

APPEAL BEFORE THE APPEAL COMMITTEE

OF THE COUNCIL FOR THE COUNCIL FOR THE BUILT ENVIRONMENT

In the matter between:

SHANE VILJOEN

APPELLANT

And

ENGINEERING COUNCIL OF SOUTH AFRICA

1st RESPONDENT

ROELOF DAVID COMBRINK

2nd RESPONDENT

Coram

P A Beck – Chairperson (Attorney)

T C Moshe – Professional Engineering Technician (Specialist)

Mr. D. R. Riley – Professional Valuer (Generalist)

JUDGMENT AND REASONS

THE PARTIES

1. The Appellant is Shane Viljoen an adult female complainant resident in the Western Cape.
2. The Appellant represented herself at the hearing.

3. The 1st Respondent is the Engineering Council of South Africa (“ECSA”) a statutory body established in terms of the Engineering Profession Act, (“EPA”) 46 of 2000 to regulate the engineering profession in terms of this Act.
4. The 1st Respondent was represented by an attorney Mr. H. Anderson of the Law firm Anderson Law.
5. The 2nd Respondent is Roelof Dawid Combrinck and adult male engineer resident in Mossel Bay, Western Cape.
6. The 2nd Respondent was represented by an attorney Mr. P. Bielderman of the Law Firm Bieldermans Inc.

INTRODUCTION

7. This is an appeal in terms of Section 21 of the Council for the 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 the councils for the professions such as the Engineering Council of South Africa (“ECSA,”) to appeal that decision to the Council for the Built Environment (“the CBE or the Council”) within 30 days of becoming aware thereof.
8. The Appeals Committee heard the Appeal on 18 September 2024 and consented to the Appellant and the 2nd Respondent attending the hearing via an audio and video conferencing link.

FACTUAL BACKGROUND

9. The factual background to this matter is that in an affidavit dated 10 February 2021, the Appellant filed a complaint with the Council against the 2nd Respondent. The complaint was lodged with the Council on 21 February 2021.

10. On receipt of the complaint, The Engineering Council of South Africa appointed an Investigative Committee in terms of Section 17 and Section 28 of the Engineering Professions Act 46 of 2000, which representative of the Investigative Committee inspected the property on 14 April 2021.
11. Following the report of the Investigative Committee, and in terms of Section 30 of the EPA, a disciplinary tribunal was appointed by Council.
12. On 23 August 2022, a disciplinary hearing was held against the 2nd Respondent, a Professional Engineering Technician with Registration Number 201130034. The Disciplinary Hearing was concluded on 18 April 2023.
13. The 2nd Respondent pleaded guilty to all of the charges in terms of Rule 8 of the Rules of the Inquiry into alleged improper conduct; submitted a guilty plea dated 22 August 2022; and was found guilty by the Disciplinary Tribunal.
14. The following sanction was imposed by the Disciplinary Tribunal on the 2nd Respondent on 9 August 2023 -
 - 14.1 a fine of R40 000.00 (fourty thousand Rand and Zero Cents) payable to the Council within 30 (thirty) days; and
 - 14.2 the 2nd Respondent's Registration was further given a supervised suspension for a period of thirty (30) days.
15. The 2nd Respondent appealed to the Council but only against the sanction imposed upon him.
16. The Council resolved as follows:
 - 16.1 *"The Appeal against the decision of the Council is dismissed; and*
 - 16.2 *The "findings of the sentence by the Disciplinary Tribunal is confirmed."*¹
17. On 31 July 2024, the Appellant gave the Council Notice of an Appeal in terms of Section 35 of the Engineering Profession Act 46 OF 2000 ("the EPA"), against the decision of Council, as defined in section 1 of the EPA.

¹ Page 4 of the Bundle

18. The Appellant alleges that the process before the Disciplinary Tribunal was not conducted lawfully with due regard to the Constitution, PAJA and relevant legislation; and that the sanction imposed on the 2nd Respondent was disproportionate to the transgression of misconduct.

19. The Appellant seeks an Order in the following terms:

19.1 *“That the Appeal Committee refers the matter back to the ECSA to consider the matter afresh and to ensure that the relevant Rules and Sections of the Act is complied with and the sanction imposed accordantly (sic accordingly.)”*²

THE HEARING

20. No *points in limine* were raised by the 1st Respondent at the Appeals hearing.

Points in limine raised by the 2nd Respondent's Representative

21. At the hearing of the matter, the 2nd Respondent raised the following two (2) *points in limine*:

21.1 The *locus standi* of the Appellant;

21.2 The *jurisdiction* of the Appeals Committee to grant the order sought by the Appellant.

Appellant's locus standi

The 2nd Respondent's submission in summary:

22. The 2nd Respondent disputed the *locus standi* of the Appellant to bring this action before the Appeals Committee.

23. The 2nd Respondent argued that Section 33 of the EPA deals with appeals by registered person's against a finding or sentence by the Disciplinary Tribunal. This section does not extend any right to a member of the public to appeal the decision of the Disciplinary Tribunal made against a registered person.

² Page 17 of Appeal Record 4.

24. The 2nd Respondent submitted that Section 35 of the EPA provides that any member of the public whose interests and rights are affected by a decision of Council may appeal to the CBE against such decision.
25. The 2nd Respondent further draws a distinction between decisions made by the Disciplinary Tribunal and decisions made by Council in terms of the EPA. These per the 2nd Respondent are two distinct administrative bodies, defined separately in the EPA and who have separate and distinct functions.
26. The 2nd Respondent submitted that the Appellant's interests and rights could only have been affected had Council refused to investigate and or prosecute her complaint against the 2nd Respondent. The Council in this matter investigated the complaint and thus the right of the Appellant was satisfied and became extinguished.
27. Furthermore, the only decision of Council that the Appellant can appeal is the decision by Council to dismiss the 2nd Respondent's appeal against the sanction imposed on the 2nd Respondent as this is the only "decision" made by Council subsequent to the Council deciding to institute disciplinary proceedings against the 2nd Respondent.
28. Accordingly, there is no further right of the Appellant or anyone else, other than the 2nd Respondent.
29. Section 33 of the Constitution read with the Provision of PAJA creates no more than a legitimate expectation that once a matter is referred to Council, in terms of Section 28 of the EPA, that the Council would investigate the complaint; charge the person against whom the charges are brought; and then appoint a Disciplinary Tribunal to hear the complaint, which brings the Appellant's interest to an end.
30. Thus there is no evidence that the Disciplinary Tribunal did not consider the Appellant's complaint in a lawful, reasonable and procedurally fair manner which affected her interests and rights; nor is there any evidence before the Appeal Committee of the rights and interest of the Appellant that were adversely affected by the Council in investigating the complaint and upholding the sanction imposed by the Disciplinary Tribunal.

31. Accordingly, the Appeal must be dismissed on the ground that the Appellant has no *locus standi* in the matter.

The Appellant's submissions in summary:

32. The Appellant argued that in so far as its locus standi is contested by the 2nd Respondent, it is evident that Section 35 of the EPA provides that any member of the public whose interests and rights are affected by a decision of Council may appeal to the CBE against such decision.

33. The Appellant further grounds her *locus standi* in section 5 and 6 of PAJA. In addition, Section 3 of PAJA requires that any administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.³ The Appellant cites *Zondi v MEC for Traditional Affairs and others* where it was "*settled that PAJA governs the exercise of administrative action in general and all decision makers ... make administrative actions ... consistent with PAJA.*"⁴

34. The Appellant submits further that the 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 Constitution.⁵

35. Accordingly, the contentions of the 2nd Respondent are without merit and the point *in limine* must be dismissed.

The Jurisdiction of the Appeals Committees

The 2nd Respondent's submissions in summary:

³ Appeal Record 4 Page 2 paragraph 3

⁴ Appeal Record 4 paragraph 2.

⁵ Appeal Record 4 page 2 paragraph 4.

36. The 2nd Respondent argued that the reference to Council in Section 35 of the EPA relates to the Council and not to the Disciplinary Tribunal. The Tribunal is a creature of statute governed by the provisions of Sections 30 to 32 of the EPA.
37. Section 35 of the EPA upon which the Appellant relies, does not apply to issues pertaining to the Disciplinary Tribunal, which is not the Council as defined and which is separately defined in the EPA.
38. The 2nd Respondent submitted that the Appellant is effectively, in a “roundabout” way attempting to appeal both the conviction and sentence imposed upon the 2nd Respondent by the Disciplinary Tribunal and not the decision of Council to dismiss the 2nd Respondent’s appeal to Council in terms of the EPA.
39. The 2nd Respondent argued that the Appellant has no such rights under section 33 of the EPA.
40. The Appellant seeks an order from the Appeals Committee for a *de novo* hearing. The 2nd Respondent argued that once the Council has appointed a Disciplinary Committee, Council’s functions are complete in terms of Section 28 to 30 of the EPA and is *functus officio*.⁶
41. The 2nd Respondent argued that accordingly, the Appeals Committee is thus not empowered to grant the order sought by the Appellant.
42. Accordingly, the 2nd Respondent asks that both *points in limine* are upheld and the Appeal dismissed.

The Appellant’s submissions in summary

43. The Appellant argued that she is aggrieved by the resolution passed by the ECSA confirming the (i) finding of the Disciplinary Tribunal; and the (ii) sentence imposed on the 2nd Respondent. The Appellant submits that the administrative action in the shape and form of the Disciplinary Tribunal was not conducted lawfully, or in a reasonable and procedurally fair manner as required by Section 33 of the Constitution read with PAJA.

⁶ Appeals Record 4 Page 40.

44. The Appellant argued that the Appeals Committee has the powers and thus the jurisdiction to grant an order to remit the matter back to Council for a hearing *de novo* for the reasons stated in paragraph 33 above.
45. The Appellant asks that the Appeals Committee dismisses the *points in limine* and grants an order to remit the matter back to the Disciplinary Committee for a *de novo* hearing.

THE ISSUE IN DISPUTE

46. The issue in dispute is whether (i) due process was followed by the Disciplinary Tribunal in arriving at a finding and sanction against the 2nd Respondent; (ii) whether Council's decisions in the matter were lawful and procedurally fair; and (iii) whether the Appeals Committee is empowered by the Act to grant the order sought by the Appellant to remit the matter back to the Disciplinary Tribunal for a hearing *de novo*.

THE MERITS

47. In this matter, the *points in limine* must first be determined before the Appeals Committee can adjudicate on the merits of the matter before it.

Locus Standi of the Appellant

48. The heart of the first point *in limine* is raised whether the Appellant has *locus standi* in the matter before the Appeals Committee.

49. Section 21 of the CBE Act stipulates as follows-

"Appeal

(1) Any person who is aggrieved by a decision of any of the Councils for the professions may upon payment of the prescribed fee and, within 30 days from that person becoming aware of such decision, in writing appeal to the council, and the council must consider and decide the appeal."

50. Section 35 of the EPA stipulates as follows-

"Appeal against certain decisions of council

(1) Any member of the public whose interests and rights are affected by a decision made by the council may -

(a) within 30 days from that person becoming aware of the decision request the council in writing to furnish him or her in writing with its reasons for that decision;

(b) within 90 days from the date on which the council furnished him or her with its reasons for that decision and after giving notice to the council, appeal to the CBE against that decision in terms of section 21 of the Council for the Built Environment Act, 2000.”

51. Section 3 of the CBE Act stipulates that the objects of the council are to amongst others-
“(a) *promote and protect the interests of the public in the built environment.*”
52. Section 2 of the CBE Act defines “Council” as the Council for the Built Environment.
53. Section 2 of the ECSA defines “Council” as the Engineering Council of South Africa.
54. The “Disciplinary Tribunal” in the ECSA means a Tribunal appointed in terms of Section 30 of this Act.
55. It is trite law that the Appeals Committee is a creature of statute established in terms of Section 21 of the CBE Act; and that it derives its jurisdiction from the Act.
56. As such it is empowered to only hear matters that it is specifically empowered by statute to hear.
57. The Appellant references section 33 of the Bill of Rights to bring her case, and thus give her *locus standi* before the Appeals committee. In this matter if due regard is had to section 33 of the Constitution, on a plain reading of the section no case has been made out in the papers before the Appeals committee by the Appellant that she was not provided with written reasons for the decision of the Disciplinary Tribunal; nor of a specific interest or right affected by a decision of Council to bring the Appeal within the ambit of Section 21 of the CBE Act read with Section 35 of the EPA.
58. It is trite that where a party, such as the Appellant in this matter, relies on a Constitutional right, it is incumbent upon the Appellant to allege and take the Appeals Committee into her confidence on which right is relied upon and the grounds upon which she does so.

59. Accordingly, the Appellant has failed to establish her *locus standi* before the Appeals Committee and the case should end here.
60. However, for completeness we will deal specifically also with the aspect of the “decision of Council” being the basis of the appeal by the Appellant, as detailed below.

Decisions of Council

61. Turning to Section 21 of the CBE Act, indeed the Appellant in order to have *locus standi* must be aggrieved by a decision of Council; and to be within the ambit of Section 35 of the EPA, the decision of Council must also have affected the Appellant’s interests or rights.
62. The facts are that the Appellant filed a complaint against the 2nd Respondent with the CBE. The Council of the EPA (through its appointment of the Investigative Committee (Section 28 of the EPA) and Disciplinary Tribunal (Section 30 of the EPA) investigated the complaint and after such investigation, the Disciplinary Tribunal charged the 2nd Respondent with misconduct. Nowhere in the papers does the Appellant allege that she is aggrieved by this decision of Council or that her interests or rights were affected by the decision of Council to investigate the complaint. It would be fair to accept on the evidence before the Appeals Committee that the Appellant is not aggrieved by the decision of Council to investigate the Appellant’s complaint; and that the actions of Council to investigate the complaint fulfilled Council’s statutory obligation to the Appellant and in so doing indeed acknowledged the Appellant’s interests and rights.
63. The Council, following its investigations appointed a Disciplinary Tribunal in terms of Section 30 of the EPA, and therefore met its obligations.
64. It is important to note that the Disciplinary Tribunal is specifically defined in the EPA. The legislature in its wisdom separated the functions of Council and that of the Disciplinary Tribunal for good reason being, but not limited to, maintaining procedural independence for fairness and justice to be served. Again the Appellant, on the evidence before the Appeals Committee, takes no issue with the decision of Council to appoint the Disciplinary Committee. No other view can be gleaned from the decision of Council to appoint the Disciplinary Tribunal, other than that Council fulfilled once more its statutory obligation and once more in so doing, acknowledged the Appellant’s interests and rights.

65. The matter is then heard; finalised by the Disciplinary Tribunal; a finding of guilty is arrived at; and a sanction imposed on the 2nd Respondent by the Disciplinary Tribunal, not by Council (***my emphasis***) who played no role in arriving at a finding at the Disciplinary Tribunal.
66. The 2nd Respondent appealed the sanction imposed upon the 2nd Respondent by the Disciplinary Tribunal. The Council passed a resolution to uphold the decision of the Disciplinary Tribunal thereby exercising its discretion in accordance with Section 33 of the EPA and fulfilling its statutory obligations.
67. This is then the decision of Council (as outlined in paragraph 66 above) that the Appellant contests; further alleging procedural irregularities and non-compliance with PAJA and the Constitution by the Disciplinary Tribunal.
68. *It is noteworthy to mention that Council has a statutory obligation in terms of Section 32 of the EPA to publish the finding and sanction imposed on a registered member in the Government Gazette and to give effect to the decision of the DC.*
69. Turning to the *locus standi* of the Appellant, it is not sufficient that the Appellant meets the requirement of “any person” as defined and intended by Section 21 of the CBE. Section 21 of the CBE must be read with Section 35 of the EPA because the charges of misconduct were brought against a member regulated by the EPA.
70. Hence, the Appellant in order to have *locus standi* to appeal the matter must demonstrate which of her interests or rights were affected by a *decision* of Council. No particulars were given of the Appellant’s interests or rights that were adversely affected in the proceedings before the Disciplinary Tribunal or in the actions of Council fulfilling its statutory obligation following the *Disciplinary Tribunals decision* to bring the Appellants case within the ambit of Section 35 of the EPA.
71. The Appellant’s claim for damages against the 2nd Respondent in a competent court remains intact. The guilty finding and sanction by the Disciplinary Tribunal will no doubt support any claim for damages the Appellant may wish to institute in a competent court.
72. Accordingly, having considered and interpreted all relevant legislation in the context of the facts before the Appeals Committee we conclude and are satisfied that the Appellant has *no locus*

standi in the matter before the Appeals Committee due to the Appellant's failure to demonstrate which of her interests and rights were affected by the decision of the Disciplinary Tribunal read with the Council's decision to dismiss the 2nd Respondent's appeal against the maximum fine sanction imposed upon him by the Disciplinary Tribunal. The Disciplinary Tribunal went further in imposing a supervised suspension on the 2nd Respondent for a period of 30 days.

Jurisdiction

73. The 2nd Respondent argued that the Appeals Committee has no jurisdiction to make an order for a *de novo* hearing based on any provisions in the CBE Act; or the EPA; or based on any of the grounds advanced by the Appellant.
74. The Appellant bases the Appeal on the decisions taken by Council. These decisions are discussed in paragraphs 61-72 above.
75. The 2nd Respondent correctly points out and the Appeals Committee is satisfied and finds that the guilty finding and sanction imposed on the 2nd Respondent was that of the Disciplinary Tribunal and not a decision of Council. As a creature of statute, Council has an obligation in terms of Section 32 of the EPA to give effect to the decision of the Disciplinary Tribunal; and cannot exercise any discretion whether or not to give effect to the decision of the Disciplinary Tribunal. It follows that the Appeal arising out of Council fulfilling its statutory obligation cannot be sustained in law and cannot sustain a referral for a hearing *de novo*. Similarly, the decision of Council to dismiss the Appeal of the 1st Respondent.

Prospects of success

76. The Appeals Committee when considering this matter is mindful of the impact the conduct of the 2nd Respondent had on the Appellant. The disciplinary bundle; the photographs of the condition of the Appellant's home; and the visuals at the on-line hearing displayed by the Appellant are self explanatory.
77. We also note that in terms of Section 31 (6) (b) (i), that "*At a (Disciplinary Hearing) the registered person charges – may admit at any time before conviction that he or she is guilty of the charge despite the fact that he or she denied the charge or failed to react in terms of Section 29 (3) (b) or (c)*".

78. The Appeals Committee were informed at the Appeals Hearing of a pending delictual claim initiated by the Appellant against the 2nd Respondent.
79. At this juncture we point out the guilty finding against the 2nd Respondent and the maximum fine and sanction, as well as the suspension imposed upon him strongly contested by the Appellant, who persists with the relief for an order for a *de novo* hearing from the Appeals Committee.
80. It was demonstrated in many cases that an Appellant must demonstrate that there are reasonable prospects of success in an action. This approach was accepted as correct in the SCA matter *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd 1986 (2) SA 555 (A)* at 561E; and even later, in *Smith v S 2012 (1) SACR 567 (SCA)* the court clarified the position on the aspect of prospects of success.
81. *Based on the aforementioned what the test of reasonable prospects of success postulates is that this Appeals Committee must make a “dispassionate decision, based on the facts and the law,” of whether a referral back to a Disciplinary Tribunal (bearing in mind a newly constituted Disciplinary Tribunal) for a hearing de novo; and whether such referral could reasonably arrive at a finding and sanction different to that of the initial Disciplinary Tribunal.*
82. The allegation of the Appellant is that there was non-compliance with PAJA and thus procedural irregularities at the Disciplinary Tribunal; and accordingly the finding and sanction is disproportionate to the transgression and the harm suffered by the Appellant.
83. In order to succeed with an order that the matter is remitted back to the Disciplinary Tribunal for a hearing *de novo*, the Appellant must convince this Appeals Committee on proper grounds that the Appellant has prospects of success with such *de novo* hearing, and that those prospects are not remote but have a realistic chance of succeeding. In other words, the Appellant must demonstrate a sound, rational basis for the conclusion that there are prospects of success that a *de novo* hearing would elicit a stronger finding (other than a guilty finding) and sanction (other than the maximum fine) *in the face of scarce public resources.*

FINDING

84. In conclusion, this matter is clearly of importance to all parties.

85. Accordingly, the Appeals Committee is satisfied and finds on the case before us that the Appellant has not made out a compelling argument that :

- 85.1 She has *locus standi* in the matter.
- 85.2 The Appeals Committee has jurisdiction to grant the Order sought by the Appellant.
- 85.3 It is in the interests of justice to refer the matter back for a *de novo* hearing.
- 85.4 The Appellant has prospects of success with a *de novo* hearing.

ORDER

86. Accordingly, the Appeals Committee makes the following order:

- 86.1 The 2nd Respondent's points *in limine* are upheld.
- 86.2 The Appeal is dismissed.
- 86.3 There is no order as to costs.
- 86.4 The Engineering Council of South Africa finalise its mandate in terms of Section 32 (5) of the EPA, and publish the finding and the sanction imposed in terms of subsection (3) in the Gazette. Further, that, as with other matters, the disciplinary actions be reflected on its website.

THUS DONE AND SIGNED AT JOHANNESBURG ON THIS THE 25th DAY OF SEPTEMBER 2024.



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**PA BECK
CHAIRPERSON**



.....
MS T. MOSHE PROFESSIONAL ENGINEERING TECHNICIAN (SPECIALIST)



.....
MR D.R. RILEY PROFESSIONAL VALUER (GENERALIST)