IN THE APPEAL COMMITTEE FOR THE BUILT ENVIRONMENT

("APPEAL COMMITTEE")

In the matter between:

DEBRA GAIL COSTOPOULOS **APPELLANT**

And

ENGINEERING COUNCIL OF SOUTH AFRICA (ECSA) **1ST RESPONDENT**

WESSEL NORMAN ESTERHUIZEN **2ND RESPONDENT**

FINDING OF THE APPEAL COMMITTEE

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[1] **Introduction**

Before the commencement of the proceedings, the Appellant and Second Respondent made an application to have the matter heard virtually. There was no opposition to the application. The Appeal Committee (herein and after referred to as the Committee) was provided with the document "Policy on Conduct of Appeals" which provided as guide line as to how to conduct appeals. Paragraph 7.3 of the policy determines that the "The hearing will be held at the offices of the CBE" and paragraph 9.1 states "Should it not be

possible for parties to appear in person, the CBE will as far as possible facilitate alternative means of contact during hearing, such as a telephone conference." There being no opposition to the application, same was granted and the matter was directed to be heard virtually. Therefore both Appellant and Second Respondent were connected virtually during hearing and all other participants were present in person at the venue of hearing at the Pretoria offices of CBE.

[2.] At the commencement of the proceedings the First Respondent indicated that he wishes to amend paragraph 5 of the first respondent's affidavit and correct the error that appears there, Wednesday 31st July 2024 should read Thursday 26 November 2024. There was no opposition to the application and the amendment was granted.

[3.] The First respondent, further indicated that he would like to raise a point in *limine* before the appellant starts with the actual hearing of the appeal. When dealing with the point in *limine* he stated that he objects to annexure "F" at page12 of the Second Respondent's bundle. He said it appears as if the Second Respondent is bringing an appeal by "back door" (my emphasis and

terminology)[1]. He further stated that he should have used of Section 21 of the Council for the Built Environment Act , 43 of 2000 and Section 35 of Engineering Profession Act, 46 of 2000.

[4.] Secondly, the Second Respondent seeks to dismiss "charges" which he faced during the hearing in the Engineering Council Tribunal (herein and after referred to as the Tribunal). He said the Second Respondent is not appealing the decision of the Tribunal. He argued that the Second Respond cannot appeal charges, but can appeal decision of the Tribunal provided that he followed the procedure stated in the two Acts of Parliament referred to in the previous paragraph.

[5.] The Second Respondent has not paid the requisite fee in order to lodge an appeal, and therefore he cannot bring an appeal under the present circumstances.

[6.] The Second Respondent admitted that the appeal they brought was not brought in accordance with the procedure for the appeal. He indicated that the

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1. My emphasis and terminology.

appeal was done in desperation, as the Engineering Council Tribunal had failed to provide them with reasons for the judgment (finding and sanction), which they had requested in order to enable them lodge a proper appeal.

[7.] **The appeal committee unanimously upheld the point in *limine*.**

The Appeal

[8.] The Appellant appeals against the following sanction imposed by the Tribunal, it being;

8.1 a monetary fine of R20 000,00 payable within thirty (30) days after the transmission of the sanction by email to the Second Responded and,

8.2 suspension of the Second Respondent for a period of thirty (30) days. The applicant is only allowed to work during this period of suspension under supervision of a registered professional, who is registered under the ECSA.

[9.] The appellant, in her heads of the argument state the following as her grounds of appeal, which she puts under the heading;

" **Remediation Sought**"

1. Training on the legality of the required Form 2 and NHBRC documentation

and that it needs to be submitted to the relevant bodies by the competent people involved in any project.

2. A full investigation into the long-standing relationship between Mr W.N. Esterhuizen and the builder Mr F.J. Cooper and,

3. A more stringent decision against Mr W.N. Esterhuizen (a stronger penalty and suspension of at least one year).

[10.] In motivation for the above she states the following;

10.1 Mr W N Esterhuizen' s actions and their impact on the building project.

10.2 His relationship with the Builder, and his alleged attempts to mislead the ECSA committee.

10.3 lack of accountability have led to significant financial and structural consequences.

10.4 the condemnation of the building by several professionals entities, including Mr Esterhuizen himself condemning his own building, underscores the severity of the situation.

10.5 It is imperative the CBE ensures justice is served and industry standards are upheld to address the negative publicity surrounding regulatory concerns.

10.6 Mr Esterhuizen's continued defence of his behaviour raises doubts about

his claimed professional integrity, and the charges warrant further scrutiny to uphold accountability to the industry.

[11.] She stated that, “I appeal to the CBE Appeal committee, in light of all evidence provided, that the CBE consider both my complaint and appeal to be viewed in far more serious and stringent manner.”

The Fist Respondent’s opposition to the Appeal

The First Respondent opposes the appeal based on the following grounds;

12.1 “... facts are with respect irrelevant to the focal point off the Disciplinary Tribunal hearing and the Council's decision relating to the Section 33 Appeal in so far as the Appellant seeks to include possible prior building projects engaged in by the Builder.....”

12.2 The First Respondent is of the view that the correct procedural aspects were correctly upheld by the Tribunal in dismissing the other charges and upholding only two (2), as that would have amounted to the ambush of the Second Respondent. Other charges proffered, which were discussed, were emanating from the "Overarching Code" which had to be excluded due to

absence of any respective professions contained in the code.

12.3 The First Respondent states further that the "Appellant did not take the Appeal Committee into her confidence by not setting out either the nature and / or relevance of such evidence in her appeal."

12.4 He further states that there is no evidence that the First Respondent did not consider the Appellant's complaint lawful, reasonable or procedurally fair manner which affected her rights and interest, being the only good upon which the Appellant is entitled to launch an appeal within the precepts of the applicable legislation.

12.5 He avers that her (appellant) query pertains to the Second Respondent P1 insurance. This falls beyond the mandate of the Appeal Committee.

The 2nd Respondent's opposition to appeal.

[13.1] The Second Respondent states in opposition to the appeal that " In her documentation Appellant has failed to substantiate her request or set out reasons for her request to increase the sanction of the Second Respondent,..."

13.2 The Second Respondent also states, "I wish for CBE to determine whether ECSA, based on the information provided above, in fact had jurisdiction to entertain the complaint lodged by Appellant."

Discussion of the grounds of appeal

14. Let me interpose at this stage, and suggest that it will be best to first deal with the opposition to the appeal by Second Respondent, in line with the ruling on the point *in limine* raised by the First Respondent and upheld. The Second Respondent deals at length addressing the issue of Form 2 in his opposition to the appeal. This issue is clearly raising a cross appeal of which he has not complied with the procedure for a cross appeal and has not paid the requisite fee. The Appeal Committee therefore will not deal with this issue. The Second Respondent could have dealt with other ways of compelling the Council to provide it with reasons, and lodge the appeal in line with the proper prescripts relating to the appeals procedure. In any event the Second Respondent had withdrawn the "cross" appeal.

[15.] The appellant calls on the Appeal Committee to adjudicate on three (3) points which he laid down as basis of her appeal. The South African law allows

a wide variety of grounds of appeal. Amongst them are the following, but not limited to the grounds stated herein,

15.1 whether there was sufficient evidence to sustain the charge,

15,2 incorrect factual finding on evidence presented,

15.3 improper admission or exclusion of evidence,

15.4 procedural errors,

15.5 mistake in the application or interpretation of law,

15.6 imposition of sanction which is disproportionate to the offence committed and other grounds. The list is not exhaustive.

16. It is trite law that the Appeal Committee in adjudicating the appeal should deal with matters which were dealt with during the hearing of the appeal as contained in the appeal record and the subsequent outcome or sanctions thereof.

[17.] It is clear from the reading of the entire appeal that Appellant does not appeal against the guilty verdict by the tribunal, as it is obviously in her favour.

The first two (2) grounds she relies on were not adjudicated on by the Tribunal, that is;

17.1 Training on the legality of form 2 and NHBRC documentation.

17.2 A full investigation into long standing relationship between Mr. W.N. Esterhuizen and the builder Mr F.J. Cooper.

17.3 What the Appellant correctly seeks to appeal is the sanction imposed by the Tribunal. This last ground falls squarely within the purview of the jurisdiction of the Appeal Committee and therefore the committee will deal only with this ground as a justiciable ground of appeal.

18. The following was the sanction which was an imposed by the Disciplinary Tribunal, which the Appellant seeks to appeal;

18.1 a fine of R20 000.00 (Twenty thousand Rand only) is to be paid to the Council within thirty (30) days from date of transmission of this sanction to the Respondent (Mr. W.N. Esterhuizen).

18.2 the Respondent's registration shall be suspended for a period of 30 days, from the day after this sanction is transmitted to the respondent via email. During the suspension period, the provision of section 26(4) of the EPA, which provides that

the “Complainant”(sic)[2] will not be prohibited to performing work as defined in EPA, provided such work is carried under supervision of a registered person, defied in the EPA, who must assume responsibility for any work conducted during this time.

The discussion of sanction

[19.] There are number of decided cases which deals with how the Appeal Court (in our current case the Appeal Committee) should approach the appeal on the sanction or sentence. See the case of **Makeke v S**[3], where is stated that, “A court of appeal will not interfere lightly with the trial Court's exercise of its discretion”. In the book Du Toit's Commentary (Du Toit et al, Commentary on the Criminal Procedure Act (Jutastat R S66 2021 at ch30_p 42A, it is stated, "A court of appeal will not, in the absence of material misdirection by the trial Court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers. To do so prefers to do so would be to

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2. **(CA & R09/2022) [2023] 3rd January 2023,**

[20] This principle applies to our present case in that, the Appeal Committee cannot just substitute the Disciplinary Tribunal sentencing discretion with that if its own simply became it prefers it. The applicant should provide tangible and compelling reasons why this committee should depart from the sanction imposed by the Tribunal, whose decision is the subject of appeal.

[21.] Maya DP (as she then was) in the case of **S v Hewitt** [4] she said the following, "It is trite principle of our law that the imposition of sentence is the peregrotive of the trial Court. A court of Appeal may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude its own choice penalty will have been appropriate penalty. Something more is required; it must conclude that its own choice of the penalty is the appropriate penalty and that the penalty chosen by the trial Court is not. Thus the appellate Court must be satisfied the trial court committed a misdirection of such a nature, degree and seriousness that shows it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where the exist a "striking" or "disturbing" disparity between trial Courts sentence and that which the appeal Court would have

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3. **2017 (1) SACR 309 SCA**

Imposed. And in such instance the trial Court discretion is regarded as having been unreasonably exercised."

[22.] Another case in point is the case of S V Bogaavads[5], a Constitutional court case, where Khampempe J held at,41 that, "It can only do so [i.e. interfere with the sentence imposed] where there has been an irregularity that result in the failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.

[23.] The appeal committee has to ask itself whether the test laid down in these three (3) cases referred to above has been met. Without further ado it is the finding of the committee that the appellant has failed to lay down the reasons why the Appeal committee should interfere with the discretion which was exercised by the disciplinary Tribunal. The court in the Hewitt case concluded that, at paragraph 9 that, "Consequently, the court in the present matter can only interfere with the

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5. **2013(1) SACR 1 CC**

sentence when the trial Court's discretion was patently incorrect. The sentence must be otherwise left undisturbed."

[24.] The First Responded in his heads of argument state in paragraph 15 page 5 of that"..... the Disciplinary Tribunal was fully aware of the nature of the transgressions complained off by the appellant and advanced by the pro forma complaint". He goes on to say that, " The Appellant has not determined that any of her rights and interest have been adversely affected by the Council's decision, in upholding the Disciplinary Tribunals findings and sanction".

[25.] The Second Responded in his heads of argument at page 2 states, "In her documentation Appellant has failed to substitute her request or set out the reasons for her request to increase the sanction of the Second Respondent. As such, the Second Respondent is of the opinion that the appeal should be dismissed".

[26.] The Appeal Committee having done a thorough analysis of the grounds of appeal and analysed the evidence submitted in support of such grounds of appeal, it cannot find the reason(s) which justify it from interfering with the sanction imposed, particularly in the line with the grounds stated in the **Hewit**t

case. She has failed to show that's the sanction by the Disciplinary Tribunal is patently incorrect, nor has she shows that there is "striking" or "startling" or disparity between the Disciplinary Tribunals sanction on the one she is seeking to be imposed. She only told the Appeal Committee that the, one (1) year suspension of Second Respondent and a fine up to R40 000.00 are inadequate sentence without substantiating.

[27.] It is important at this juncture to note that the Appeal Committee is not privy to the mitigation factors placed before the Tribunal when considering the sentence, nor were the aggravating circumstances placed by the pro forma complainant in aggravating the sanction. The documents which deals with the sanction was attached by the Appellant and is at pages 10 - 11 of appeal record 1: Appellants bundle (notice of appeal), that being the sanction in terms of section 32 (3)(a) of the Engineering Profession Act,46 of 2000.

[28.] It stands to reason that the Appellant has failed to comply with the requirements for interfering with the sanction, which was imposed by the Disciplinary Tribunal, and that the Appeal Committee can therefore not interfere with the sanction, otherwise it will be committing travesty of justice.

[29.] **In the end, the result is that the appeal is dismissed.**

Dated at Pretoria on the 21st January 2025.

P.I. Songo

(Chairperson)

I, Concur

Eugene Barnard

(Appeal Committee member)

I, concur

Thapelo Dibakwane

(Appeal committee member)

Quorum : Phumzile Songo - Chairperson

Eugen Bernard - Appeal committee member

Thapelo Dibakwana - Appeal committee member

Debra Gail Costopolus - Appellant - In Person

Hamish Anderson - For the 1st Respondent - Hamish Anderson Attorneys), Pretoria.

Arthur Sterly - For the 2nd Respondent (From Van Zyl's Inc.)

And to: The Legal Specialist

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