

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

In the matter between:

KULANI DINIVHA KENNEDY MHLARI

Appellant

And

ENGINEERING COUNCIL OF SOUTH AFRICA (ECSA)

Respondent

RULING

1. Introduction

- 1.1 This is an appeal against the decision of the Respondent to refuse the Applicant's application for professional registration as a professional Engineering Technologist.
- 1.2 The Appeal Hearing was held on the 23rd of June 2023 at the premises of the Council for the Built Environment ("CBE") offices, Lourie Park, 2nd Floor, Hillcrest office park, Pretoria.
- 1.3 The Appeal Committee was properly constituted in accordance with Section 21(3) of the Council for the Built Environment Act No. 43 of 2000 ("CBE ACT") read with paragraph 3.2 of the CBE's Policy of Conducting Appeals.
- 1.4 The Proceedings were conducted in English and were also digitally recorded and assisted by Ms M Chiloane from Council for Built Environment (CBE) in Pretoria.

2. The Parties

2.1 The Appellant is Mr Khulani Dinivha Kennedy Mhlari who is an applicant for professional registration.

2.2 The Respondent is the Engineering Council of South Africa (ECSA), a body that oversees the engineering profession, the professional norms and standards of the engineering profession in South Africa, which include applications for registration.

3. The Appeal Committee comprised of the following:

3.1 Ms Keitumetse Stella Mahlangu as Chairperson;

3.2 Mr Jan Johannes de Koker as Committee Member; and

3.3 Mr Thabiso Njokwana as Committee member.

4. Also present at the Appeal Hearing were the following;

4.1 Mr Kulani Dinivha Kenny Mhlari, the Appellant who was representing himself.

4.2 Mr Hamish Lan Roy Anderson, the legal representative of the Respondent from the law firm, Naidoo & Associates Incorporated.

4.3 Ms Carla de Beer, Acting Manager from Improper Conducting and Investigations Business Unit of ECSA.

4.4 Ms Meltonia Chiloane, Legal Specialist of the CBE.

4.5 Mr Curtis Mbhalati, Legal Specialist of CBE.

4.6 Semakaleng Sekoboane, Paralegal of CBE.

5. The Issue

5.1 Firstly, the issue is about the refusal of the Appellant's application for professional registration as a Professional Engineering Technologist.

5.2 Secondly, whether or not Appellant was provided with reasons for turning down or rather declining his application for registration as a Professional Engineering Technologist.

6. Background Facts

6.1 This Appeal has come before the Committee in terms of Section 21(3) of the Council for Built Environment Act 43 of 2000 (The CBE Act). 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.

6.2 The Appellant, Mr Kulani Mhlari lodged a Notice of Appeal on the 4th May 2023 due to the decision of the ordinary Council meeting held on the 30th March 2023, where the decision to refuse to register, the Appellant, Mr Kulani Mhlari was upheld.

6.3 At the beginning of the proceeding the parties were given an opportunity to raise any procedural issues and points in limine. The Respondent raised an issue relating to their application for condonation for late filing of documents which the Appellant had opposed.

6.4 Therefore, first and foremost Committee dealt with the application for condonation of late filing of the documents. In this instance the Committee gave the opportunity first to the legal representative of the Respondent, Mr Anderson to state his case. Thereafter the opportunity was given to the Appellant, Mr Kulani Mhlari to make his submission in opposing the Respondent's application.

7. Condonation

7.1 It is common cause that the Respondent's Answering Affidavit has been served out of time.

- 7.2 The Respondent is of the view that he has not wilfully delayed the serving of the opposing papers which necessitated the obtaining of the necessary documentation pertaining to the Review Committee hearing.
- 7.3 The Respondent submits that the delay occasioned has not and will not cause any real or material prejudice to the Appellant in view of the fact that the Appeal has been enrolled for hearing in accordance with the 60-day rule.
- 7.4 The Appellant is of the view that timelines cannot be ignored, and they cannot be seen as minor infringement to conclude an appeal in almost two years while the statutory requirement is 60 days. He says that the delay is an act of illegality by the Respondent. He further says the delay can also be classified as Contempt of Court due to non-compliance with the Court Order.
- 7.5 The Committee spent some time on the discussion of who is at fault regarding the delay in filing the documents. A lengthy deliberation was spent by both the Respondent and Appellant on this discussion. After sometime, it was apparent that timelines were not adhered to by the Respondent. The Committee observed many inconsistencies as to the dates in the version of the Respondent as opposed to the version given by the Appellant, where the timelines were adhered to strictly.
- 7.6 In the case of ***Madinda v Minister of Safety and Security 2008(4) SA312 (SCA)***, it was held that it is trite “that a party seeking condonation, is seeking a court’s indulgence, a full explanation for non-compliance must be given, and the explanation must be reasonable enough to excuse the default”. The court held that the requirement of ‘good cause’ involves an examination of all those factors which bear on fairness of granting the relief as between the parties and as affecting the proper administration of justice, and may include, depending on the circumstances, prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the bona fides of the applicant, and any contribution by other persons or parties to the delay and the applicant’s responsibility therefore.

7.7 The court further held that good cause for the delay is not 'simply a mechanical matter of cause and effect' but involves the court in deciding 'whether the applicant has produced acceptable reasons for nullifying, in whole, or at least substantially, any culpability on his or her part which attaches to the delay in serving the notice timeously, and in this process, strong merits may mitigate fault, no merits may render mitigation pointless.

7.8 As regards the third requirement it is not all and any prejudice that precludes the grant of condonation. It is the only unreasonable prejudice. The court further said, 'the availability of witnesses and records will be of particular importance under this head, but other features may also be relevant'.

7.9 After all the deliberations, the Committee came to the conclusion that even though the timelines were not adhered to by the Respondent, there was no material or substantial prejudice suffered by the Appellant. Therefore, the Committee came to the conclusion to uphold the application for condonation for the late filing of documents.

8. Main Case

Appellant's Submissions:

8.1 It is the Appellant's submission that the Respondent refused to provide him with reasons. This assertion by the Appellant automatically invokes section 33(2) of the Constitution of the Republic of South Africa which entrenches the right to reasons for administrative action.

8.2 Appellant avers that "it is difficult if not impossible to appeal without understanding where you were lacking".

8.3 The Appellant dealt individually with the findings of the following outcomes 1, 2, 3, 9, 10, and 11 where he is said to have fallen short in, which resulted in the refusal of his application for registration. If one analyses the interpretation of failure to provide reasons, it appears that this failure to provide reasons has two levels which are:

- (i) Firstly, that no reasons were in fact provided by the Respondent, according to Appellant,

- (ii) Secondly, reasons are not reasons as we understand them, if they are not provided by the Act of Parliament, in this particular instance the Act is the Engineering Profession Act and its regulations.

8.4 Appellant is of the view that in terms of Section 22 of the Constitution 'Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.'

8.5 Furthermore, he is of the view that failure by the Respondent to comply with Section 24 of the Engineering Profession Act (Act 46 of 2000) violated his right to practice the profession of his choice. He is of the strong view that it cannot be accepted that this automatic right can be infringed unlawfully and without any reason.

8.6 He advocates that the only remedy available to the Appeal Committee is to reverse the unlawful decision of the Respondent.

8.7 Finally, he is of the view that according to him, the only remedy at his disposal is for the Appeal Committee to set aside the decision of the Respondent as required by Section 8(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000.

9. Respondent's Submissions:

9.1 Contrary to what the Appellant said regarding the fact that the Respondent has violated his rights to freely choose his occupation or profession. It is submitted that the Respondent through its rigorous assessments, moderation processes assessed the Appellant's competencies and found that the Appellant was "unable to demonstrate competence within broadly defined engineering activities". Essentially, the Respondent did not 'violate' the Appellant's right to freely choose his profession, but rather simply found that he had not met the qualifying criteria to be registered as such.

9.2 With respect to the provisions of 'Section 33 of the Constitution' Respondent agrees that 'Everyone has the right to administrative action that is lawful. Respondent submits that the Appellant's rights have not been adversely affected by the decision taken to refuse his registration.

9.3 He says the Appellant fails to set out the manner in which he believes his rights have been adversely affected and merely boldly states that no reasons were provided by the Respondent for the decision to refuse registration.

9.4 The Respondent is of the view that reasons were as a matter of fact provided at two levels, namely:

9.4.1 Firstly, the reasons are contained in the letter of refusal that was delivered to the Appellant; and

9.4.2 Secondly, if the reasons are not clear or understandable from the letter, the reasons ought to have been reasonably apparent from the contents of the various reports of assessors, moderators and reviewers.

9.5 The Respondent is further of the view that reasons provided, are reasons that are provided for in law and they are located within the Engineering Profession Act, 2000 (Act No. 46 of 2000) and its relevant regulations and policies, e.g. R-02-STA-PE/PT/PCE/PN with reference to PT which relates to competency standards for Engineering Technologists. He should know of the reasons because form B4-REF which is attached to his application which sets out all the categories of the outcomes. These are forms which are completed by his referees, therefore it cannot be said that he does not understand the generic terminological reference to those specific terms.

9.6 The Respondent submits that the reasons were furnished to the Appellant for the decision to refuse his registration. The Respondent is of the view that whether the reasons were provided or not to the Appellant, according to him the truth is that Appellant failed to demonstrate the necessary competencies to obtain registration as a Professional Engineering Technologist. Appellant can be advised to join a Voluntary Association of his choice, which can offer him advice on his application.

9.7 Furthermore, the Respondent had to check whether those reasons have legal basis in law for the refusal of his application for registration. The

Respondent in this instance did not have to go far but to look at the same Act of Engineering Profession Act, 2000 (Act No. 46 of 2000) quoted above.

9.8 Finally, a further question which the Respondent had to look at, was whether the reasons provided to Appellant were substantively adequate. In this regard the Respondent relied on the report named “examination of the grounds of appeal of application for registration as a Professional Engineering Technologist” a report which was prepared by Mr Jerry Kae. According to Respondent the report of Mr Kae was given to the Appellant at the previous hearing. Respondent also indicated that Mr Kae gave oral evidence of the contents of his written report at that hearing but this was not disputed or rather questioned by the Appellant.

10. Findings

10.1 After analysis of the evidence and facts before the Appeal Committee, the question to be asked is whether were there any reasons provided or given to the Appellant or not?

10.1.1 Firstly, it is common cause that the reasons allegedly given to the Appellant by the Respondent for the refusal of the application for registration had a legal basis primarily in the Engineering Profession Act, 2000 (Act No. 46 of 2000) with its regulations and internal policies of ECSA.

10.1.2 Secondly, it is also common cause that the reasons for refusal for registration are contained in a letter dated 22 July 2021 where the different competency outcomes were discussed. In the said letter it was specifically said the Appellant was ‘unable to demonstrate competence in broadly defined engineering activities in the following outcomes of 1; 2; 3; 9; 10; 11’. The letter was written by Ms Annah Thongwana, who is a Registration Officer.

10.1.3 Furthermore, Respondent indicated that the reasons were also provided in the report of Mr Jerry Kae which was titled “examination of the grounds of appeal of application for registration as a

Professional Engineering Technologist” of which Mr Kae gave oral evidence on its contents.

- 10.2 The letter further explains that if the Appellant does not understand reasons given on those outcomes, he can request an advisory interview in order to gain a better understanding of those reasons where his application was unsuccessful. Unfortunately, the Appellant did not make such a request to attend the advisory interview which could have maybe explained the reasons better than in the letter. This does not mean that the reasons were not clear in that letter of the 22 July 2021. On the face of the letter the reasons are clear as to why he was refused registration. It states in no uncertain terms that “During your Professional Review, you were unable to demonstrate competence in broadly-defined engineering activities in the following outcomes 1, 2, 3,9,10, and 11.
- 10.3 It is common cause that the Appellant was asked by the Committee why he did not attend the advisory interview which could have helped him to understand the reasons better. His explanation to the Committee was that he had a bad experience with the advisory interview on a previous occasion. This according to the Committee does not justify his non-attendance on this occasion. The reason is not valid enough not to have attended the Advisory interview which could have given him an opportunity to understand the reasons which he has all along been looking for. If he had a bad experience of the Advisory interview on a previous occasion, it does not mean he would always have a bad experience.
- 10.4 It is also common cause that the reasons were actually given, maybe it could be a question of whether the Appellant did or did not understand those reasons.
- 10.5 It should also be taken into cognisance that the Appellant cannot be registered as Professional Engineering Technologist simply because he was not given reasons which are satisfactory to him. It is the Committee’s position that the awarding of professional status can only be awarded on the basis of demonstrated competence by a professional, but it cannot


be awarded on the basis of pity or that you were not given reasons which are understandable to you. In terms of the profession, you need to prove yourselves that you are well qualified for the position as you would be dealing with the lives of people and an assurance must be obtained that you are not a danger to the lives of human beings.

11. Having considered the above, the following ruling is hereby made:

11.1 The condonation for late filing of the documents is granted.

11.2 The Appeal is dismissed.

11.3 Each party to pay its own costs.



Keitumetse Mahlangu

Chairperson: Appeal Committee-Council for Built Environment (CBE)

Date: 03 July 2023

Committee Member: Johannes de Koker: Concur

Committee Member: Thabiso Njokwana: Concur

This is a unanimous Ruling of the Appeal Committee-with all Committee members in concurrence.