorce order and who relied on such advice.

[50] Paragraph 11 of annexure A to the divorce order makes clear that the duty imposed on Mr Defries was to furnish a final account. The only other provision in the divorce order relating to an account is in paragraph 6.24, which empowered Mr Defries to furnish an interim account 'as he may deem necessary'. This provision confers a discretion on him, not a duty. The duty the committee found to exist in fact contradicts the discretion expressly conferred on Mr Defries. In any event, the account which he furnished, on the undisputed facts presented in this application, satisfied the duty the committee found to exist. The only 'asset' to be accounted for was the repatriated funds. These funds were fully accounted for and Dr Goldman had been invited to inspect that account.

[51] On charge ten – Mr Defries' failure to provide Mrs Goldman with a subsistence allowance – the committee held that Mr Defries had the power to consider Mrs Goldman's request for a subsistence allowance under paragraph 10 of the Woodward AJ order and that Mrs Goldman's circumstances justified her request. The committee held that Mr Defries had required Mrs Goldman to obtain a court order because he was of the view 'that Dr Goldman should consent to the payment'. This, so the committee held, 'reflects a failure on his part to properly fulfil his duties' because '[t]here was no need for such a consent'.

[52] The committee found Mr Defries guilty of a breach of a duty not alleged by IRBA in the schedule of charges. IRBA alleged that Mr Defries' duty arose under s 79 of the Insolvency Act, 1936 and the common law. The committee, instead, held that the duty arose from the provisions of the Woodward AJ order. The committee rejected the contention that the Insolvency Act was of application in relation to Mr Defries' duties, in considering charge nine. In the relevant part charge ten reads thus:

'Under section 79 of the Insolvency Act and the common law, [Mr Defries] was obliged to have regard to the financial state of the parties and to make provision for and pay a subsistence allowance to one or both of the parties, should it be reasonable to do so in the circumstances, before the liquidation of the joint estate was complete.'

[53] It was not permissible for the committee to find Mr Defries guilty of a breach of a duty not relied upon by IRBA (see *Hos+Med Medical Aid Scheme v Thebe Ya Bophele Healthcare Marketing & Consulting (Pty) Ltd and Others* 2008 (2) SA 608 (SCA), paras 31-32), and procedurally unfair for it to have decided the charge on that basis without affording Mr Defries an opportunity to answer (see *Tao Ying Metal Industry (Pty) Ltd v Pooe NO and Others* 2007 (5) SA 146 (SCA), para 6). The committee was obliged to determine the complaint brought before it. Once the committee had concluded that there was no duty on Mr Defries as alleged in the schedule of charges, it ought to have found him not guilty of the charge. It had no general power to enquire into the conduct of Mr Defries outside of the complaint. In so doing it acted *ultra vires*. The committee's decision in respect of charge ten, therefore, should be set aside.

[54] Furthermore, paragraph 10 of the Woodward AJ order conferred a discretionary power on Mr Defries, to be exercised as he considered appropriate. It did not impose a legal duty on him, the failure to comply with which would result in him acting unlawfully. Mr Defries also did not consider that, as a matter of law, he required the consent of Dr Goldman. He merely sought to protect himself from unnecessary further litigation by requiring Mrs Goldman to approach a court if Dr Goldman did not consent, thereby affording Dr Goldman an opportunity to contest her right to a subsistence allowance in court proceedings if he wished and for any such dispute between them to be adjudicated by a court. Mr Defries cannot be faulted for having required Dr and Mrs Goldman's concurrence and failing their agreement for them to have their dispute resolved by a court (see *Brighton* (supra), at 193). It was prudent of Mr Defries not to pay Mrs Goldman from the repatriated funds without a court order, also in the light of the fact that Dr Goldman was disputing that those funds belonged to the joint estate.

[55] IRBA argues that Mr Defries' evidence was destructive of his own case. His testimony, it argues, establishes that he was of the view that he had no obligation to preserve (the value of) the assets in the joint estate; that he refused to make any decisions which would further the liquidation; that he was only prepared to act when

there was complete agreement between Dr and Mrs Goldman; that he acted under the instructions of his advisers and did not apply his independent mind to the issues pertaining to the joint estate; that throughout his tenure as liquidator he was completely out of his depth but yet did not resign his office or seek immediate discharge as liquidator. All of this he did, the argument continues, despite knowing that Dr and Mrs Goldman's entire patrimony was tied up in the joint estate; that Mrs Goldman, who was elderly and in poor health, in particular, was desperate for money; that Dr Goldman or a third party could be mismanaging or misappropriating from the entities (the equity of which is held almost exclusively by the joint estate); that he considered it his professional duty to furnish interim and other accounts but did not do so on advice received; and that he was the custodian of the joint estate assets. Mr Defries' testimony, such as it was, does not detract from the essentially uncontentious and objectively verifiable facts to which I have referred and does not establish his guilt on any one of the charges of which he was found guilty.

[56] I conclude, therefore, in finding that the committee, in arriving at its decision in respect of charges one, two, three and ten, was materially influenced by several errors of law. The ineluctable inference is that it also took into account irrelevant considerations and failed to take into account relevant ones. The result of these errors was that the committee rendered a decision that is not rationally connected to the information before it and so unreasonable that no reasonable decision-maker would have made it. It follows that each finding of guilt against Mr Defries must be reviewed and set aside in terms of subsections 6(2)(d), (e)(iii), (f)(ii)(cc) and (h) of PAJA, and, in the case of charge ten, also in terms of subsection (c).

[57] In terms of subsection 8(1)(c)(ii) of PAJA a court may in exceptional circumstances substitute administrative action with the action that should have been taken. This is such a case. The evidence did not establish that Mr Defries' conduct in each instance was not 'without reasonable cause' or that his conduct amounted to disgraceful or dishonourable conduct or that the ways he exercised his discretion were unreasonable. Contraventions by Mr Defries of or a failure by him to observe any of the statutory provisions and the rules that he was alleged to have contravened or failed to observe, had not been established nor that he made himself guilty of improper conduct within the meaning of the rules on which reliance were placed. Had the committee not made the errors of law and other errors it would have found Mr Defries

not guilty on each of the charges one, two, three and ten. In the circumstances, it would serve no purpose to refer the matter back to the committee as IRBA urged me to do. Moreover, it is not fair and practical to remit the matter to the committee. The finalisation of this matter should not be delayed any further. Manifestly there has been a time lapse of about eight years from the time Dr Goldman submitted the complaint against Mr Defries in November 2008 to the judgment of this court. To remit the matter to the committee in a situation where the appropriate decision is inevitable would not be fair to both parties. (See *Gauteng Gambling Board v Silverstar Development Ltd and Others* 2005 (4) SA 67 (SCA), paras 28-29; *National Tertiary Retirement Fund v Registrar of pension Funds* 2009 (5) SA 366 (SCA), para 26; *Ntshangase v MEC for Finance, KwaZulu-Natal and Another* 2010 (3) SA 201 (SCA), paras 21-23; *University of the Western Cape and others v Member of Executive Committee for Health and Social Services and Others* 1998 (3) SA 124 (C), at 131.)

[58] Finally, the matter of costs. Mr Defries has been successful in this application. The ordinary course is for costs to follow the event. However, IRBA is not in the position of an ordinary civil litigant. The objects of the Act include the protection of the public, investors and the profession. IRBA is the custodian of the auditing and accounting profession. It is a statutory body performing a public duty. Its mandate includes taking steps to protect the public in respect of their dealings with registered auditors and to promote the integrity of the auditing profession by investigating alleged improper conduct, conducting disciplinary hearings and imposing sanctions for improper conduct.

[59] In *Competition Commission of South Africa v Pioneer Hi-Bred International Inc and Others* 2014 (2) SA 480 (CC), paras 23-24, the Constitutional Court said the following about costs awards in circumstances where a litigant is litigating in the course of fulfilling its statutory duties:

'[23] The ordinary course is for costs to follow the result. But the Commission is not an ordinary civil litigant. While the Commission is not obliged to participate in CAC proceedings when a private party initiates the appeal, its participation will often be central to the fulfilment of the aims of the Act as there will frequently be no opposing party or amicus in appeal proceedings. The Commission's participation will in these cases be important not only to the defence of the public-interest aims under the Act, but also be of service to the CAC in assisting it to gain a balanced perspective. In the context of similar institutional roles, such as that of a

prosecutor, an important principle has emerged that the usual rule that costs follow the result does not ordinarily apply to these state actors.

[24] The principle that should inform the CAC's exercise of discretion is that, when the Commission is litigating in the course of fulfilling its statutory duties, it is undesirable for it to be inhibited in the bona fide fulfilment of its mandate by the threat of an adverse costs award. This flows from the need to encourage organs of state to make and to stand by honest and reasonable decisions, made in the public interest, without the threat of undue financial prejudice if the decision is challenged successfully. This principle would fittingly fall within the requirements of law guiding the exercise of the CAC's discretion, as it is well established in precedent.'

(Footnotes omitted.)

[60] As a special litigant acting in the public interest IRBA should, therefore, in principle not be mulcted in costs, unless it were shown that there is *male fides* on its part (see *KwaZulu-Natal Law Society v Davey and Others* 2009 (2) SA 27 (NPD), para 215) or some other reason making it deserving of an adverse costs order. In *Law Society of the Northern Provinces and Another v Viljoen and Others* [2011] 3 All SA 133 (SCA), para 22, the Supreme Court of Appeal held that a special litigant acting in the public interest was indeed deserving of an adverse costs order in the light of the facts of that case where it would be unfair not to award costs to the successful litigants. The Supreme Court of Appeal said the following:

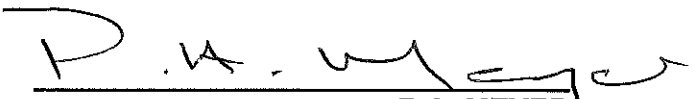
'I have no doubt that in the circumstances of both cases, the appellants were not entitled to refuse to issue fidelity fund certificates to the respondents. It is clear to me that the second appellant's decision was indeed misconceived. Furthermore, even after the appellants had lost both cases in the high court, they still zealously pursued the appeal in this court, thus exposing the respondents to substantial legal costs. Notwithstanding the long standing and salutary practice of not mulcting a Law Society with an adverse order of costs as it is a special litigant acting in the public interest, I am of the view that it would be unfair, given the facts of this case, not to award costs to the respondents.'

[61] I have no reason to believe that the committee had not acted in good faith in reaching its decision. IRBA opposes this application for review in the course of fulfilling its statutory duties and there is also nothing to indicate that it does not act in good faith in doing so. Its answering affidavit and argument before me attempt to defend the decision of the committee. I am of the view, therefore, that there are no special circumstances warranting an adverse costs order against IRBA.

[62] In the result the following order is made:

(a) The disciplinary committee's decision finding the applicant guilty of charges one, two, three and ten and the sanctions imposed upon the applicant as a result of such finding are reviewed and set aside and substituted with an order finding the applicant not guilty on each of the aforesaid charges one, two, three and ten.

(b) Each party is to bear its own costs of the application.



P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing:	5 December 2016
Date of judgment:	23 December 2016
Counsel for applicant:	A Subel SC (assisted by E Rudolph)
Instructed by:	Werksmans Inc., Sandton
Counsel for first respondent:	JP McNally SC
Instructed by:	Webber Wentzel, Sandton