

**BEFORE THE APPEAL COMMITTEE OF THE COUNCIL
FOR THE BUILT ENVIRONMENT (APPEAL COMMITTEE)**

In the matter between

THABO ZACHARIA HLABELA

Appellant

and

ENGINEERING COUNCIL OF SOUTH AFRICA (ECSA)

First Respondent

ASIENE THOMSON NEBOTALO

Second Respondent

RULING

INTRODUCTION

1. The Appeal Hearing was held on the 29th of August 2022 and 11th of October 2022 at the premises of the Council for Built Environment (CBE) in Pretoria.
2. The Proceedings were conducted in English and the Appeal Committee kept handwritten notes and were also digitally recorded and assisted by Ms. M Chiloane from Council for Built Environment (CBE).
3. The Parties in this Appeal are Mr. Thabo Zacharia Hlabela herein referred to as the Appellant; The Engineering Council of South Africa (ECSA) herein referred to as the First Respondent and Mr. Asiene Thomson Nebotalo herein referred to as the Second Respondent.

4. This Appeal has come before us in terms of Section 21(3) of the Council for Built Environment Act 43 of 2000 (The CBE Act).
5. Section 21 of the (CBE) Act Permits any person who is aggrieved by a decision of professional body such as the Engineering Council of SA (ECSA) to Properly Appeal that decision to the Council for Built Environment (CBE) within a period of 30 days of becoming aware thereof.
6. On or about 11 July 2022 the Appellant lodged an Appeal against the decision of the First Respondent on the grounds set out in his notice of Appeal with Council for the Built Environment (CBE) and the matter was set down for hearing on the 29th August 2022.
7. At the beginning of the proceeding the parties were given an opportunity to raise any procedural issues and points in limine. Only the Appellant raised an issue relating to information that he had repeatedly requested from the First Respondent. The Appellant submitted several letters to the First Respondent as the information was very cardinal to enable him to properly prepare for the hearing. It was common cause this information was not given or provided to the Appellant as he requested.
8. All Parties were given an opportunity to respond to the issues raised by the Appellant and submissions were duly considered by the Appeal Committee.
9. The proceeding was adjourned to allow the Appeal Committee to consider the submissions and evidence presented by all parties on issues raised by Appellant
10. The Appeal Committee hearing was resumed on the same day and the Appeal Committee made an order that the Appellant must be given all information

by close on 30 of August 2022 by the First Respondent and the matter was postponed *Sine die* to allow further submissions from all Parties.

- 11 After all additional submissions submitted by all parties the Council Built Environment set down the matter for further hearing on the 11 October 2022, in order to hear all evidence and submissions accordingly.

Late filing of Documents (Condonation)

12. It is very important to deal with the late filling of documents during the filling of the Appeal and exchanging of documents in any Appeal process. The Appeal Committee does not take a rigid position with regard to the late filling of relevant documents.
13. All three applications for late filling of documents (condonation) were unopposed. The Committee does not have any concern to condone the late filling of documents on good cause shown. The Appeal Committee condoned in circumstance where good cause was shown, therefore all Parties have shown good cause, even though Council for the built Environment 's Policy on conducting Appeals does not expressly deal with the late filling of documents or does not make any provision for condonation in case of the late filling of documents.
14. The Committee's position is informed by the Section 21(4) of the Council (CBE) Act 43 of 2000 and Section 33 of the Constitution (Act 108 of 1996) and (CBE) Policy on Conducting Appeals.

Background to the Dispute

15. The purpose of this Appeal was to review the outcome of the decision made by the First Respondent. The Appellant is a registered person with the Engineering Council of South Africa.

16. The First Respondent in this appeal is the Regulatory body established in terms Section 2 of the Act (Engineering Profession Act 44 of 2000) Engineering Council of South Africa.
17. The Second Respondent in this matter is Mr. Asiene Thomson Nebotalo an adult male who is registered with the First Respondent as a Professional Engineer.
18. The Second Respondent was at all relevant time in relation to the matter in question carried on business at Nevhotalu Consulting Engineers.
19. The Appellant received a letter of appointment from the Gauteng Department of Roads and Transport (the Employer) on the 07 September 2017, following a written FIDIC Conditions of Contract for Construction of Building and Engineering works designed by the Employer was concluded between the Appellant as the contractor and the Employer 09 September 2016 (the FIDIC Agreement), and in terms of the FIDIC agreement the Second Respondent and Mr. Mulandi George Nduvheni an adult male candidate engineering technologist were appointed as the engineer and the resident engineer respectively to supervise the execution of routine road maintenance contract on selected RISFSA Class 3 Provincial roads in identified areas of Gauteng Province for a period of 3 years (the project-north).
20. The Appellant was first given temporary sign management in order to accommodate the traffic to ensure that the shoulder and lane on the western side next to the sinkhole was not utilized.
21. On the 25 April 2020 there was an inspection by the Second Respondent, a representative of the Employer, the Appellant and a Geotechnical specialist.

It was agreed by the parties present that the situation required a hard closure of the road to determine the extent of the sinkhole, in order to establish and carry out the repairs deemed necessary.

22. Further a second meeting on the same day was held with the MEC of Roads and Transport who also agreed with the proposal.
23. The understanding was that the area close to the sinkhole site will undergo single lane shoulder closure (the temporary soft closure) while the Appellant procures the necessary signs and materials to be specified by the engineer for the full hard closure at the sink hole location, and two soft closures at the nearest intersections on the approach roads to the sink hole location, which soft closures would restrict all access except for residents in the area.
24. The Second Respondent was to urgently issue the information pertaining to the temporary sign management to the hard and soft closures. The Appellant was instructed to ensure that all temporary signs are provided and to be implemented to both the soft and hard closures.
25. The road (M57) consisted of two lanes of which the one was north bound while the other one south bound and whereas the sinkhole appeared next to the road on the western side next to the shoulder of the north bound lane.
26. The hard and soft closures were to be implemented by the Appellant and be operational as from 01 May 2020 but based on the submissions from the Appellant and supported by the evidence lead by the Second Respondent, on the evening of the 04 May 2020, the placement of the soft closure signs at both intersections were still ongoing. A vehicle accident at one of these soft closures, at the intersection of the M57 with Porcelain Avenue was reported and on arrival on the location by the Second Respondent at around

19h30, the installation of the signage for the soft closure was not complete and there were no visible signs of the accident having occurred.

27. The Second Respondent sent an email detailing the design to the Appellant in order for him to comply with safety measures as required by law referred to email dated 29 April 2020 on page 43 to 50 annexure B1 Engineer 's Design.
28. The Appellant wrote a letter to the Second Respondent on the 29 May 2020 with the attached quotation claiming the costs of the damages to the car, which apparently belongs to a Mr. Amos Tjiane, alleging that the accident was caused due to the lack of signage from inside the restricted area when approaching the soft closures. The claim being for the amount of R65 437.30 plus 10 percent of handling fee in the total amount of R71 981.03 as recorded in the Appeal Record 1 Appellant bundle page 52 to 54.
29. The Second Respondent wrote a letter on the 12 June 2020 to the Appellant advising him and the claimant, Mr. Amos Tjiane to follow due process in claiming such, as recorded on the Appeal record 1 Appellant bundle page 65.
30. It is noted that before the accident took place on 04 May 2022 there was communication between the Appellant and Second Respondent with regard to safety issues. The Appellant did not attend to those safety matters as a matter of urgency by ensuring that the relevant signs as instructed by the Second Respondent and also required by law, were timeously installed.
31. The Appellant blamed the Second Respondent acting in his capacity as the employer's agent in issuing a detailed design that was insufficient, as referred to in Annexure B page 45 to 46 of the Appeal Record 1 Appellant's Bundle, and further the Appellant also submitted that the detailed design

issued by the Second Respondent on 22 April 2020 failed to meet the minimum standards and norms of the profession as the design did not include any warning signs for road users (residents) coming from inside the restricted area towards the two soft closures, and that as a direct result of the lack of signage, Mr. Amos Tjiane was involved in an accident at around 19h00 on 04 May 2020.

32. The Appellant decided to file complaints against the Second Respondent with the First Respondent on the 13 October 2020 to investigate the complaint on the basis that the Appellant alleged that the Second Respondent contravened the Code of Conduct of the First Respondent and that the code of conduct applicable to all its registered professional, provides amongst others, the following provisions:

32.1 Engineering Profession Act 46 of 2000, clause 27 Professional conduct, Section 27(3) says that *“All registered persons must comply with the code of conduct and the code of practice and failure to do so constitutes improper conduct,”*

32.2 Code of conduct of the Engineering Council of South Africa, Clause 1 - Objectives

“1.the objective of this schedule are to ensure that registered person –

(1) apply their knowledge and skill in the interests of humanity and the environment

(2) execute their work with integrity, sincerity and in accordance with generally accepted norms of professional conduct

(3) respect the interests of their fellow beings and honour the standing of the profession:

(4) continuously improve their professional skills and those of their subordinates

(5) encourage excellence within the engineering profession, and

(6) do not prejudice public health and safety”

32.3 Code of conduct of the Engineering Council of South Africa, Clause 3: Rules of conduct: Ethics states that “Registered person in fulfilling the objectives contemplated in clause 1 above must comply with the following rules:

32.3.1 Competency: subclause (3)(1) registered persons states as follows: *“(a) must discharge their duties to their employers, clients, associates and the public effectively with skill, efficiency, professionalism, knowledge, competence, due care and diligence; and (c) must, when carrying out work, engage in and adhere to acceptable practices”*

32.3.2 Integrity: subclause (3)(2) Registered persons states as follows: *“(a) Must discharge their duties to their employers, clients associates and the public with integrity, fidelity and honesty; and (c) must not engage in any act of dishonesty, corruption or bribery; and (f) must avoid situations that give rise to a conflict of interest or the potential for such conflict; and (h) must give engineering decisions, recommendations or opinions that are honest, objective and based on facts.”*

32.3.3 Dignity of the profession: subclause 3(5) Registered Persons states as follows: *“(a) must order their conduct so as to uphold the dignity standing, and reputation of the profession; and b) may not maliciously or falsely, whether in the practice of their profession or otherwise, knowingly injure the professional reputation or business of any other Registered person or the reputation of the council”*

33. The following below complaints were lodged against Second Respondent and investigated:

33.1 Complaint no 1: failure to act in a professional manner as in accordance with the ECSA Code of conduct;

33.2 Complaint no 2: failure to discharge his duties with integrity, fidelity and honesty;

33.3 Complaint no 3: failure to execute his work with integrity, sincerity and in accordance with general accepted norms of professional conduct;

- 33.4 Complaint no 4: acted falsely, whether in the practice of their profession or otherwise, knowingly injure the professional reputation or business of any other registered person or the reputation of the Engineering council.
34. The First Respondent upon receiving complaints against the Second Respondent, appointed an investigator to carry out the investigation. The investigation report was completed and handed over to the First Respondent on the 18 August 2020 for further consideration by the First Respondent.
35. The First Respondent at their meeting on the 11 May 2021 considered the investigation report pertaining to the claims of unprofessional conduct against the Second Respondent. After deliberation by the First Respondents' investigation committee, a resolution was passed that there was no prima facie evidence to support the claims against the Second Respondent as per the minutes on page 14 to page 18 of the Appeal 2 First Respondent's bundle.

Ground for Appeal

36. The Appellant submitted the notice of Appeal which appeared as Annexure A2 at page 3 of the Appeal 1 applicant's bundle. Failure to prepare charges or investigate a complaint and grounds also are mentioned in page 7 of the same Appeal Record 1 Appellant Bundle.
37. That the Second Respondent infringed Article 1 and Article 3 of the ECSA code of conduct.
38. That the appointed First Respondent's one-man investigator (the investigator) failed to consider all the matters placed before him.

39. That the investigator's decision be set aside pending the impartial panel to investigate the allegation.
40. The Appellant submission claimed that investigation, together with its findings was not properly executed as expected from a competent investigator.

The issues to be determined

41. This Appeal process required the Appeal Committee to determine whether the complaints lodged against the Second Respondent were properly and fairly investigated by the First Respondent as required by the (PAJA) Promotion of Administrative Justice Act and section 3, 2 of the CBE's policy on Conducting Appeals.
42. Section 33(1) of the Constitution of the Republic Act 108 of 1996 states that "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
43. This is in the light of the Submissions and Evidence presented and also by reference to the criteria of fairness as supported by legislation.

Summary of the Submission and Evidence

44. All Parties were afforded an opportunity to make Submissions and Evidence relevant to the determination or to support any of the elements or fairness as required or may be referred, however this does not mean that the Appeal Committee failed to consider other submissions and evidence or ignored such evidence in coming to the decision.

45. The committee noted that the bulk of the matters brought to the Second Respondent, which became the subject matter of the Appeal were contractual disputes between the Appellant and the Client with the Second Respondent acting as the Client's appointed agent, which matters were in the most part resolved by an agreed contractual mediation process.
46. The committee after considering, evaluating and assessing the submissions found no evidence of gross negligence, maleficence or material misconduct on part of the Second Respondent.
47. The committee found that the Second Respondent had been tasked with the administration of a challenging project which delivery during the Covid lock down period did not comply with the standard established practice. Under the circumstances, it appeared that the Second Respondent performed his duties as the appointed Engineer with acceptable care and diligence, further the Second Respondent was professional in his correspondence and seemed to have applied himself diligently and fastidiously in assessing claims from the Appellant.
48. The committee considered each one of the allegations and made assessment of each before arriving at a final determination. The matter of signage was dealt with in detail. The committee's view is that, although the Second Respondent claims to have issued instruction to move the temporary signage from the sinkhole location to the two soft closure locations for residents approaching the soft closures, there was no record of evidence lead to this effect.
49. It would seem that the instruction was issued verbally, as claimed by the Second Respondent, as it was eventually implemented as directed by the Second Respondent, although it was done late.

50. The Appellant mentioned that the Second Respondent was aware that contractually and in terms of the Occupational health and safety regulations, it was not ideal to erect signage in the dark, which statement was not denied by the Second Respondent, but the committee observed that, and in making the statement, the Appellant was equally aware of the contractual and OHS regulation provisions, however considering the urgency of the situation, it may justify their actions.
51. The committee was of the view that the Second Respondent, when he became aware that the works would take place in the dark, should have insisted on adequate precautionary safety measures, alternatively he should not have allowed the urgency to get the signage installed before the drilling at the sinkhole, cloud his judgement. However, in mitigation the committee considered the extraordinary circumstances caused by the covid lock down and the absence of a safety consultant who would have ordinarily been responsible for the OHS compliance.
52. The committee recognized that it may have been an oversight by the appointed safety consultant that the standby teams of the appellant operated without a safety officer, but the Appellant and the Second Respondent had an equal responsibility to ensure that the works were implemented in compliance with the contract and the occupational health and safety regulations.
53. The committee was of the view that all other matters were contractual matters as mentioned above which were resolved by the mediator and that the fact that there was a difference in interpretation do not in this instance equate to gross or material transgressions of the code of the First Respondent.

54. The committee also noted that the lack of clear procedures for investigators acting on appointment by the First Respondent was a cause for concern. The committee questioned the First Respondent on the existence of a Guideline or procedure on how investigators should conduct investigations in the ambit of the Act, but no such guideline or procedure was in place.
55. The committee noted the verbal submissions by the Appellant wherein he indicated that the investigator during his interview was not thorough, did not follow a detailed procedure and did not deal with all the complaints as reported by the Appellant. The Appellant emphasized that the investigators did not even interview the person that was involved in the accident.
56. The committee took note of the investigator's report of which the factual contents were not disputed by any of other parties. This report dealt with all the complaints and the investigators interrogated the written submission by the Appellant in detail.
57. The appointed investigator by the First Respondent did not do an inspection in-loco when the parties to the matter would have been required to point out features that they wanted the investigators to consider as part of his inspection report, although the committee acknowledged that this investigation took place during strict covid 19 lock down when movement was restricted, and, as the investigation took place well after the completion of the contractual works in question had been completed, it would appear logical that an inspection in-loco would have revealed little more, if anything at all, than what the record of evidence presented.
58. The committee noted evidence adduced by the Second Respondent when he was testifying that his version was reasonable and on the balance of probabilities true and nothing suggested otherwise.

Reasons for the decision /ruling

59. The Committee could not find any prima facie evidence that there is any material contravention of the code of conduct that would warrant any action against the Second Respondent in this matter.

60. The Committee noted that the Occupational Health and Safety (OHS) Regulations were not adequately observed in the execution of duties by the Appellant and the Second Respondent.

61. There were questions raised about the procedure followed by the investigators of the First Respondent. The lack of General procedures that must be followed by investigators may compromise future investigations carried out on behalf of the First Respondent. This will ensure procedural compliance by all appointed investigators in the future.

The Appeal Committee accordingly make the following order

62. The Appeal by the Appellant is hereby dismissed, the decision of the First Respondent that no prima facie evidence that the Second Respondent contravened the code of conduct of the First Respondent is upheld.

63. The First Respondent must compel the Second Respondent, in terms of its continuous development programme (CPD) to include a course in the construction occupational health and safety regulations, as part of his current cycle of the professional registration renewal process.

64. The First Respondent must develop an investigation guideline and procedure and ensure that it is communicated to all their appointed investigators.

65. No order as to costs

THUS, CONCURRED AND SIGNED BY THE APPEAL COMMITTEE MEMBERS ON THE DATES AND AT PLACE SET OUT HEREUNDER

1. 

Adv MG Mello -Appeal Committee Chairperson

Date 21 October 2022

Place: Pretoria

2. 

Mr. CG Koopman -Appeal Committee Member

Date 21 October 2022

Place: Pretoria

3. 

Mr. M Pencharz -Appeal Committee Member

Date: 21 October 2022

Place: Pretoria

APPEARANCE

For the Appellant

Mr. Z Hlabela

Mrs. P Hlabela

For the First Respondent

Mr. F Jassat (Attorney)

Ms. C de Beer

For the Second Respondent

Adv. P Coetzee

Mr. A Makwarela (Attorney)

Ms. R Sikhupa

For the (CBE) Council for Built Environment

Ms. M Chiloane

Mr. C Mbhalati