

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

In the matter between:

MALOSE MOGASHOA

Appellant

and

SACAP AND ANOTHER

First Respondent

BENJAMIN VOSLOO

Second Respondent

In re:

**RULING IN THE COUNCIL FOR BUILT ENVIRONMENT APPEAL COMMITTEE HEARING
HELD ON 15 NOVEMBER 2024 AT THE OFFICES OF THE COUNCIL IN HILLCREST,
PRETORIA**

INTRODUCTION

- 1 The Appellant, Mr Malose Mogashoa ("Appellant"), brought an appeal against the South African Council for the Architectural Profession ("SACAP") in terms of Section 35(1) of the Architectural Professions Act, Act No.44 of 2000, in terms of which 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 in writing with its reasons for that decision;
 - (b) within 90 days from the date on which the council furnished him with its reasons for that decision and after giving notice to the council, appeal to the Council for Built Environment ("CBE") against the decision of the South African Council for the Architectural Profession ("SACAP") in terms of section 21 of the Council for the Built Environment Act, Act No. 43 of 2000.
- 2 The Appellant was self- represented and filed the Notice of Appeal together with the appeal records and Heads of Argument attached hereto.
- 3 The First Respondent was represented by Mr Sfanele Mathebula and the 2nd Respondent failed to file notices to oppose or abide, notwithstanding being properly served by the Council for the Built Environment ("CBE").
- 4 The Appeals Committee is comprised of Adv D J Block, Chairperson with 2(two) members, Mark Pencharz and Patrycia Mazibuko-Chalwa.

5 The Appeal emanates from a decision by SACAP dated 21 May 2024, wherein the Appellant was notified as follows:

“Council has considered a complaint of improper conduct against Benjamin Vosloo, the 2nd Respondent. After an evaluation of the evidence made available, Council resolved that the complaint should be dismissed due to insufficient evidence.

This decision reached by Council will operate in full and final resolution of the complaint.”

6 The Appellant hereto appealed the decision by SACAP not to proffer charges against the Registered Person/2nd Respondent, Mr Vosloo, of Vision Architects, and

7 The failure by SACAP to instruct the Registered Person/2nd Respondent to admit that his decision and conduct was improper and therefore prays that the Appeal Committee rescind said decision.

Nature of the Complaint before the Investigating Committee of SACAP

8 The Complainant, herein the Appellant, lodged a complaint on 28 October 2023 with the South African Council for the Architectural Profession (“SACAP”) wherein he alleged the following:

8.1 That the Registered Person has allowed himself to be influenced to validate discriminatory practices by the Board of Directors of the Zwavels Nest Home Owners Association (“HOA”). This conduct put the

architectural profession in a negative and discriminatory light due to the failure of the Registered Person to apply his skills with due care, impartiality and with competence and that the Registered Person's conduct does not promote trust in the architectural profession.

8.2 The Complainant submitted that the Registered Person insisted on the Complainant's calcamite sewer solution being at a higher location on his stand without applying basic engineering and architectural design principles of gravity for a self-propelling sewer waste system. The effect is that the Complainant would have to either install a sewer pump or bury his calcamite system very deep into the ground to allow for a fall and gravitational function of his sewer system. Both the options are held to be unnecessary and cost ineffective. The suggested location by the Registered Person will also make vehicular maintenance access for the sewer system to be difficult. The Respondent has been advised of a similar development that was completed recently in the same estate that contradicts the proposed revised sitting of the tank. Pictorial evidence was shared with the Registered Person and the Investigation Committee of SACAP that shows the location of the calcamite system located on the front of the house close to the boundary of the stand and adjacent to the internal road of the estate. Furthermore, the calcamite system for that particular house is not concealed from the street view. However, the location is very similar to the location that the Complainant had elected for his calcamite system on his erf, but with the Complainant's calcamite system concealed behind his boundary wall.

8.3 The Complainant submitted that the Registered Person rejected the location of his calcamite system even though it was held to be the most practical and efficient position on the Complainant's stand per

engineering principles and as specified by clause 4.8.1 (b) and 4.8.2 (b) (1) of South African National Standards ("SANS") 10400-P:2010 (Edition 3).

8.4 The Complainant submitted that there is no estate rule that determine the location of the conservancy tank/calcamite system and therefore the Respondents should have had regard to the applicable National Building Regulation Part P, which in any case would supersede estate rules. The Respondent contravened SANS 10400 Part P clauses 4.8.1 (b) and 4.8.2 (b) (1) as the conservancy tank is to be easily accessible for maintenance. The Respondent contravened SANS 10400 Part P) which states:

"the siting of conservancy tanks should be approved by the local authority. Generally, tanks should be located near driveways to facilitate cleaning by a vacuum tanker".

8.5 The Registered Person's location of the septic tank prevents access for maintenance as there is no driveway to access the septic tanks and no manoeuvring space for the cleaning vacuum tanker truck to access the conservancy tank. Discretion, however, shall not override regulation/legislation.

8.6 There are other inconsistencies that are present in the Registered Person's review. The electrical box was incorrectly positioned by the developer and the Complainant requested to relocate this closer to the boundary of his stand and that of his neighbour. This was denied without relying on any estate rule or best practice on the positioning of electrical boxes. The electrical box is incorrectly positioned per estate rules. There is no regulation nor risk in moving the electrical meter to the correct location, but this was denied by the 2nd Respondent, Mr Vosloo. The effect is that the Complainant had to re-position his house and lost his preferred

location and orientation on the erf. His driveway design and accessibility have also had to be compromised.

8.7 The estate rules are clear on the location of the electrical boxes/meters, they are to be wherever possible integrated between the boundary walling between erven. The architectural guidelines/house design manual clause 14.2 details this, therefore, the Respondent contravened clause 14.2 as it was possible to correct the location of the electrical box to be located between the two erven boundaries but he rejected it without reason. The applicable estate house design manual (Annexure H), under clause 14.2 states that -

“ Boundary Walling between Erven

All external walling is to be plastered (the minimum being a one-coat plaster on the external side) and painted to the same standard on both sides to the ZNHA's satisfaction. On a common boundary between two erven, it shall be the owner of the erf for which building plans are approved first who will be responsible for the finishing of that side of the common wall facing the adjoining erf, irrespective of whether that adjoining erf may at the time remain unimproved. Wherever possible, electrical meter boxes are to be integrated into the boundary wall design.”

8.8 There is an estate rule that determines the location/relocation of the electrical meter/box, which the Registered Person contravened by his refusal to relocate the electrical box. The Complainant submitted that the Registered Person should have also regarded applicable municipal bylaws. The Appellant contends that the 2nd Respondent has thus ignored the latitude given to owners on the relocation of unsuitably located electrical meters which in terms of the National Municipal Electricity By-Laws clause 47 (4) states that:

"Where in the opinion of the Municipality the position of the meter, service connection, protective devices or main distribution board is no longer readily accessible or becomes a course of danger to life or property or in any way becomes unsuitable, the consumer shall remove it to a new position, and the cost of such removal, which shall be carried out with reasonable dispatch, shall be borne by the consumer".

8.9 The Appellant claims that the Registered Person's overriding of the estate-building rules or regulation/legislation with no attempt made to offer explanation is patently discriminatory.

8.10 The Complainant submitted that the Registered Person also insisted on all of the Complainant's windows on his existing neighbour's side being obscure and the balcony having a 1.8 m privacy brick wall, while the new development referenced above, was not subjected to the same principles as their windows are not obscure notwithstanding that they overlook onto his neighbour's pool and entertainment area. The effect is that certain properties are not subjected to and do not comply with The Respondent's principle on obscure windows, thus demonstrating prejudice and discrimination shown against the Complainant.

8.11 Annexure E of the Estate house design manual makes it clear that discretion may be applied in determining and imposing restrictions to enhance privacy *and views with the same rules clarifying that there is no duty on the estate to safeguard privacy.*

8.12 Clause 8 of the House Design Manual (Annexure H) reads as follows:

“the privacy and views of surrounding properties must always be considered. The ZNHA or the ARC may, in their discretion, determine and impose restrictions to enhance privacy and views. Notwithstanding this, there is no duty on the ZNHA, howsoever arising, to safeguard the privacy of residents nor shall the ZNHA be liable to any person for damages howsoever arising in this regard”.

8.13 The extent to which the Registered Person went in detailing the extreme level of privacy is not consistently applied to all the owners, equating to discrimination. The Respondent seemingly did not consider how discretionary privacy provisions had been applied in the estate which led to his overreaching in applying discretion to this level. The Complainant submitted fact that his neighbour in question is part of the board of directors should have compelled the Respondent to ensure that he is seen to be objective.

8.14 The Complainant submitted that discretion when applied inconsistently to the same group of people, amounts to discrimination. The Registered Person's decisions again are questionable and disregard established estate principles in the estate, regulation, and legislation.

8.15 The underlying issue is that the Registered Person was appointed by the estate to provide a professional and objective review and he simply adopted the estate HOA review and validated their discriminatory principles applied against the Complainant's stand by the Board of Directors of Zwavels Nest Estate. The matter relates to the Zwavels Nest Estate which the Respondent has been appointed to oversee and approve drawings submitted by home owners and or their agents for the properties in the estate.

8.16The Registered Person acted outside his competence/lacked competence, ignoring engineering best practices, architectural principles, and existing estate established principles, as well as regulation and legislation, and failed to use estate rules to guide his decision-making.

8.17The Registered Person has also failed to undertake a comparative analysis of developed houses in the estate which would have highlighted the discriminatory provisions in his review. The above placed the Registered Person in the worst position to rely on discretion as this has led to inconsistent discretion that is not aligned with estate rules and contrary to built-up houses in the same estate, and effectively means that the Registered Person has failed to act with impartiality.

8.18The Registered Person also failed to exercise professional judgment. The worst part is that the Registered Person has allowed for the Architectural profession to be used as a discriminatory tool.

8.19It must be noted that the 2nd Respondent in this matter is acting on the capacity of the estate and not on his own as per the appointment.

8.20The Complainant submitted that the 2nd Respondent is being used and or allowed to be used by the estate and or its directors to reject his building application.

Reasons for Dismissal of Complaint by the Investigating Committee

8.21 The appointment of the Registered Person was on Tuesday, March 22, 2022, by when the issue with the Calcimite system was already raised together with the electrical meter box which forms a considerable part of the complaint.

8.22 The Complainant alleged discrimination based on race and also made mentioned of the directors and or management of the estate which deviates from the professional conduct of the Respondent and further implies that the matter cannot be solely rest on the Respondent as a registered person, but the estate as an entity.

8.23 It is in this view that the Investigation Committee that the matter be referred to the community scheme ombuds service as they deal with community schemes related matters and the issue of race discrimination can be referred to the appropriate authority that has the capacity to investigate those matters.

Appellant's Grounds of Appeal

9 The very fact that the Registered Person, Mr Vosloo, has disregarded SACAP's request for submission of representation goes against the rules of SACAP but more so threatens the credibility of SACAP in regulating its members. The approach wherein the investigation committee then interprets emails and submission in the defence of Mr Vosloo is puzzling. Mr Vosloo deemed it unnecessary to make submissions to SACAP, but is being defended by SACAP without making a submission on the matter.

- 10 SACAP members must act in accordance with the code of conduct and in the best interest of the profession, regardless of the contractual arrangement they find themselves in. Members must at all times remain answerable to the professional association for matters related to that profession.

- 11 At no point did the Complainant raise or imply racial discrimination, but this finds itself in the Investigation Committee's finding, possibly as a way to trivialize an important complaint.

- 12 The Investigation Committee of SACAP disputes the Appellant's assertions that the Architect, Mr Vosloo, was appointed to conduct an independent review of my building plans' compliance with the Estate Architectural Guidelines to resolve the impasse on the key technical items that he was disputing with the Estate. This is evidenced by the Investigation Committee's suggestion that he was already in dispute with the Estate. This confirms that the Investigation Committee did not comprehend the basis of the complaint and the mandate given to Mr Vosloo as well as the objectiveness required on the part of Mr Vosloo. Mr Vosloo's decisions should have been impartial, and consistent with that of a Built Environment professional.

- 13 All evidence required was submitted in the form of 14(fourteen) annexures which were attached to the Complaint, but the investigation committee concluded that there was insufficient evidence. The Investigation Committee also did not visit the site in order to better comprehend the complaint. The evidence provided included independent submissions by a Professional Engineer and a Registered Plumber, with drawings and pictures that contradicts the decisions of the Architect in the same Estate.

All of the above were simply not considered by the Investigation Committee.

- 14 A Professional Architect, however employed, remains bound by the code of conduct and rules of the SACAP, especially if they are practising in the Built Environment. The argument that he was acting on behalf of the estate is both incorrect and irrelevant for the purposes of his obligation to adhere to SACAP rules and code of conduct in carrying out his work. What is relevant is that he is a member of SACAP and his conduct in reviewing architectural matters without due skill, care and impartiality qualify as misconduct. This misconduct is a contravention of the SACAP rules and code of conduct.

- 15 The Investigation Committee incorrectly determined that the matters raised are within the jurisdiction of CSOS, this again is due to taking into account parts of the Appellant's complaint which are out of context. The matters that the Appellant raised with SACAP are technical and specifically related to the specialised trade of architecture. In fact, the matters against the Estate as they relate and relevant to the jurisdiction of the CSOS had been previously been submitted to the Community Schemes Ombud Service ("CSOS").

- 16 It is common cause that the complaint against Mr Vosloo was not properly investigated by the investigation committee. It is not clear if there was a technical member on the investigation committee as the nature of the complaint is technical. The investigation committee, with all due respect, did not deal with or did not understand the technical matters hence the decision that the matters raised are not within the jurisdiction of the SACAP.

The dismissal of the matter without proper investigation is both unreasonable and procedurally unfair.

Heads of Argument by Appellant

- 17 In his heads the Appellant submits that he had submitted his building plans to the "Architectural review committee" of the estate, who then appointed Mr Bennie Vosloo, a Registered Person in terms of the South African Council for the Architectural Profession ("SACAP") to review his building plans for compliance against the estate rules and building guidelines. The Registered Person, Mr Vosloo's appointment was done after the estate and myself had reached a stalemate on three key items which are dealt with below.
- 18 According to his appointment by the HOA, Mr Vosloo would have "full and final say for approval" on his plan approval. The HOA argued that they were doing this to ensure that the review of my plans is "strictly professional".
- 19 The Appellant contends that he is dissatisfied with the improper conduct of the Registered Person, Mr Vosloo, and lack of impartiality displayed by him in carrying out his appointed duties. According to the Appellant, Mr Vosloo has also avoided providing rationale for his decisions even when requested to do so.
- 20 Despite Mr Vosloo being made aware of factual prejudice that emanated directly from his improper conduct and lack of impartiality he failed to resolve the complaint and prejudice. Mr Vosloo has also

avoided advising how complaints are handled within his organisation as there was no engagement at all after submission of my complaint and follow-up and the only response that the Appellant received is from the Zwavels Nest HOA Lawyers who have requested that the Appellant do not engage Mr Vosloo any further.

21 The Appellant maintains that he had been prejudiced by the improper conduct of the Registered Person, Mr Vosloo, for the following reasons and/or in the following manner:

21.1 Mr Vosloo insisted on my calcimite sewer solution being at the higher location on my stand without applying basic Engineering and Architectural design principles of gravity for self-propelling sewer waste system. The effect is that the Appellant would have had to either install a sewer pump or bury my calcimite system very deep into the ground to allow for a fall and gravitational function of my sewer system. The Appellant, however, contends that both options are unnecessary and cost ineffective. He furthermore avers that the suggested location by Mr Vosloo will also make maintenance access for the sewer system to be difficult. Mr Vosloo has been advised of a similar development that was completed recently in the same estate that contradicts his logic. Pictorial evidence was shared with Mr Vosloo that shows the location of the calcimite system located on the front of the house close to the boundary of the stand and adjacent to the internal road of the estate. (see Annexure 8,- B1 and B2 to the heads). In addition, the calcimite system for this particular house is not concealed from the street view. This location is very similar to the location that the Appellant had elected for his calcimite system, but with his concealed behind his boundary wall. Mr Vosloo rejected the location of his calcimite system

even though it was the most practical and efficient position on the Appellant's stand per engineering principles.

- 21.2 There is no estate rule that determines the location of the conservancy tank/calclimite system and therefore Mr Vosloo should have regarded applicable National Building Regulation Part P, which in any case would supersede estate rules, thereby contravening SANS 10400 Part P clauses 4.8.1 (b) and 4.8.2 (b) (1) as the conservancy tank is to be easily accessible for maintenance.
- 21.3 The Appellant also contend that discretion shall not override regulation/legislation.
- 21.4 Moreover, the Appellants submits that there are other inconsistencies that are present in 2nd Respondent's review. The electrical box was incorrectly positioned by the developer and I requested to relocate this closer to the boundary of my stand and that of my neighbour. This was denied without relying on any estate rule or best practice on positioning of electrical boxes. The electrical box is incorrectly positioned per estate rules. There is no regulation nor risk in moving the electrical meter to the correct location, but this was denied by Mr Vosloo. The effect is that the Appellant have had to re-position his house and lost his preferred location for his property with his driveway design and accessibility also being compromised.
- 21.5 The estate rules are clear on the location of the electrical boxes/meters, and they are to be wherever possible, integrated in the boundary walling between erven. The architectural guidelines/house design manual clause 14.2 details this, therefore, Mr Vosloo

contravened clause 14.2 as it was possible to correct the location of the electrical box to be located between the two erven boundaries but Mr Vosloo rejected it without reason. The applicable estate house design manual, under clause 14.2 state that:

“Boundary Walling between erven

All external walling is to be plastered (the minimum being a one coat plaster on the external side) and painted to the same standard on both sides to the ZNHA's satisfaction. On a common boundary between two erven, it shall be the owner of the erf for which building plans are approved first who will be responsible for the finishing of that side of the common wall facing the adjoining erf, irrespective of whether that adjoining erf may at the time remain unimproved. Wherever possible, electrical meter boxes are to be integrated into the boundary wall design”.

21.6 It is clear that there is an estate rule that determines the location/relocation of the electrical meter/box which Mr Vosloo contravened by his refusal to relocate the electrical box, and his disregard of applicable municipal by-law. Mr Vosloo has thus ignored the latitude given to owners on the relocation of unsuitably located electrical meters. The National Municipal Electricity By-laws clause 47 (4) states that:

“Where in the opinion of the Municipality the position of the meter, service connection, protective devices or main distribution board is no longer readily accessible or becomes a cause a/ danger to life or property or in any way becomes unsuitable, the consumer shall remove it to a new position, and the cost of such removal, which shall be carried out with reasonable dispatch, shall be borne by the consumer”.

21.7 The discretion exercised by Mr Vosloo amounted to the estate building rules or regulation/legislation being overridden.

22 2nd Respondent also insisted on all the windows on the Appellant's existing neighbour's side to be obscure and the balcony to have a 1.8 m high privacy brickwall, but the new development was not subjected to the same principles as their windows are not obscure but they overlook onto the Appellant's neighbour's pool and entertainment area. The effect is that certain properties are not subjected to and do not comply with Mr Vosloo's principle on obscure windows.

23 The Estate house design manual makes it clear that discretion may be applied in determining and imposing restrictions to enhance privacy and views, the same rules clarify that there is no duty on the estate to safeguard privacy (see Clause 8 reads (House Design Manual, Annexure H), which provides that-

"PRIVACY

The privacy and views of surrounding properties must always be considered. The ZNHA or the ARC may, in their discretion, determine and impose restrictions to enhance privacy and views. Notwithstanding this, there is no duty on the ZNHA, howsoever arising, to safeguard the privacy of residents nor shall the ZNHA be liable to any person for damages howsoever arising in this regard".

24 The extend to which the 2nd Respondent went in detailing the extreme level of privacy is not consistently applied to all the owners, equating to discrimination. Mr Vosloo seemingly did not consider how discretionary

privacy provisions had been applied in the estate which led to his overreaching in applying discretion to this level. The fact that the Appellant's neighbour in question is part of the board of directors should have compelled Mr Vosloo to ensure that he is seen to be objective. Discretion when applied inconsistently to the same group of people, amounts to discrimination.

- 25 Mr Vosloo's decisions again are questionable and disregards established estate principles in the estate, regulation and legislation.

CONTRAVENTION OF SACAP RULES AND CODE OF CONDUCT

- 26 The Appellant contends that the Registered Person contravened the Rules as follows;

- 26.1 Rule 1.2 by allowing his profession to be used as a tool to discriminate.
- 26.2 Rule 1.3 by failing to exercise engineering and architectural best practices and established principles.
- 26.3 Rule 1.4 by failing to remain impartial and was used to validate HOA's bias and incorrect assertions.
- 26.4 Rule 1.9 by failing to confirm any potential conflict of interest even when requested by the Appellant to do so.
- 26.5 Rule 1.16 by failing to exercise due skill, impartiality and independent professional judgement in his review of the Appellant's building plans.
- 26.6 Rule 2.1 by failing to exercise engineering and architectural best practices and established principles.

26.7 Rule 6.2 by failing to exercise impartiality and professional judgement in his review as outlined in item 5.2 above, leading to and validating discriminatory practices within the estate community. Mr Vosloo has disregarded my request for the rationale behind his decision making, even after written request and follow-up. Justice and accountability cannot be discouraged by referral relevant professional matters to lawyers.

27 The Appellant claims that Mr Vosloo acted outside his competence/lacked competence, ignoring engineering and architectural principles, he failed to use estate rules and "Estate Architectural guidelines" to guide his decision making, and also failed to undertake comparative analysis of developed houses in the estate which would have highlighted the discriminatory provisions in his review.

28 That aforementioned conduct placed Mr Vosloo in the worst position to rely on discretion as this has led to inconsistent discretion that is not aligned to estate rules and contrary to built-up houses in the same estate and general best practice.

THE SACAP INVESTIGATION COMMITTEE ERRORS

29 The Appellants also contends that the very fact that Mr Vosloo has disregarded SACAP's request for submission of representation goes against the rules of SACAP but more so threatens the credibility of SACAP in regulating its members.

- 30 It thus follows that the approach wherein the Investigation Committee interpreted the Appellant's emails, my emails and submissions, in the defence of Mr Vosloo, is puzzling when, Mr Vosloo, who deemed it unnecessary to make submissions to SACAP, is defended by SACAP without making any submission on the matter, and SACAP downplaying it by suggesting that he was exercising his right to not make a statement. This clearly demonstrates Mr Vosloo's disregard for his professional obligations, the SACAP code of conduct, the SACAP disciplinary processes and the SACAP as a regulatory body.
- 31 Professional members must always remain accountable to their registered associations and held accountable for misconduct. Any professional regulatory body that allows such conduct is not inspiring confidence in its ability and mandate to protect the public and perpetuates a culture that should not be associated with professionals.
- 32 SACAP members must act in accordance with the code of conduct and in the best interest of the profession, regardless of the contractual arrangement they find themselves in. Members must at all times remain answerable to the professional association/council for matters related to that profession.
- 33 Mr Vosloo would not have been contracted by the estate if he was not professionally registered with SACAP or other professional bodies under the Council for the Built Environment. The fact that he was appointed by virtue of his professional registration to look at to review Architectural submission requires him to uphold the SACAP code of conduct and remain answerable to SACAP.

- 34 The Appellant asserts that despite the investigating committee's finding, he at no point raised or implied racial discrimination, possibly as a way to trivialize an important complaint.
- 35 The Appellant submits that the investigation committee was not objective, and that this is evidenced by this obscure analysis, and there is no evidence that the Investigating Committee engaged the merits and relevance of the complaint.
- 36 The investigation committee's averment that my complaint with respect to independent review of my building plans' compliance with the Estate Architectural Guidelines by Mr Vosloo already formed the subject matter of a dispute with the Estate demonstrates that the investigating committee did not comprehend the basis of the complaint and the mandate given to Mr Vosloo as well as the objectiveness required on the part of Mr Vosloo. The Appellants maintain that Mr Vosloo's decisions should have been impartial, and consistent with that of a Built Environment professional.
- 37 The Investigating Committee therefore failed to objectively investigate the complaint by assessing the merits of the complaint and the evidence contained in the annexure submitted thereto, but instead opted to protect the Registered Person registered persons against further investigations.
- 38 Aforesaid evidence which formed part of the complaint included independent submissions by a Professional Engineer and a Registered Plumber, and also included drawings and pictures that contradict the

decisions of the Architect in the same Estate. All of the above were simply not considered by the investigation committee.

- 39 It is contended that the Investigation Committee erroneously concluded that there was insufficient evidence and it also failed to visit the site in order to better comprehend the complaint.
- 40 It is thus inconceivable and no plausible reason for such overwhelming evidence to be set aside as not being in the jurisdiction of the SACAP where the decision maker, the Registered Person, is a member of the SACAP and the matters related to SACAP's mandate.
- 41 It is common cause that a Professional Architect, however employed, remains bound by the code of conduct and rules of the SACAP, especially if they are practising in the Built Environment. The investigation committee's argument that Mr Vosloo was acting on behalf of the estate is both incorrect and irrelevant for the purposes of his obligation to adhere to SACAP rules and code of conduct in carrying out his work.
- 42 What is relevant is that the Registered Person was a member of SACAP and his conduct in reviewing architectural matters without due skill, care and impartiality, constitutes misconduct and a contravention of the SACAP rules and code of conduct.
- 43 The Investigation Committee also incorrectly determined that the matters raised were within the jurisdiction of CSOS as the matters raised

are technical and specifically related to the specialised trade of architecture.

- 44 That given the manner in which the investigating committee dealt with the assessment of the technical matters of the complaint it begs the question if there was a technical member on the investigation committee having regard to the nature of the complaint and the committee's conclusion that the matters raised were not within the jurisdiction of SACAP. The dismissal of the matter without proper investigation is both unreasonable and procedurally unfair.
- 45 The Investigating Committee erred in ignoring written professional opinion on both positioning of the calcimite system and electrical box by a Professional Engineer and Registered Plumber who both are not involved with his development

CONCLUSION

- 46 The underlying issue is that Mr Vosloo was appointed by the estate to provide objective review, but he simply adopted estate HOA review and validated the discriminatory principles applied by the Board of Directors of Zwavels Nest Estate.
- 47 Mr Vosloo acted outside his competence/lacked competence, ignoring engineering best practice, architectural principles, existing estate established principles, as well as regulation and legislation and he, whilst being gainfully employed by the HOA owing to his registration with SACAP, failed to use estate rules to guide his decision making.

- 48 Vosloo, as a Registered Person, was in in a similar position as a medical practitioner contracted to a hospital, against whom a complaint is brought by a member of the public, being investigated and charged in his/her professional capacity as a medical professional registered with the Health Professions Council.
- 48 Mr Vosloo has also failed to undertake comparative analysis of developed houses in the estate which would have highlighted the inconsistencies in his review.
- 49 Mr Vosloo has failed to act with impartiality and exercise professional judgement.
- 50 The investigating committee therefore erred in concluding that elements of the complaint fall within the jurisdiction of CSOS and therefore precludes SACAP from proferring charges against Mr Vosloo.

RELIEF SOUGHT

- 51 The Appellant therefore prays that the decision by SACAP's Investigation Committee to dismiss the complaint, be rescinded, and
- 52 That Mr Vosloo admit and advise Zwavels Nest Estate HOA that he erred in his review of the positioning of stand 672 calcimite sewer system, the non-relocation of the electrical box and obscure windows and screen wall requirement on developed neighbours side and that

this must be done unreservedly in the signed letter head of Mr Vosloo's company clearly indicating Mr Vosloo's full names and professional registration number, and furthermore, Mr Vosloo must request for his review errors to be corrected by the Estate with his input at no additional cost.

53 Mr Vosloo must also undertake to do all that is within his control to assist in correcting the prejudice suffered by the Appellant as a result of his improper conduct and to copy the Appellant on email communication to the estate in this regard.

54 In the event that Mr Vosloo is unable to correct his errors in the above manner he must be investigated and charged in accordance with the SACAP disciplinary rules/provisions to be adjudicated by an investigating committee composing of a professional member in the Built Environment suitably experienced in the technical matters raised.

55 The Estates/Body Corporates/Developments must be also be advised against the use of the title "Architectural Review Committee" where there is no Professionally Registered Architect included in the committee as this is misleading to the public and allows for discriminatory practices to prevail.

COUNCIL'S REASONS FOR ITS DECISION TO DISMISS THE COMPLAINT

56 At the outset Mr Mathebula acknowledged and expressed sympathy for the Appellant's circumstances and his ordeal in getting his house

plans approved by the Architectural Review Committee of Zwavels Nest Estate Home Owners Association.

- 57 Council on receipt of the Appellant's complaint against the Registered Person decided to dismiss the complaint as it believed that there was no contractual arrangement that existed between the Appellant and the Registered Person, and which rendered the complaint dismissible.
- 58 Council contends that the Appellant by his own admission on p. 7 of his appeal record acknowledge that the terms and my agreement with the registered person were as follows: *"The Architect, Mr Vosloo was appointed by Zwavels Nest HOA Board of Directors for architectural review and approval of my building plans....I had submitted my plans to the "Architectural review committee" of the estate who then appointed Bennie Vosloo to review my building plans for compliance against Estate rules and building guidelines...Mr Vosloo would have "full and final say for approval" on my plan approval as communicated to myself by the Estate. The Estate said they were doing this to ensure that all the review of my plans is "strictly professional".*
- 59 That aforesaid arrangement was the Estate soliciting the services of Vosloo to discharge the mandate of the Architectural Review Committee and therefore that it should have been the HOA against whom the Appellant should have lodged the complaint as it was the ARC that was responsible for the review and approval of the plans , and therefore accountable for the decision whether to approve or reject the plans.

- 60 This scenario is likened to that of an attorney providing advise for a client where the opponent of the client challenged the client's attorney for the advice he had provide to his client, or where the Appellant, being disgruntled with the decision of the CBE Appeals Committee, holds the individual committee members accountable in their professional capacities for the decision of the Appeal Committee.
- 61 Based on these grounds, the Investigating Committee, therefore, decided that the Appellant lodge the complaint with the HOA and not the Registered Person, who was merely executing the mandated of the ARC.
- 62 Given the factual disposition, which is common cause, it is thus the duty of the Appeal Committee to determine and decide whether SACAP had the duty to investigate the Registered Person and to proffer charges against the Registered Person for improper conduct based on the evidence in the appeal record, and
- 63 Therefore, based on the contentions supra, the appeal is to be dismissed.

EVALUATION OF GROUNDS OF APPEAL, THE APPEAL RECORD AND VIVA VOCE EVIDENCE

- 64 On October 3, 2023 the Appellant wrote to the 2nd Respondent stating-
- "Good day Bennie,*
- Your email of 08 June 2022 bear reference.*

1. Kindly confirm if you/your company have previously been appointed by any Zwavels Nest Estate stand owner and provided architectural services for the development of any stand in Zwavels Nest Estate.
2. Kindly confirm if you/your company have undertaken any architectural review for any other stand on behalf of the Zwavels Nest Home owners association, besides my stand, 672.
3. Please see attached a picture of the location of the recently developed stand in the estate, stand 676, construction started around Aug/Sept 2022 and completed this year, 2023. The picture shows the location of the calcimite system located on the front of the house close to the boundary of the stand and adjacent to the internal road of the estate. Furthermore, the calcimite system for this particular house is not concealed from the street view. This location is very similar to the location that I had elected for my calcimite system, but with mine concealed behind my boundary wall. You rejected the location of my calcimite system even though it was the most practical and efficient position on my stand per engineering principles.

3.1 Were you aware of the positioning of the calcimite system for stand 676 and were their building plans scrutinized by yourself? The above positioning of stand 676 calcimite system is clearly contrary to your review of the same matter on my stand, kindly clarify.

There are other inconsistencies that are present in your review but this is one of the more glaring ones. The others that I request for you to clarify is non-relocation of the electrical box, as it is incorrectly positioned per best practice and no rule or risk in moving it to the correct location, but you denied this.

You also insisted on all my windows on my existing neighbour's side to be obscure and the balcony to have a 1.8 m privacy brickwall but stand 676 was not subjected to the same principles as his windows are not obscure but they overlook onto his neighbours pool and entertainment area.

Your rationale behind your decision making would be appreciated as I feel discriminated against. Please note this as a complaint in line with your architectural professions' guideline."

65 On 5 July 2022 the building plan copies were submitted to the HOA with 3 sets of copies and left with security at guardhouse and with the following reply from the HOA -

“We refer to the abovementioned matter.

We herewith confirm the following:

1 we confirm that our client advised our office that the architect is satisfied that you have complied with all the recommendations;

2. the final approval of the building plans now vests with the Home Owners Association;

3. we accordingly request that you provide the HOA with three sets of buildings plans, these documents can be left at the security gate;

4. after final processing and in the event that the building plans have been approved two sets of building plans will be returned to yourself in order to enable yourself to obtain municipal approval. We confirm that the Home Owners Association will retain a set of the documents will be kept by the HOA for their records.

We trust that you find the above in order.”

66 On June 8, 2022, Bennie Vosloo wrote to the Appellant stating:

“Good day all

Mail as received with comments that need to be addressed Comments in red

1. You are required to comply with Mr Vosloo's findings and do we herewith provide you with a list of the requirements:

1.1 Obstruction of services not allowed....removing or moving of existing services like electricity boxes, streetlights etc. are not allowed. Please remove from plans;

1.2 Please provide surveyed contour plans (Plus all contact info of professional land conveyor); no such document received so cannot confirm that contours on plans are accordingly, so making assumption the contours received is actually from a survey and designed according)

1.3 Adjust plans according to Land surveyor's survey to comply with estate's building guidelines; cannot confirm cause don't have surveyors plans.

1.4 Balconies with obscure glass will not be approved as a privacy wall....Privacy Screen/wall, West & South; in order

1.5 Add note to paint all fascia Colours; note added

1.6 Indicate all AC positioning, awnings, heat pumps, solar, gas etc. if you had intention of installing them later; acceptable

1.7 Paving apron. Please specify paving material; noted and in order

1.8 Either submit plans for future pool & Tennis Court as indicated on your plans or remove from existing plans;

1.9 General notes on plan not legible. In order

1.10 The Calcamite system positioned on the "The Ridge" street boundary will not be permitted, please move to the Atterbury Road boundary. Moved as requested."

67 On March 30, 2022, the HOA informed the Appellant that all feedback in respect of the plan approval "will be addressed by Mr Bennie Vosloo (Professional Architect appointed by Zwavelsnest Body Corporate), who is aware of all issues raised and discussed on site, and will provide you with answers regarding this..."

68 Mr Coetzee also commented that "I'm only a board member and not a professional architect", and further recorded that "they(HOA) have decided to use Mr Vosloo as our professional adviser regarding dispute matters, as per your plan. Herewith we want to ensure you that all approvals and/or disapprovals of plans is strictly professional.

Please contact Mr Vosloo, for I can't help you any further? Mr Vosloo will have full and final say for approval."

69 The Appellant raised his disappointment on March 22, 2022, with the HOA with the delay in the approval of his plans when he wrote:

“Good day Arche,

Your below email is really disappointing and takes us back. Your email of 17 January 2022 confirmed 4 items as the final changes that were required by the ARC before approval is granted, these changes were made and drawings re-submitted to you on the 1st March 2022 and they were still not approved by the ARC.

In your feedback of 11 March 2022 wherein we were expecting approval of our drawings, you now raised new reasons why you cannot approve our drawings. You also advised us that you are expecting feedback of an 'independent source' who will then issue a professional opinion by 14 March 2022. Instead of feedback on your consultations, we are now referred to a professional architect for further evaluation/discussion of our drawings. We have a professional architect on board and we are baffled as to the reason we would be referred to another professional architect when you are the ones who seemingly have not had a professional architect advising your approval processes up to this point.

Kindly provide us with clarity as requested in our emails of 12 March and 17 March 2022. Your independent source has a duty to guide you as you are the one who appointed him, you have a duty to guide and approve our drawings where they are compliant with Zwavel's Nest Architectural guidelines.

Arche, as you are aware, Council approval is a different process from Zwavel Nest's HOA approval contrary to your suggestions in your email. The outstanding ARC's approval is delaying our submission to Council.

Regards,

Malose Mogashoa ”

70 The email above was followed by a response from the HOA's Mr Arche Coetzee on March 22, 2002, who wrote back stating the following:

“Hello Malose,

We have appointed Mr Bennie Vosloo (Professional Architect), who works with city council on a daily basis.

According to Mr Vosloo your plans need some general adjustments to pass estate approval and/or city council approval.

Mr Vosloo asked if your Professional architect could contact him on this number- 0836209336 For one consultation only, to discuss all relevant changes for approval.

All changes addressed by Mr Vosloo will be your last and final changes for estate approval and city council approval.

Thank you in advance"

71 Aforesaid emails were preceded by correspondence from the Appellant requesting clarity on Wednesday, March 16, 2022 from Mr Coetzee on why approval of the plans had not be granted after all 4 issues raised by the HOA had been addressed and complied with as none of the new comments made by the HOA related to their previous ARC findings.

72 This request for clarification stems from the following email from the HOA on March 11, 2022 in reply to a reminder by the Appellant that the approval of his drawings submitted both electronically and physically on the 1st and 8th March 2022 is still outstanding on the part of the HOA and requiring the plan approval to finalise as he wanted to build as soon as possible, but still required Council approval, whereto they wrote:

"Hello Malose,

Thank you for the changes you made on Balcony regarding privacy issues.

We can't approve your plan stating that an Electrical box needs to be moved by Body Corporate. We currently do not allow for any Electrical boxes and/or streetlamps to be moved at all.

We have an issue with your placing of your Calcimite system from your neighbours. We therefore decided to get a second opinion from an independent source regarding above mentioned issue. We hope to have this professional opinion by Monday 14 March 2022.

I will respond immediately after receiving a professional second opinion with our final verdict."

73 This is after the Appellant apparently already addressed the issue of the calcamite sewer on February 21, 2022, when he wrote:

"Good day Arche,

We will be re-submitting affected drawings shortly. These would have addressed items 1 privacy wall; item 2 Calcamite sewer system as specified by the directors of Zwavels Nest; item 4 water feature heights..." and wherein he further stated-

"...You are acknowledging that my neighbour is contravening building rules and you are ok with it. You are also saying that you are ok with the defaulting party determining when they must comply with estate rules, and you are not opposing their continued non-compliance and seemingly have agreed with them that they can correct their non-compliance when they are ready..."

74 The aforesaid reply follows an email from the HOA on January 17, 2022, when they wrote:

"Good Day Malose,

Herewith our criteria for final submission of building plans at ZHOA...

1. *"Privacy wall" on main balcony, with brick and opaque glass combination, must be a minimum of 1,7m in height.*

See Building guidelines no 8. regarding Privacy.

The fact that your neighbor build the boundary wall (at his own cost) with "see through" openings were for security reasons (Open stands next to him) at the time. He is more than willing to discuss the closing of those "see through" openings with you when you start with building works on site.

2. *Building height - please refer to no 9.1 in Building Guidelines*

Overall height — Not any part of the building will be allowed to exceed 8,5m above natural ground level.

Your Plan no 4001 indicates a height of 8,661m from natural ground level to top of brickwork of chimney. (already exceeding maximum height).

On top of your Chimney you have another 600mm for the rotating cowl, which brings your total height above natural ground level to 9,261m.

3. *We will only allow the Calcamite sewerage system. This decision was made by all the Directors and ARC, considering all Pros & Cons of these type of systems, regarding smell, effectiveness and impact of general health in the Estate.*

4. *Water feature heights to be shown on plans.*

We did ask your neighbour to remove the exposed conduit on your side of the boundary wall.

We have written confirmation from your neighbour that he will remove the exposed conduit on your side of the wall as soon as building work start on that site."

75 McKenzie's "Law of Building and Engineering Contract and Arbitration 7th Edition, p 129" defines an architect as "a duly qualified professional person whose function it is to design and supervise the erection of buildings." In the Shorter Oxford English Dictionary an architect is described as "One whose profession it is to prepare plans of edifices and exercise a general superintendence over their erection." One may only practise as an architect in South Africa if you are registered as such in terms of the Architectural Profession Act No 44 of 2000. Section 27 of this Act provides that the South African Council for the Architectural Profession must compile a code of conduct for all registered persons. Such registered persons must adhere to the terms as included in this code and failure to do so will constitute improper conduct.

76 The Committee took cognizance and drew an analogy of the role of SACAP to the decision of the court in *Groenewald v SA Medical Council* 1934 TPD 404 on p.410, where it was held that the Council being the primary *custos morum* and body par excellence of the profession had to decide on improper conduct:

“...the Legislature has wisely, in my view, left it to the Council to decide what acts or omissions should in their opinion render a member of their profession liable to punishment. They are the custodians of the honour and rectitude of the profession, it is left to them to say what standard of honour the members of the profession should conform to, and much depends upon their opinion whether the standard of personal and professional honour of its members is a high one or not....”.

77 This was also emphasised in *Veriava and others v President, SA Medical and Dental Council and others* 1985 (2) SA 293 (T) with Boshoff J P's judgment on this issue, where he pointed out that the possession of a power to act may well be coupled with a duty that the power should be exercised, and after noting that the Council certainly possessed the power to act, the learned Judge President proceeded to consider whether the Council had been placed under a duty to exercise its powers in instances of presumed unprofessional *sic* (improper) conduct (Our emphasis underlined). In deducing the existence of such a duty, Boshoff J P considered whether anyone enjoyed a correlative right. He observed that the function of the Council under the Act is *'to supervise and control the ethical and professional standards of the profession and in this way protect the prestige, status and dignity of the profession and the public interests in so far as members of the public are affected by the professional conduct of registered members of the profession to whom they had stood in a professional relationship'*. As members of the profession *'have a real and direct interest in the prestige, status and*

dignity of their profession', he considered that they have a right to expect of the Council that it should exercise its powers to protect this interest; similarly, members of the public to whom a practitioner had stood in a professional relationship had a right to expect the Council to exercise its powers so as to protect them. 'It could not have been the intention of the Legislature', the learned Judge President concluded, *'that the Council should be given a discretion to institute an enquiry on a genuine and valid complaint so that in the case of one complaint it would be able to use its powers of inquiry and in the case of another identical complaint it should be able to refuse to use its powers (Our emphasis underlined)*. He argued that the Council was the *"final arbiter of what conduct constituted unprofessional conduct in the profession and its finding that there was non-prima facie evidence thereof was virtually unassailable"* (per Boshoff JP at 304).

- 78 Aforesaid is particularly relevant in view of Council's decision on 28 October 2023 dismissed the complaint, in what it deemed for insufficient evidence
- 79 The preamble of the Code of Professional Conduct, issued under BN 154 of 2007, Government Gazette 32731, 27 November 2009, provides that *"it is an overriding obligation under the rules that, in carrying out professional work, a registered person is expected to act with due skill, competency and integrity"*.
- 80 That arrangement where the Registered Person stepped into the shoes of the ARC, as in this case, whereby the estate solicited the services of Vosloo to discharge the mandate of the Architectural Review Committee, did not release the Registered Person from his obligation

under the rules, in carrying out professional work, to act with due skill, competency and integrity approve or reject the plans of the Appellant.

- 81 It is also common cause that once the Registered Person was appointed by the HOA, a binding contract comes into existence between the parties. This means that a claim for negligence could be instituted against him in his personal capacity, in terms of contract, or based on delict. Tacitly included in the terms of the agreement is that the architect, accountable to SACAP by virtue of being registered with SACAP, ought to have had the required skills and ability to be reasonably proficient in his calling.
- 82 It is trite law in South Africa that a person who does not practice with the due skill and diligence will be regarded as negligent. In the Supreme Court of Appeal matter, *Goliath v MEC for Health, Eastern Cape* 2015 (2) SA 97 (SCA), the Court referred to the matter of *Van Wyk v Lewis* 1924 A.D 438 in which the test for negligence has been defined as *"the failure of a professional person to adhere to the general level of skill and diligence possessed and exercised at the same time by the members of the branch of the profession to which he or she belongs would normally constitute negligence."*
- 83 In the English matter of *Nye Sanders & Partners v Alan E Bristow* (1987) 37 BLR 92 (CA) the Court held the following with reference to the position of an architect: "Where there is a conflict as to whether he has discharged that duty [to use reasonable skill and care], the courts approach the matter upon the basis of considering whether there was evidence that at the time a responsible body of architects would have

taken the view that the way in which the subject of enquiry had carried out his duties was an appropriate way of carrying out the duty, and would not hold him guilty of professional negligence merely because there was a body of competent professional opinion which held that he was at fault."

- 84 Should it therefore be found that an architect's conduct falls short of the conduct that would have been reasonable exercised by another person of the same profession, the architect will be held liable for damages to his/her employer.
- 85 In the recent matter of Bentel Associate International (Pty) Ltd v Loch Logan Waterfront (Pty) Ltd 2015 JDR 0323 (FB), the Court had to decide inter alia as to whether the defendant's claim in reconvention, alleging that it has suffered damages as a result of the plaintiff's failure to perform its obligations in a professional and workmanlike manner and without negligence, should be upheld. The Court held that "the architect's liability is not absolute in the sense of being liable for whatever occurs. The architect is liable for substantial negligence (Dodd v Estate Cloete and Another 1971 (1) SA 376 (ECD))."
- 86 The aforesaid court further alluded to the matter of De Wet v Steynsrust Municipality 1925 OPD 151, where it was held that "an architect must exercise the general level of skill and diligence exercised by other persons exercising the same profession, being skilled and experienced persons." The learned Judge referred with approval to the position in international law pertaining to the liability of the architect and quoted John R. Heisse from his article "The Measure of Malpractice" Journal of the American College of Construction Lawyers Vol 5, Nr 2, 2011:

“Noting that architects and engineers deal in somewhat inexact sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise measurement the courts have reasoned that the indeterminate nature of these factors makes it impossible for professional service people to gauge them with complete accuracy in every instance.”

- 87 The benchmark regarding the standard of care that should be applied by an architect in the law of the United States has been defined in the Maine Supreme Court matter of *Coombs v Beede* 89 Me. 187 A 104 (1896). Here the Court held that the responsibility of the architect is the same as a doctor to patient or lawyer to client, in that the architect has “*some skill and ability in some special employment and offers his services to the public on account of his fitness to act in the line of business for which he may be employed.*” The Court further held that the undertaking of the architect implies that he/she consequently possesses the “skill and ability, including taste, sufficient to enable him to perform the required services at least ordinarily and reasonably well; and that he will exercise and apply, in the given case, his skill, ability, judgment and taste, reasonably and without neglect.” The Court then attempted to define the exclusions from the architect’s duty of care, submitting that “the undertaking does not imply or warrant a satisfactory result. It will be enough that any failure shall not be the fault of the architect. There is no implied promise that miscalculations may not occur. An error in judgment is not necessarily evidence of want of skill or care, for mistakes and miscalculations are incidents to all business of life.” Negligence should therefore be evident from the conduct of the architect and it will not suffice to simply state that a mistake was made by the architect.

- 88 The question is whether the Registered Person took the expert opinions of both the professional plumber, Wynand J Herbst and Boundless Civil Engineers (Pty) Ltd provided on 14 July 2022, who was appointed by the HOA as early as March 22, 2002, into consideration.
- 89 The evidence clearly demonstrates that the Registered Engineer, Boundless Civil Engineers (Pty) Ltd, clearly indicated that on studying the architectural drawing [011-1000-SITE PLAN-REV-C- (2021-11-27)] they found that with respect to the (2) electrical kiosks, Mo (2) street lights and position(s) of the proposed on-site calcamite conservancy tank they find that the two (2) electrical kiosks and Mo (2) street lights in the road reserve adjacent to the frontage of the Appellant's property with one (1) kiosk and one (1) street light is positioned roughly in the middle of the Appellant's proposed drive-way and thereby constituting an obstruction within the width of your proposed drive-way.
- 90 They further conclude that it seems to them an undue expectation for the Appellant to be expected to either curtail and/or constrain the design of his proposed dwelling to accommodate what is seemingly poorly sited electrical infrastructure in the vicinity of his site.
- 91 It is also common cause that the Registered Engineer believed that it was no complex matter to argue the point that it is more typical to site the electrical infrastructure in question close to property boundaries where the position of the infrastructure does not constitute and encumbrance on Land Owner's development plan or in the worst of circumstances where such encumbrance is minimized as far as is reasonably possibly.

92 Their view is that in their professional judgement the Appellant had firm grounds to approach either the Developer and/or Building Authority to seek relief in the form of removal of these encumbrances to afford him the appropriate latitude to institute his proposed development plans for the site.

93 In respect of the position(s) of the proposed on-site calcamite conservancy tank they noted that the natural grade on the site predominantly falls towards the easterly and south- easterly direction, and that the low point of the site is towards the south-east corner of the site, thereby making it technically and economically efficient for the proposed calcamite conservancy tank to be situated downstream of the most westerly wastewater collection point on the site to ensure that;

(i) The sewer reticulation system flows on gravitational acceleration and no mechanical effort (and associated costs) is required for optimal and safe function, and

(ii) No excessive bulk earthworks (and the associated capital costs) are required to lower (and possibly) change the natural grade of the site with a view to siting the calcamite conservancy tank upstream of the wastewater collection point.

94 Their opinion was also that it would be unreasonable for the Appellant not to be granted permission to implement the calcamite conservancy tank as per his proposal, and that it was onerous to expect of the Appellant to site the tank upstream of the lowest wastewater collection point on the site.

- 95 Concomitantly, the professional plumber, Wynand J Herbst, who also reviewed drawings no 1000 Rev C dated 27 November 2021 and 1000 Rev F dated 30 May 2022 for Zwavels Nest estate, stand 672, on 11 July 2022, also concluded that the calcamite sewer system's ideal and best location is on the South-East Comer of the stand per drawing 1000 Rev C. and held that sewer systems work best with gravity and therefore natural flow should be maintained as far as reasonably possible to minimize capital costs and maintenance costs.
- 96 Herbst further commented that the positioning of the sewer system on the South-West comer will require major earthworks and/or a pump system to get the sewer to counter natural gravity and that this would also not be consistent with best practice in plumbing and recommended that the best positioning of the calcamite sewer system is on the North-East comer of stand 672 Zwavels Nest, and because the system does not have an underground soakaway/filter system, the risk of direct contamination of underground water due to the positioning of the system is very minimal.
- 97 SANS 10252-2 Clause 4.8, under conservancy tanks, septic tanks and french drains, prescribes that -
- 97.1 Conservancy tanks shall, subject to the clearing services provided by the local authority in question,
- a) have a capacity as prescribed by such local authority,
 - b) be constructed with a means of access for cleaning, and
 - c) be provided with a means for clearing as prescribed by such local authority.

97.2 Rule 8.2 provides that a conservancy tank or septic tank to be used on a site for the reception of sewage shall-

- a) be so designed and constructed that it will be impervious to liquid,
- b) be so sited
 - 1) that there will be a ready means of access for the clearing of such tank,
 - 2) that it is not less than 2,0 m from the property boundary, or another structure,
- c) be so designed and sited that it is not likely to become a source of nuisance or a danger to health or the structural integrity of adjacent buildings,
- d) satisfy one of the following criteria:
 - 1) it shall be the subject of an Agrément certificate and be used within the scope, conditions and limitations prescribed in the certificate;
 - 2) it shall be rationally designed by a competent person (sanitation);
 - 3) it shall be designed and constructed in accordance with standard drawings issued by a local authority; or
 - 4) it shall be in accordance with the requirements of 4.8.3, 4.8.5, or 4.8.6, as relevant, and
- e) be vented at the building.

98 It also requires that the siting of conservancy tanks should be approved by the local authority. Generally, tanks should be located near driveways to facilitate cleaning by a vacuum tanker.

- 99 In the matter of Bloomsbug Mills, Inc, v Sordoni Construction Co 401 Pa. 358 (1960), the Pennsylvania Court confirmed that “an architect is bound to perform with reasonable care the duties for which he contracts. His client has the right to regard him as skilled in the science of the construction of buildings and to expect that he will use reasonable and ordinary care and diligence in the application of his professional knowledge to accomplish the purpose for which he is retained. While he does not guarantee a perfect plan or a satisfactorily result, he does by his contract imply that he enjoys ordinary skill and ability in his profession and that he will exercise these attributes without neglect and with a certain exactness of performance to effectuate work properly done. While an architect is not an absolute insurer of perfect plans, he is called upon to prepare plans and specifications which will give the structure so designed a reasonable fitness for its intended use, and he impliedly warrants their sufficiency for that purpose.”
- 100 The Code of Conduct for Registered Persons provides that the Code applies to a Registered Person in whatever capacity they may work or act in (Our emphasis underlined), as a natural person, whether in private or public practice, as sole practitioner, partner, director or employee (whether as a professional or a candidate) and whether in the employ of another Registered Person or not.
- 101 The Code furthermore stipulates that where such a Registered Person fails to comply with any provision of the Act or Rule published in terms thereof, which is deemed by the Council to constitute improper conduct, it shall proceed with disciplinary action against such Registered Person.

- 102 Rule 2.1 of the Code of Conduct clearly specifies that Registered Persons shall discharge their duties to the employer, client, *agent*, associate, and the public with due skill, diligence and competence.
- 103 Rule 6 furthermore provides that Registered Persons shall, in the performance of their duties respect the constitutional rights of individuals and communities that could be affected by their work and comply with the National Building Regulations and Standards Act 103 of 1977, Town Planning Schemes, National Heritage Resources Act 25 of 1999 and any other built environment laws or any other applicable law governing the works.

Prima facie evidence

- 104 Sections 27(1)&(3) of the Act provides that Council must, in consultation with the CBE, voluntary associations and registered persons, draw up a code of conduct for registered persons and all registered persons must comply with the code of conduct and failure to do so constitutes improper conduct.
- 105 Section 28(1) of the Act provides that Council must refer any matter brought against a registered person to an investigating committee contemplated in section 17 if (a) *the 'Registrar' has reasonable grounds to suspect that a registered person has committed an act which may render him or her guilty of improper conduct;* or (b) a complaint, charge or allegation of improper conduct has been brought against a registered person by any person. (Our emphasis

underlined). *At the request of the council, the investigating committee must-*

(a) investigate the matter; and

(b) 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.

106 In *George v Rocket* 1990 170 CLR 104 (HCA)24 it was said that the 'reasonable grounds to suspect' is the required state of mind, contrasting suspicion with a belief or a reason to believe, and that suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove". The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown.

107 It must therefore be understood that at the time Council considered referral of the complaint by the Appellant to the Investigating Committee there was sufficient suspicion to believe that the Registered Person, Mr Vosloo, has committed an act which may render him guilty of improper conduct.

108 In *Mabona and Another v Minister of Law and Order and Others*, 1988 (2) SA 654, Jones J held:

"The test is whether a reasonable man in the Registrar's position and possessed of the same information have considered that there were

good and sufficient grounds for suspecting that the Registered Person was guilty of improper conduct?”.

- 109 In South African Legal Practice Council v Marais (32362/2020) [2024] ZAGPPHC 472 (14 May 2024), the court held that :

“...the purpose and function of the Investigating Committee is to investigate and make recommendation to council for misconduct proceedings by the Disciplinary Committee where circumstances permit and that the investigation is not an event limited to a discussion conducted by the Investigating Committee but a process which also includes a meaningful interrogation of the allegations against the practitioner, a call for further submissions and evidence, interview with witnesses who may not have been party to the discussion...”.

- 110 In Mavudzi and another v Majola and others (49039 | 2021) [2022] ZAGPJHC 575, 2022 (6) SA 420 (GJ) 10 August 2022 [11] Sutherland DJP stated that the apparatus to discipline a professional requires that a professional who is accused of misconduct must enjoy a fair procedure, inclusive not only of audi alteram partem but that there be an appropriate investigation of the allegations against the practitioner.

- 111 Rule 5 of the SACAP Rules for Inquiry into Alleged Improper Conduct, 2021, provides that the Registrar must upon receipt of the complaint/information, furnish the Registered Person/s whose conduct is the subject of a complaint or who has committed an act which may render him or her guilty of improper conduct, a written copy of the complaint and inform the Registered Person – (a) of his or her right to be represented or assisted by another person; and (b) that he or she is

not obliged to make any statement and that any statement so made may be used in evidence against the Registered Person.

- 112 In terms of Rule 5(3) of the aforementioned Rules, the Registrar of SACAP must submit all complaints and other available information related to the alleged improper conduct to the Investigating Committee. The Investigating Committee must afford the Registered Person the opportunity to respond in writing to the complaint and all other evidence considered against him or her. The Investigating Committee or persons assigned by it, including people appointed to investigate the complaint, may, with due consideration of the provision of section 28(3) of the Act, question the Registered Person concerned for the purpose of gathering further information. The Investigating Committee must investigate the matter and obtain evidence to determine within a reasonable time considering the nature and complexity of the investigation, whether or not, in its opinion, the Registered Person concerned should be charged and if so, recommend to the Council the charge or charges that should be preferred against that Registered Person.
- 113 Rule 4.1 of the said Rules also provides that any person or body lodging a complaint of improper conduct against a Registered Person with the Council must do so in the form of an affidavit or an affirmation detailing the specific act or acts relating to the alleged improper conduct, and must attached evidence in support of it.
- 114 What is clear is that the first step for the Investigating Committee is to conduct an investigation. The next step is for the Investigating Committee to decide whether the available *prima facie* evidence

may lead to a finding of improper conduct which is the sort of conduct that requires disciplinary proceedings in terms of the Code of Conduct for Registered Persons. If so, the matter must be referred to a disciplinary committee.

- 115 In *Groundup News NPC & 2 Others v The South African Legal Practice Council & 4 Others* (Case No. 20150/2021) [2023] ZAGPJHC 559(24 May 2023), the court held that *"to expect a member of the public complaining about the conduct of a practitioner to bring a complete case would make a mockery of the what the LPC seeks to achieve. The LPC must therefore assist members of the public, rather than to protect legal practitioners by making it harder for members of the public to obtain redress. The approach taken by the LPC in this matter is fundamentally flawed and inconsistent with not only the literal meaning of the LPC, but also with its stated purpose."*
- 116 Similarly, in the case of SACAP, the Code of Conduct prescribes that the overriding objectives for the Code of Conduct is to strive for excellence in the Architectural Profession, to protect the environment against unsound architectural practices and the delivery of services to the public with due care, skill, diligence and integrity, applying all relevant knowledge in the process.
- 117 Should these objectives not be met, Registered Persons are subject to the disciplinary supervision of the Council. The Rules lay down standards of professional conduct and practice which must be complied with. Failure to do so could lead to an investigation which may result in a disciplinary hearing.

- 118 It is also common cause that the Investigating Committee or persons assigned by it, or those appointed to investigate the complaint, may, with due consideration of the provision of section 28(3) of the Act, question the Registered Person concerned for the purpose of gathering further information.
- 119 The Investigating Committee *must* investigate the matter and obtain evidence to determine within a reasonable time considering the nature and complexity of the investigation, whether or not, in its opinion, the Registered Person concerned should be charged and if so, recommend to the Council the charge or charges that should be preferred against that Registered Person.
- 120 The Code of Conduct for Registered Persons furthermore stipulates that where a particular conduct is not specifically stipulated in this Code it does not mean that such conduct cannot form the basis of disciplinary proceedings. Each case shall be judged on its merits, and there may be circumstances in which unacceptable or improper conduct or serious professional incompetence is found even where there has been no breach of the express terms of this Code. The rules in the Code are not exhaustive.
- 121 The use of the phrase "... to determine... whether or not, in its opinion, the Registered Person concerned should be charged" in Rule 5, shows that the Investigating Committee does not have to decide whether a watertight case exists. It is not for the investigating committee to evaluate the probity of the evidence.

- 122 As earlier highlighted, in determining whether the Registered Person should be charged the Investigating Committee must "obtain evidence to determine ..., whether or not, in its opinion, the Registered Person concerned should be charged".
- 123 The probative value of statements such as the statements favoured by the Professional Engineer and plumber in the evidence of the Appellant, have been ruled upon by the courts on many occasions over periods of many years. It is impossible and indeed unnecessary to refer to all the cases where this issue was discussed in view of the fact that the majority of decisions apply a uniform approach.
- 124 In casu is when Diemont J A confirmed this when he remarked as follows in Veldhuizen 1982 (3) SA 413 (A) in respect of section 212(4):
"The word `prima facie evidence' cannot be brushed aside or minimized. As used in this section they mean that the judicial officer will accept the evidence as prima facie proof of the issue and, in absence of other credible evidence, that prima facie proof will become conclusive proof." (416G). With regard to the rebuttal of prima facie proof Nestadt J held in Trust Bank of Africa Ltd v Senekal 1977 (2) SA 587 (T):
"Merely to cast suspicion on the correctness of the fact or facts prima facie established and mere theories or hypothetical suggestions will not avail the defendant; the defendant's answer must be based on some substantial foundation of fact." (593E.)
- 125 By misconstruing its role, the Investigating Committee has committed an error of law.

Burden of proof

126 The terms “burden of proof’ and “onus of proof” refer to the duty that is cast upon a litigant to adduce evidence that is sufficient to persuade a court, at the end of the trial, that the claim or the defence, as the case may be should succeed. In *Pillay v Krishna and Another* 1946 AD 946 it was described as follows:

“The only correct use of the word ‘onus’ is that which I believe to be its true and original sense (cf D 31.22), namely, the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim, or defence, as the case may be...”.

[20] The burden of proof in an action will not necessarily fall on the one party alone, but each of the parties may bear a burden of proof in relation to different issues. In *Pillay v Krishna* the general approach was explained as follows:

“If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it. But there is a second principle which must always be read with it: Where the person against whom the claim is made is not content with a mere denial of the claim, but sets up a special defence, then he is regarded quoad that defence, as being the claimant: for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it ... But there is a third rule, which Voet states... as follows: ‘He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is fact that is denied and that the denial is absolute’. The onus is on the person who alleges something and not on his opponent who merely denies it.”

127 In the result, the following order is made:

127.1 In terms of Rule 3.1 of the Rules of Inquiry into Alleged Improper Conduct, Council by resolution, may delegate the following functions to the Registrar or other staff member:

(a) The referral of matters brought against a Registered Person to the Investigating Committee for investigation;

(b) The charging of Registered Persons and the furnishing of charge sheets to them;

(c) The appointment of disciplinary tribunals; and

(d) The appointment of a pro-forma complainant.

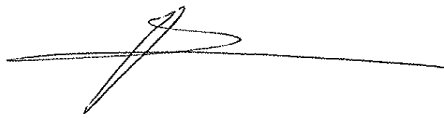
128 The decision by the Investigating Committee is hereby rescinded and the appeal is upheld, and the Committee orders:

128.1 That the complaint so lodged by the Appellant on 28 October 2023 be referred back to the Council to reconstitute an Investigating Committee for the purposes of reconsidering the complaint de novo, provided

128.2 That said Investigating Committee be constituted by different members to those that issued the decision on 21 May 2024.

Adv. Derick Block

Chairperson: CBE Appeal Committee



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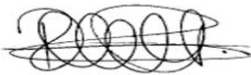
Member: Ad-Hoc Appeal Committee



Supported:

Mark Pencharz

Member: CBE Appeal Committee



Supported:

Patricia Chalwa

Member: CBE Appeal Committee