CBE
COUNCIL FOR THE BUILT ENVIRONMENT

IN THE APPEALS COMMITTEE OF THE COUNCIL FOR THE BUILT ENVIRONMENT

In the matter between:

SHANĖ VILJOEN	Appellant
and	
SOUTH AFRICAN COUNCIL FOR THE ARCHITECTURAL PROFESSION	Firs Respondent
CIZANNE VAN ZYL	Second Respondent

APPEALS COMMITTEE DECISION

INTRODUCTION

1. This Appeal is in two parts, which are classified into Part A and B by the Appellant in this Appeal Hearing. Part A is an appeal against the whole of the administrative sanction imposed on 29 April 2024 by the Disciplinary Tribunal of the First Respondent, the South African Council for the Architectural Profession ("the SACAP") in terms of

section 32(3)(a)(ii) of the Architectural Profession Act No.44 of 2000 (“the AP Act”). The Appeal is before this Appeal Committee in terms of section 21(1) of the Council for the Built Environment Act No. 43 of 2000 (“CBE Act”) and set down for the hearing on the 17th of July 2024 at the premises of the Council for the Built Environment (“the CBE”) in Pretoria.

2. The Appeals Committee is properly constituted and complies with the requirements of section 21(3) of the CBE Act, read with paragraph 3.2 of the CBE’s Policy on Conducting Appeals (“the PCA”).

3. Coram:

   3.1 Adv Lulamile Peter as the Chairperson of this Appeals Committee;

   3.2 Dr Ronald Watermeyer as the Committee Member of this Appeals Committee; and

   3.3 Ms Janet Barnard as the Committee Member of this Appeals Committee.

4. Save for the Appellant described in 4.1 herein, the following persons attended this Appeal Hearing in person:

   4.1 Ms Shanė Viljoen, the Appellant -representing herself;

4.2 Mr Sfanele Mathebula ("Mr Mathebula"), an official of the First Respondent – on watching brief for the First Respondent;

4.3 Adv A Knoetze ("Adv Knoetze"), a legal representative of the Second Respondent;

4.4 Ms Meltonia Chiloane, an official of the CBE;

4.5 Ms Jennifer Joni, an official of the CBE; and

4.6 Ms Semakaleng Sekoboane, an official of the CBE.

5. This is a per curiam decision of the Appeals Committee –reserved on 17 July 2024.

BACKGROUND

6. The Appellant is a member of the public and is the complainant that lodged the complaint that was before and resulted in the impugned administrative decision of the First Respondent's Disciplinary Tribunal, dated 29 April 2024. In this Appeal the Appellant is challenging this administrative decision of the Disciplinary Tribunal and what the Appellant asserts as 'the failure to prefer charges' against the Second Respondent. The full particulars of these two appeal issues are set out hereinbelow.

7. The First Respondent is a regulatory body established in terms of Section 2 of the AP Act. When referring to the First Respondent herein, we include the Council, Disciplinary Tribunal and where applicable, its Appeal Panel too. It is common cause that the First Respondent is empowered amongst other by the AP Act to deal with the disciplinary matters relating to the allegations of improper conduct of all persons registered in terms of the AP Act.

8. The Second Respondent is a registered person in terms of section 18(1)(a)(iv) of the AP Act. On the 16 April 2024, the Disciplinary Tribunal of the First Respondent had found the Second Respondent guilty of improper conduct and issued the administrative decision referred to hereinabove.

9. The administrative decision of the Disciplinary Tribunal of the First Respondent that is impugned by the Appellant, is the sanction imposed on the Second Respondent in terms of section 32(3) of the AP Act; whereas the challenge on the alleged failure to proffer charges appears to be grounded on section 28(2) and 29(1) of the AP Act.

ISSUES ON APPEAL AND RELIEF SOUGHT

10. Constructed, the Appellant's grievance is as a result of the First Respondent's administrative action, which in terms of section 1 of the Promotion of Administrative Justice Act No.3 of 2000 (PAJA) is constituted by a 'decision taken, or any failure to take a decision'.

Summated without the intention to rehash what we have already submitted hereinabove, in this Appeal the Appellant is challenging the decision taken ("sanction ruling") and the alleged failure to take a decision to ("proffer charges") against the Second Respondent.

11. The first relief sought in this Appeal is for a variation of the decision of the Disciplinary Tribunal of the First Respondent, to either a suspension of registration of the Second Respondent for one year or to cancel and remove the Second Respondent's name from the register of registered persons. The second relief sought is that in respect of the charges that were not proffered against the Second Respondent, this Appeals Committee must 'either decide on the charges or refer it back to the SACAP to investigate'.

APPEALS DECISION

12. This Appeals Committee has jurisdiction in terms of section 21 of the CBE Act to hear this Appeal in accordance with the administrative justice framework founded on section 33 of the Republic of South Africa Constitution Act No.108 of 1996 ("the Constitution"). Notwithstanding this provision of the CBE Act, it is long settled in *Zondi v MEC for Traditional and Local Government Affairs and Others*[1] that:

[1] [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at para 101. See also, *Electoral Commission of South Africa v Democratic Alliance and Others* [2021] 4 ALL SA 52 (SCA).

"PAJA was enacted pursuant to the provisions of s 33, which requires the enactment of national legislation to give effect to the right to administrative action. PAJA therefore governs the exercise of administrative action in general. All decision-makers who are entrusted with the authority to make administrative decisions by any statute are therefore required to do so in a manner that is consistent with PAJA. The effect of this is that statutes that authorise administrative action must now be read together with PAJA unless, upon a proper construction, the provisions of the statutes in question are inconsistent with PAJA".

13. In this Appeal there is no challenge brought to light on the lawfulness, reasonableness, and fairness of the SACAP' processes. The Constitutional Court in *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*[2] has held that the three principles (lawfulness, reasonableness, and fairness) are fundamental to the administrative processes and decisions.[3]

14. Our consideration of the sequence of material events that resulted in this Appeal and the respective parties' papers placed before us, has satisfied us to conclude that the effect has been given to the lawfulness, reasonableness, and fairness principles that the court in *Bengwenyama Minerals* matter had said they are subject to PAJA.[4]

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[2] (CCT 39/10) [2010] ZACC 26 2011 (4) SA 113 (CC).

[3] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* at para 61.

[4] Ibid.

15. Furthermore, it is held by this Appeals Committee that the Appellant's appeal regarding failure to proffer charges is unmeritorious in law and fact.

16. Consequently, this Appeals Committee holds a view that it does not have an unfettered discretion and as such, the decisions of the Disciplinary Tribunal of the First Respondent must not be interfered with, in the absence of proven error of law or capricious decision of the forum a quo. This unanimous view of the Appeals Committee is based on the following legal principles and reasons.

LEGAL PRINCIPLES AND REASONS

17. The CBE Act and the PCA provides respectively, the appeal procedure and establishment of an Appeals Committee.[5] However, unlike other[6] administrative appeals tribunals the CBA Act and PCA does not expressly provide the Appeals Committee with specific powers in respect of its decisions. This has some significance when due regard is had to Rabie'[7] proposition that-

[5] See, section 21 of the CBE Act and paragraphs 3-9 of the PCA.
[6] For example, section 45(D)(7) of the Financial Intelligence Centre Act grants the Appeal Board of the Financial Intelligence Centre (FIC) with powers to (a) Confirm, set aside or vary the relevant decision of the FIC or the supervisory body or (b) Refer a matter back for consideration or reconsideration by the FIC or supervisory body concerned in accordance with the directions of the appeal board.
[7] See, Rabie A 'Reflections on a General Administrative Appeals Tribunals' [accessed online] at https://uir.unisa.ac.za/bitstream/handle/10500/19561/Joubert__JJ__0869819380__Section5 [available, July 18, 2024].

> "Since the availability of all appeals is dependent upon a legislative basis, the nature and scope of any appeal are likewise determined by the legislation concerned".

18. Both the CBE Act and PCA merely provide that the Appeals Committee shall decide the appeal within certain timelines, without providing further particulars of the kind or categories of decisions the Appeals Committee is empowered to take (such as but not limited to either confirm, vary, or set aside an impugned decision of the forum a quo).

19. With respect to the internal appeals lodged by registered persons found guilty of improper conduct, section 33(2) of the AP Act brings certainty by expressly providing that the SACAP has powers to-

> "(a) dismiss the appeal against the decision of the disciplinary tribunal and confirm the finding or sentence or both; or
> (b) uphold the appeal against the decision of the disciplinary tribunal wholly or in part and set aside or vary the finding or sentence or both".

20. Since this Appeals Committee derives its powers from the CBE Act and by extension some of these in the PCA, the Appeals Committee' decision powers ought to have been expressly provided for in section 21 of the CBE Act and/or clarified in the PCA. We do recommend that this Appeals Committee's supposition must be considered by the CBE and the decision powers of the Appeals Committee be clarified further and incorporated into the PCA. This is significant, as it may prevent or mitigate possible overreach by the Appeals Committee. Notwithstanding, our view is that the legislature did not intend to

grant this Appeals Committee with decision powers that are any different to the internal appeal decision powers provided for to the SACAP in terms of section 33(2) of the AP Act.

Sanction Ruling

21. In this Appeal the Appellant is challenging amongst other the administrative sanction imposed by the Disciplinary Tribunal. The Disciplinary Tribunal imposed a sanction purported under section 32(3)(a)(ii) of the AP Act, which in its ruling it suspended it wholly 'for a period of three years provided that the Second Respondent is not found guilty of similar charge/s'. It is important to observe that section 32(3)(a) of the AP Act is peremptory in nature, as it provides that-

> "...the disciplinary tribunal must *either*-
> (i) caution or reprimand the registered person;
> (ii) impose on him or her a fine not exceeding the amount calculated to the ratio for one year imprisonment determined in terms of the Adjustment of Fines Act, 1991 (Act No. 101 of 1991);
> (iii) suspend the registration of the registered person concerned for a period not exceeding one year; or
> (iv) cancel the registration of he registered person concerned and remove his or her name from the register referred to in section 11(c)".

22. On construction, in addition to it being peremptory on the Disciplinary Tribunal's sanctioning powers, section 32(3)(a) of the AP Act also grants the Disciplinary Tribunal with powers to choose from the list of possible sanctions the one or more it deems appropriate. In our view this is in line with *Florence v Government of the Republic of South Africa*[8] where it was held that-

> "The discretion accorded to the FIC and by extension the Appeal Board, is thus a discretion in the true sense and is so because there are wide range of equally permissible options available to the FIC and anyone or a combination of these would be within the FIC powers. Given the discretionary nature of this power, a court is not at liberty to interfere at will. Put differently, a court can neither (i) impose its opinion as to what is appropriate, nor (ii) interfere with the sanction simply because it may have imposed a different sanction" [our emphasis].

23. Constrained by the provisions of section 32(a) of the AP Act, in this matter the Disciplinary Tribunal exercised its discretion and chose to impose one of the sanctions described hereinabove. In this Appeal, the Appellant is basically asking us to interfere with the statutory discretion of the Disciplinary Tribunal, without proffering to us that the Disciplinary Tribunal was wrong in law or had no powers to impose on the Second Respondent the sanction described in section 32(3)(a)(ii) of the AP Act.

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[8] 2014 (6) 456 CC

24. Our view is that the legal position relating to the interference with decisions of forum a quo is clear and long established in case law, which include amongst other the *Florence* matter we have already referred to hereinabove. More recently in the *Sunward Motors (Pty) Ltd v the Financial Intelligence Centre and the Director*[9] matter, the Gauteng Division had held that 'it is trite that on appeal a court does not have "unfettered discretion" to interfere with the findings of a tribunal, unless the court finds grounds which render the sanction imposed startingly inappropriate'. The *Sunward Motors* matter had endorsed *Federal Mogul Aftermarkets SA (Pty) Ltd v Competition Commissioner*[10], where the following position was articulated:

> "The court does not enjoy an unfettered discretion to interfere with a Tribunal's assessment and imposition of an administrative penalty. Even if we decided that a different penalty was appropriate we are not merely at large to substitute our finding for that of a Tribunal. This approach is consistent with the general principle that in an appeal against the exercise of its discretion by a court or statutory body the court on appeal has limited powers to interfere. It can only do so in certain well recognized grounds namely where a court a quo exercises its discretion capriciously, upon a wrong principle or where it has not brought its unbiased judgment to bear on the question or where it has not acted for substantial reason".

[9] (A4/21) [2022] ZAGPPHC 959 (19 May 2022) at para 13.
[10] (2005) 56 BCLR 613.

25. The Appellant has not submitted in papers before us nor argued in this Appeal Hearing that the Disciplinary Tribunal had exercised its discretion haphazardly or its decision was based on a mistake of law and/or had not acted for substantial reason. In fact, the Appellant has not demonstrated or provided grounds that could persuade this Appeals Committee that the sanction imposed on the Second Respondent was arrived at capriciously or based on mistake of law.

26. In the Appellant's heads of argument, it is submitted that 'the Appeal Committee is required for the purposes of PART A of my appeal to establish if the Tribunal indeed did come to a wrong conclusion on the facts or misinterpreted the law, or both, in ultimately arriving at the sanction for Charge 2 on the Charge Sheet'. We are satisfied that the Disciplinary Tribunal exercised its discretion judiciously and within the confines of the law. Also, we are satisfied that the sanction imposed by the Disciplinary Tribunal was proper in the circumstances of the Second Respondent.

27. Our posture hereinabove is premised on the rationale that the Second Respondent was found guilty of an improper conduct that related to a single incident that occurred at the time when the Second Respondent could be considered as a novice in the profession and without a history or previous findings of improper conduct.

28. The observation made on the Second Respondent's heads of argument that the Appellant seeks to import into this Appeal extraneous circumstances which did not relate to the charge the Second Respondent had been found guilty of by the Disciplinary

Tribunal, has merits. In this Appeal we find it impermissible and objectionable to consider extraneous circumstances that the Second Respondent had not been charged with or for which there was no evidence evaluated by the Disciplinary Tribunal.

29. In this Appeal we align ourselves with the observation made in *S v Bodibe*[11] regarding the imposition of appropriate sanction, wherein the court held that "invariable there are overlaps that render the process unscientific; even a proper exercise of the judicial function allows reasonable people to arrive at different conclusions"[12]. The Appellant also finds herself between a rock and hard place regarding the appropriate sanction. The Appellant could not decide in her papers, which of the suspension from practice or removal from the register is the appropriate sanction that should be imposed on the Second Respondent. It is also for this reason that we deem in this Appeal Hearing, the Disciplinary Tribunal' sanction was a rational one and should not be interfered with.

30. We therefore hold and conclude in respect of Part A of the Appeal that there are no grounds nor exceptional circumstances that exist that could prompt an interference with the discretion exercised by the Disciplinary Tribunal in its imposition of the suspended sanction described hereinabove. The Appeals Committee is satisfied that the sanction imposed together with the reason given by the Disciplinary Tribunal, is in all circumstance lawful, reasonable, and fair when due regard is given to both section 32(3)(a) of the AP Act and the SACAP

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[11] *S v Bodibe* (CC 14/2021) [2021] ZAGPPHC 715 (20 October 2021).

[12] Idem at para 5.

Sanction Guidelines.

Proffering Charges

31. We now move further to deal with Part B of the appeal that relates to the alleged failure by the SACAP to proffer charges against the Second Respondent. In relation to this allegation, it is significant to point out at the outset that the proffering of charges is in general a power derived from an empowering legislation and consequent upon certain actions and decisions. For example, in criminal procedure the proffering of charges against an accused person is derived from the Constitution[13] and follows the investigation and a decision to prosecute by the relevant authority. Du Toit and Ferreria[14] submits that-

> "The Constitution empowers the National Prosecuting Authority to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings"[15].

32. Redpath's[16] proposition clarifies this trite position that-

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[13] See, section 179(2) and

[14] 'Reasons for Prosecutorial Decisions' 2015 *Potchefstroom Electronic Law Journal*, Vol 18 No.5, pp.1507-1526.

[15] Idem at 1507.

[16] 'Failing to Prosecute: Assessing the State of National Prosecution in South Africa' 2012 Institute of Security Studies, *Monograph* No.186 [accessed online, 19 July 2024] https://repository.uwc.ac.za/xmlui/bitstream/handle/10566/5091/Mono186Full.pdf?

"In South African law, where a prima facie case exists, a duty to prosecute arises unless a compelling reason exists to decline to prosecute. Under a constitutional order such as the one that pertains in South Africa, the exercise of all public power is constrained by the principle of legality and the provisions of the Constitution".

33. The procedure briefly outlined hereinabove for criminal matters, is not entirely different to one that is followed by SACAP in proffering charges against its registered persons. The AP Act provides a framework for complaints and preferring of charges.[17] Such framework is as follows -

"the council must refer any matter brought against a registered person to an investigating committee contemplated in section 17" [our emphasis].[18]

"the investigation committee must investigate the matter and obtain evidence to determine whether or not in its opinion the registered person concerned may be charged, and if so, recommend to the council the charge or charges that may be preferred against that registered person"[19] [our emphasis].

"The investigation committee must, after the conclusion of the investigation, submit a report making its recommendations to the council regarding any matter referred to it in terms of this section"[20]

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[17] See, sections 28 and 29 of the AP Act.
[18] Section 28(1) of the AP Act.
[19] Section 28(2) of the AP Act.
[20] Section 28(4) of the AP Act.

[our emphasis].

"The council must, after considering a report of the investigating committee in terms of section 28(2)(b) and (4), charge a registered person with improper conduct if the council is convinced that sufficient grounds exist for a charge to be preferred against such a registered person"[21] [our emphasis].

34. Clearly from the provisions of the AP Act hereinabove, a charge will only be the result when the investigation committee has investigated the complaint,[22] there is evidence to charge,[23] a report is submitted to the council with recommendations to charge[24] and the council is convinced of sufficient grounds to charge and had resolved to charge.[25]

35. During this Appeals Hearing the Appellant was asked by this Appeals Committee certain questions relating to the alleged failure of SACAP to proffer charges. The Appellant confirmed that the issues which she believes should have formed part of the charges against the Second Respondent were contained in her complaint that culminated only to the two charges. The Appellant was asked amongst other important questions, the following by this Appeals Committee-

35.1. When had the Appellant gained knowledge that SACAP failed to proffer charges on issues she believed they should form part of the charge sheet?

[21] Section 29(1) of the AP Act.
[22] See, section28(2) op.cit.
[23] Ibid.
[24] Section 28(4) op.cit.
[25] Section 29(1) op.cit.

35.2. What did the Appellant do when she discovered that the charges were not preferred by the SACAP?

35.3. When did the Appellant lodge the Appeal against the alleged failure to proffer the charges?

36. The Appellant did not provide direct answers to these questions. Notwithstanding, the Appellant did submit that she requested reasons from SACAP in terms of section 35(1) of the AP Act and never received these reasons. Furthermore, the Appellant submitted that the Appeal against the failure to proffer charges was lodged after the receipt of the sanction ruling described hereinabove. The Appellant submitted to the Appeals Committee that the reason why the appeal was lodged after, is as the result of the CBE Appeals Committee ruling in another matter, which the Appellant says it was held that a council decision must be taken before an appeal is lodged. The Appellant has misconstrued this ruling and it is not an authority for the Appellant's case before us.

37. The Appellant has proven to be evasive and disingenuous in responding to the questions hereinabove, posed by this Appeals Committee during the hearing. Furthermore, the Appellant's reply during this Appeal Hearing is inconsistent with the submissions made in the Appellant's papers before us. The views of this Appeals Committee in this regard are based on the following rationale-

37.1. The Appellant submitted in the heads of argument[26] that-

> 'upon receiving the Charge Sheet, I noted that the charges were not on the Charge Sheet. On the 15 September 2023 I questioned the omission and requested it to be included (refer to Appendix C). On the same day SACAP responded by stating my correspondence with be attended to'.

37.2. Furthermore, the Appellant submits in the heads of argument[27] that-

> 'written reasons were requested from SACAP in terms of Section 35(1) of the Architectural Profession Act 44 of 2000 to explain why SACAP did not prefer charges with regards to the above complaints despite being provided with the relevant evidence. SACAP responded by providing a copy of the Record of Submission to the Investigation Committee" from which is became apparent that the complaints were not investigated by the Investigating Committee…'

37.3. Based on para 37.1 hereinabove it is clear as conceded there that the Appellant became aware of the decision and/or failure not to proffer charges on or before 15 September 2023 and only lodged the appeal eight (8) months later, on or about 21 May 2024.

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[26] See, para 14 of the Appellant's heads of argument at p.17.
[27] Idem at para 15.

37.4. It is also clear from para 37.2 that the Appellant's request for reasons were responded to by SACAP, when the Appellant was furnished with a copy of the Investigation Committee's report meant for the attention of SACAP in terms of section 29(4) of AP Act. If this document was regarded by the Appellant as not reasons or inadequate reasons, it should have been susceptible to a challenge by the Appellant.

37.5. During this Appeal Hearing and on papers placed before us, the Appellant has not argued or made any suggestion that the reasons received were inadequate and that the inadequacy is challenged.

38. In relation to the proposition in para 37.4 and 37.5 hereinabove, this Appeals Committee finds that when SACAP failed (as alleged by the Appellant) to proffer charges and provide adequate reasons; the Appellant had a remedy in common law and in terms of PAJA. Such remedy was in a form of a court review application. In *Huijink-Maritz v Municipal Manager: Matjhabeng Local Municipality*[28] the court held that-

> "At common law, the existence of internal remedies was not a bar to approach a court for appropriate relief after an administrative decision has been taken.
> C Hoexter25 states:
> The mere existence of an internal remedy is not enough by itself to indicate an intention that the remedy must first be exhausted.

[28] (3932/2015) [2018] ZAFSHC 125 (14 August 2018).

There must be a clear legislative or contractual intention to that effect. Even then, there is no general principle at common law that an aggrieved person may not go to court 'while there is hope of extra-judicial redress.' In fact, there are indications that the existence of a fundamental illegality, such as fraud or failure to make any decisions at all, does away with the common-law duty to exhaust domestic remedies altogether"[29].

39. It is clear in the *Huijink-Maritz* matter hereinabove that at common law the Appellant did not have to wait to obtain reasons and/or a decision of the Disciplinary Tribunal or that of SACAP for the failure to proffer charges, if the Appellant was aggrieved at all by such an alleged failure to proffer charges. The exception to this common law rule is-

> "when a Statute expressly states that the exhaustion of internal remedies is an indispensable condition precedent before launching an application to a court then that condition must be fulfilled"[30].

40. This Appeals Committee could not find any provision in the AP Act nor CBE Act that provides for an indispensable condition precedence that that the Appellant is required by law to wait for SACAP reasons or a decision of the Disciplinary Tribunal before exercising the remedy in the form of a review application.

[29] Idem at para 28.
[30] Idem at par 29.

41. In relation to PAJA, section 6(2)(g) read with 6(3) thereof is the authority for the proposition this Appeals Committee makes in para 38 and 39 hereinabove. In the *Huijink-Maritz* matter the court held that-

> "If the Act did not have a deeming provision section 6(3) of PAJA would be applicable whenever there was a failure to take a decision"[31].

42. This Appeals Committee could not locate a deeming provision in the AP Act or CBE Act. Consequently, this Appeals Committee's proposition in para 38-41 is trite to the extent that the Appellant was under no legal obligation to wait for the Disciplinary Tribunal's sanction ruling in order to exercise any of the remedies available to challenge the alleged SACAP's failure to proffer charges.

43. Notwithstanding the Appellant's misplaced view and approach described hereinabove, it is also this Appeals Committee's ruling that the charges which the Appellant wished they were preferred against the Second Respondent, would have been (if they were proffered) unmerited against the Second Respondent and beyond the scope of the Disciplinary Tribunal's jurisdiction. This Appeals Committee basis this proposition on the following rationale:

[31] Idem at para 39.

43.1. The owner of the property is responsible for complying with building regulations (both prescriptive and functional), appointing competent persons and applying for deviations from approved plans, drawings, and documents.

43.2. The home builder is responsible for the appointing competent persons to perform soil classifications and the design of the structural system for the house which includes foundations.

43.3. The Second Respondent was not appointed to perform the role of a principal agent in terms of a contract to construct the house with the home builder.

44. It is our ruling based on the foregoing that the Appeal relating to the alleged failure to proffer charges (as submitted in the Appellant's Part B of this Appeal) was not lodged in substantial compliance with the AP Act. Precisely, this appeal was not lodged within the statutory timelines specified in section 35(2) of the AP Act and the Appellant had not lodge before this Appeals Committee any application for condonation of the same. Also, the Appellant's argument that the appeal against the failure to proffer charges had to be lodged on receipt of the sanction ruling of the Disciplinary Tribunal is misplaced. The sanction ruling and the single charge related to it, had no causal link or bearing on charges that were allegedly not preferred.

45. Furthermore, it is abundantly clear that the Appellant had no grievance regarding the alleged failure to proffer charges, up until the Appellant received the First Respondent's Disciplinary Tribunal sanction ruling that in this Appeal the Appellant is now disagreeing with it.

46. The Appellant's conduct described hereinabove is raising a critical question- whether the Appellant would still be aggrieved with the alleged failure to proffer charges if the Disciplinary Tribunal' sanction was made in accordance with the relief sought by the Appellant in Part A of this Appeal. Our view is that an objective answer to this question would be a negative one, considering the observation we make hereinabove.

47. Metaphorically, the description of the saga between the Appellant and Second Respondent is not entirely different from the Supreme Court of Appeal's observation in the matter of *Macrae v S*[32] where the court remarked as follows-

> "This is a case about a baboon. By all accounts, until it apparently met an untimely end, the baboon behaved impeccably. The saga has involved a trial in the district court over four days, an appeal to the full court of the North Gauteng High Court, a petition to this court and then this appeal. The expenditure of time and effort and the costs to the public purse and the appellants, Dr and Mrs Macrae, have been considerable. Those include emotional costs, because for seven and a half years the trial and their convictions for defeating or obstructing the administration of justice and theft of the baboon have hung over their

[32] (93/203) [2014] ZASCA 37 (28 March 2014).

heads. And all this was caused by a bureaucratic insistence by the officials…"

48. Similar to the *Macrae* matter above, the matter that we are seized with in this Appeal relates to the events that occurred more than six years ago. It has without a doubt resulted in expenditure of time, efforts and costs to SACAP, the Second Respondent and now the CBE. This saga has involved numerous complaints against the Second Respondent, that have been lodged one after the other by the Appellant.

49. The glaring difference between the two sagas is that the *Macrae* matter involved a baboon and the one before us relates to a house which the Appellant had purchased from the previous owner who had dealings with the Second Respondent. In the *Macrae* matter, the court attributed the cause of the saga to bureaucratic insistence by the officials to pursue prosecution of the Macraes and the prosecution's failure to exercise a sensible discretion to decline prosecution.[33]

50. Our view is that the Appeal before us results from an abuse of the SACAP processes and a failure by the SACAP to exercise a sensible discretion to decline prosecuting numerous complaints relating to the same subject-matter, at the behest of the Appellant against the Second Respondent. The conduct of the Appellant which must be rebuked, is suggestive of a conduct of a person who will never be satisfied with any lawful, reasonable, and fair outcome.

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[33] Idem at para 30.

51. The Appellant's conduct cannot be ignored by this Appeals Committee. Such conduct raises important questions, especially when regard is had to the circumstances and principles in the *Macrae* matter discussed hereinabove. The precise question that this Appeals Committee is seized with - is what would prevent the Appellant from lodging further or another complaint against the Second Respondent (including all those that were involved in the construction of the house the Appellant purchased 6 years ago)?

52. The question we are raising may not necessarily be before us in this Appeal. Also, this Appeals Committee is alive to the rights of the Appellant to exercise legal rights. Equally, the Second Respondent has rights and in the papers before us, the Second Respondent takes an issue[34] that is difficult to ignore, and which relates to the questions we are asking hereinabove in respect of the Appellant's conduct. The sequence of material events of this matter that are largely fueled and sponsored by the Appellant's demeanor *vis-à-vis* constitutional fairness duty owed to the Second Respondent in terms of section 35(3)(m) of the Constitution, invites this Appeals Committee' response to the Second Respondent's submission in this Appeal.[35]

53. This Appeals Committee is of the view that the Appellant is abusing the SACAP procedures, which are enacted amongst other with the purpose to deal with improper conduct of registered persons. Whilst we are mindful of the Constitutional right of the Appellant "to have any dispute that can be resolved by the application of law decided in a fair public

[34] See, 'Second Respondent's Background and Introductory Comments to the Appeal' at para 36.
[35] See, the 'Second Respondent Heads of Argument' at para 16.

hearing before a court or, where appropriate, another independent and impartial tribunal or forum,"[36] the exercise of this right is also subject to Constitutional limitations. In one of the earlier court's decisions and precisely in the *Goldberg v Goldberg*[37] matter quoted with approval in *Alphera Financial Services v Lemmetjies*,[38] it was held that courts can decline to entertain proceedings that amount to an abuse of its process.

54. Our view is that this Appeals Committee is enjoined with other tribunals and forums such as the courts to reject any form of abuse of processes by any party. In *Standard Credit Corporation Ltd v Bester and Others*[39] the abuse of process was explained as follows-

> "abuse of process could be said, in general terms, to occur when a court process is used by a litigant for a purpose for which it was not intended or designed, to the prejudice or potential prejudice of the other party to the proceedings"[40] [our emphasis].

55. In *Beinash v Wixley*[41] the Supreme Court of Appeal offered another explanation of what constitute an abuse of a process. The court there held that although there can be no all-encompassing definition of the concept of abuse of process, in general terms-

[36] Section 34 of the Constitution of the Republic of South Africa.
[37] 1938 WLD 83. See also, *Sealander Shipping and Forwarding v Slash Clothing Co (Ltd)* 1987 (W).
[38] (6380/2020) [2021] ZAGPPHC 103 [8 March 2021] at para16.
[39] 1987 (1) SA 812 (W).
[40] Idem at 820A-B.
[41] 1997 (3) SA 721 (SCA).

"an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective"[42] [our emphasis].

56. On papers and before us in this Appeal Hearing, it has been argued by the Second Respondent that the Appellant's actions through SACAP have caused her prejudice and "this is a never-ending vendetta conducted by the present Appellant against the Second Respondent".[43] It has been argued that 'The draughting of plans of approximately R11 000 have now incurred legal costs for the Second respondent of well over R100 000.00".

57. This Appeals Committee finds that the SACAP processes (precisely the complaints procedures) have been used by the Appellant for extraneous purpose, which this purpose has demonstrated itself amongst other from the inception of the complaints against the Second Respondent. For example, the Appellant had submitted in the complaint affidavit (made under oath on 10 February 2021) that "The outcome I hope to achieve is a DISCIPLINARY HEARING WITH THE OUTCOME TO SUPPORT ANY FUTURE LEGAL ACTION (CONTRACTUAL) AGAINST ARCHITECT". This extraneous purpose of the Appellant is discouraged and prohibited by the SACAP Rules for Inquiry into Alleged Improper Conduct[44] ("the Rules"). In these Rules it is provided that-

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[42] Idem at 734G.
[43] See, para 34 and 36 of the Second Respondent response to the Appellant's background and introductory comments to the Appeal.
[44] Board Notice 5 of 2021, GG Notice No.44190 published 19 February 2021.

> "An investigation mentioned in 1.4 is aimed at and directed toward the professional conduct of a Registered Person and <u>is not intended to</u> recover damages on behalf of any complaint, or enforce specific performance against any person and as such is not to replace civil and/or criminal litigation"[45] [our emphasis].

58. This Appeals Committee has already expressed views and pronounced on the conduct of the Appellant. Notwithstanding, during this Appeal Hearing the Appellant confirmed that there is another pending complaint lodged against the Second Respondent (which brings the total of complaints lodged by the Appellant against the Second Respondent to three). The Appellant's complaint affidavit was signed under oath on 13 May 2024 and relates to what the Appellant described as "dishonesty which occurred late in 2022" that "Ms van Zyl forged and uttered a Power of Attorney to the Municipality". It is common cause that at the center of all three complaints of the Appellant, is the house for which the Second Respondent was appointed as the Architectural Draughtsperson.

59. The various complaints of the Appellant constitute an impermissible duplication and splitting of allegations of improper conduct against the Second Respondent. It is our view that this is done by the Appellant with the sole intent to have the Second Respondent sanctioned for each and every one of these allegations. Such objective is unlawful and impermissible in law when the transaction (which in the case of the Appellant is the allegation of improper conduct) is one and the same offence.

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[45] Idem Rule 1.5.

60. This Appeals Committee finds that the three complaints that have been lodged by the Appellant relates to one continuous improper conduct and the evidence required to prove one of the complaints is the same required for proving the other two complaints.[46] Consequently, the complaints relate to allegations of improper conduct that involve a single intent and constitutes one continuous improper conduct transaction of the Second Respondent, which if the SACAP pursues any of these separately it would be improper splitting that results in duplication of sanction against the Second Respondent. The test applied in avoiding the said splitting and duplication is 'common sense and fairness'[47].

61. It is this Appeals Committee's unanimous decision (per curiam) that the Appellant's Appeal in both Part A and B of the papers the Appellant has placed before this Appeals Committee, be dismissed.

62. In the result, the following order is made by this Appeals Committee:

    62.1 The sanction imposed by the Disciplinary Tribunal of the First Respondent against the Second Respondent is confirmed and the Appeal by the Appellant against the imposition of such sanction is hereby dismissed;

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[46] See, *S v Maneli* 2009 (1) SACR 509 (SCA) at para 8 and *S v Dlamini* 2012 (2) SACR 1 (SCA) at para 8, where this was held to be the test for the splitting and duplication of charges resulting into a duplication of conviction..

[47] *S v Ntswakele* 1982 (1) SA 325.

62.2 The Appellant's Appeal that SACAP failed to proffer charges against the Second Respondent is also dismissed; and

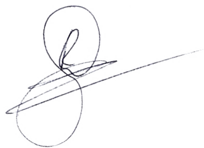
62.3 SACAP must diligently review and refuse all pending (if any) and future complaints lodged by the Appellant against the Second Respondent, which would result to impermissible duplication and splitting of allegations and/or charges against the Second Respondent.

CONCURRED AND SIGNED BY THE APPEAL COMMITTEE MEMBERS ON THE DATES AND AT THE PLACES SET OUT HEREUNDER:

LULAMILE PETER – Appeal Committee

Chairperson Date: 22 July 2024

Place: Pretoria



RONALD WATERMEYER – Appeal Committee

Member Date: 22 July 2024

Place: Randburg

JANET BARNARD – Appeal Committee Member

Date: 22 July 2024

Place: Gordon's Bay