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CBE
COUNCIL FOR THE BUILT ENVIRONMENT

APPEAL BEFORE THE APPEAL COMMITTEE OF

THE COUNCIL FOR THE BUILT ENVIRONMENT

In the matter between:

MARK DYLAN OATES Appellant

and

SOUTH AFRICAN COUNCIL FOR THE ARCHITECTURAL PROFESSION Respondent

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RULING

INTRODUCTION

1. The Appeal Hearing was held on the 23rd of June 2022 at the premises of the Council for the Built Environment ("CBE") in Pretoria.

2. The Appeal Committee was properly constituted in accordance with Section 21(3) of the Council for the Built Environment Act No. 43 of 2000 ("CBE Act") read with paragraph 3.2 of the CBE's Policy on Conducting Appeals.

3. The Appeal Committee comprised of the following:

3.1 Mr James Ndebele as Chairperson;

3.2 Ms Maria Paschini as Committee Member; and

3.3 Mr Xolisa Mnyani as Committee Member.

4. Present at the Appeal Hearing were the following:

4.1 Mr Mark Dylan Oates, the Appellant -representing himself;

4.2 Ms Bessie Hlophe ("Ms Hlophe"), an official of the Respondent - representing the Respondent;

4.3 Ms Kgaogelo Mashile ("Ms Mashile"), an official of the Respondent;

4.4 Ms Meltonia Chiloane, an official of the CBE;

4.5 Adv Kagiso Kgatla, an official of the CBE; and

4.6 Ms Mamotse Mahlatsi, an official of the CBE.

5. This is a unanimous Ruling of the Appeal Committee –with all Committee Members in concurrence.

RULING

6. The Appellant is a registered person in terms of section 18 of the Architectural Profession Act No. 44 of 2000 ("the Act") –with registration number PrArch 4150.

7. The Respondent is a regulatory body established in terms of Section 2 of the Act. When referring to the Respondent we include the Council, Disciplinary Tribunal and the Appeal Panel as the context may indicate.

8. The Respondent is empowered to and deals with, *inter alia,* disciplinary matters relating to the (improper) conduct of registered persons. In the main, this matter stems from the manner in which the Respondent (including the Registrar) dealt with a complaint which was lodged by a member of the public, namely -Mr Pano Pandaram ("the Complainant") -against the Appellant.

9. The Respondent is enjoined to exercise its powers lawfully. This means that its conduct must adhere to the Constitution of the Republic of South Africa, No. 108 of 1996 ("the Constitution"), the Act, the Board Notices, the Rules for investigations, Disciplinary hearings, Appeal investigations and Disciplinary Tribunal hearings published under Board Notice 64 of 2017 on 12 May 2017 ("the Rules"), the Promotion of Administrative Justice Act No. 3 of 2000 ("PAJA") and the common law. We refer to the aforesaid as the regulatory framework.

10. From our consideration and analysis of the facts, record, submissions and evidence presented before us, it is apparent that the Respondent grossly flouted the regulatory framework. The Respondent's conduct

and due process followed was not only flawed, but reprehensible and justifies us interfering in its decision / ruling.

11. In our view, the ruling of the Respondent must be overturned. We state this for the following reasons.

OUR REASONS

12. Firstly, we must point out that the Respondent exercises its power from statute -the Act. Secondly, it regulates all registered persons on how they carry out their work and their engagement with the public. Undoubtedly the Respondent exercises public functions and/or yields public power in relation to the architectural profession. As such, it is bound by PAJA[1] and Section 33 of the Constitution. In any event, even under common law, the Respondent is enjoined to observe the fundamental principles of natural justice which include compliance with its governing documents, rules, procedural fairness, honesty, impartiality, reasonableness and rationality.[2] In addition, in the exercise of its powers, the Respondent must at all times act in good faith.

13. It is apparent from the record that the complaint against the Appellant was not properly investigated by the Investigating Committee as envisaged by, *inter alia,* Section 33 of the Constitution which enshrines that:

[1] Ndoro and Another v South African Football Association and Others 2018 (5) SA 630 (GJ)
[2] Turner v Jocker Club of South Africa 1974 (3) SA 633 (A)

"Everyone has a right to administrative action that is lawful, reasonable and procedurally fair..."

14. It is also unclear whether the necessary evidence was obtained and independently investigated and verified by the Investigating Committee. This we seriously doubt. This does not bring comfort in circumstances where the Appellant argues that no proper investigation was conducted. This is a serious flaw both in fact and law.

15. It is further unclear whether the Investigating Committee actually applied its mind before recommending to the Council that the Appellant be charged. We doubt that the Investigating Committee had any choice on the matter. Our view is that the Investigating Committee was issued directives which were merely rubberstamped, *albeit,* in a flimsy and floppy manner. We will return to this point.

16. In fact, it is evident from the record and the submissions made by the Appellant and the Respondent that the Investigating Committee did not properly investigate the matter. The Respondent made foregone conclusions from the onset. This is evidenced by, *inter alia,* the fact that paragraph B of the Respondent's Record of Submission to the Investigating Committee purportedly compiled by the Respondent's Registrar is peppered with wording which connotes 'directives'.

17. The wording used is relatively straight forward in that such wording connotes ideal findings which the Respondent wanted the Investigating Committee to make / arrive at. As a matter of fact, it turned out that the findings of the Investigation Committee were ultimately exactly what was contained on the aforesaid Record of Submission –verbatim.

To this end, our view is that the Investigating Committee merely rubberstamped the content of submissions made by the Respondent without independent investigation and proper consideration.

18. The said wording contained on the Record of Submission is as follows:

> *"The Investigating Committee ("Committee") submits that there is no prima facie evidence that the Respondent inflated the invoice.*
>
> *The Committee submits that there is prima facie evidence that Respondent failed to engage in continues development activities.*
>
> *The Committee submits that there is prima facie evidence that the Respondent failed to put all items of appointment in writing.*
>
> *The Committee submits that there is a prima facie evidence that the Respondent letterhead does not comply with Rule 5.10*."

19. What exacerbates the matter considerably is the fact that the minutes of a meeting of the Investigating Committee purportedly convened on the 5th and 6th of November 2020 wherein pertinent discussions and decisions relating to the Appellant were made by the Investigating Committee -record a host of officials of the Respondent who were not supposed to be in attendance at such meeting. Such officials include, *inter alia,* -but not limited to the Respondent's Registrar, namely, Adv

Toto Fiduli ("Adv Fiduli"), Ms Mashile and Ms Hlophe. This was grossly irregular and in contravention of the regulatory framework.

20. The Investigating Committee is constituted by way of delegated authority in accordance with Section 17 and 40(2) of the Act. Trite law dictates that the Investigating Committee is required to perform its functions independently of the Council.

21. The Preamble of the Rules under Delegation of Powers expressly states as follows:

> " Appointment and Meetings of an Investigating Committee
>
> 1) *Council must appoint an Investigating Committee capable of investigating the professional conduct of Registered persons.*
>
> 2) *Council must ensure clear terms of reference and delegation of powers for the Investigating Committee to have sufficient meetings where the Committee can investigate matters and refer to Council."*

22. Section 28(1) of the Act provides that:

> *"The Council must refer any matter brought against a registered person to an investigating committee contemplated in section 17…"*

23. Section 28(4) provides that:

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

24. Section 29 of the Act provides that:

> *"the Council must, after considering a report of the investigating committee in terms of section 28(2)(b) and (4), charge a registered person with misconduct if the council is convinced that sufficient grounds exist for a charge to be preferred against such a registered person."*

25. It is clear from the aforesaid that the regulatory framework clearly envisages a 'separation of powers' between the Council and the Investigating Committee. From the evidence presented before us – there is no separation of powers -whatsoever. Adv Fiduli, Ms Mashile and Ms Hlophe, *inter alia,* had no business attending the aforesaid meeting of the Investigating Committee. As set out more fully herein below –it is apparent that officials of the Respondent seemingly have a propensity of flouting regulatory framework by, *inter alia,* engaging themselves in matters where they are directly conflicted.

26. It is noteworthy that the Respondent's purported proof of having delegated authority to the Investigation Committee incorrectly cites Section 29 of the Act. This is incorrect. The correct citations are Sections 17 and/or 40(2) of the Act. The Definition section of the Rules –published under Board Notice 64 of 2017 expressly define an Investigating Committee as:

"… a committee appointed by the Council under section 17 of the Act…"

27. The aforesaid error / oversight on the part of the Respondent together with various other flimsy and floppy flaws of the Respondent - foreshadowed herein should not be taken lightly. Such errors evince the fact that the Registrar, Legal and Compliance officials of the Respondent do not seem to comprehend basic fundamental principles enshrined in the regulatory framework. Such professional acts of negligence analysed holistically have a tendency of bringing the Built Environment Professional Councils into disrepute.

28. We hold the view that the Registrar was seemingly the judge, jury and executioner. Such conduct on the part of the Registrar was grossly irregular and vitiates the regulatory framework, in particular, the Constitution.

29. It is common cause that the Respondent in its hearings never called the Complainant as a witness. In the absence of a proper version from the Complainant, the version of the Appellant ought to have stood in its entirety -unless it was clearly unsustainable. This is what a reasonable decision-maker would have decided.

30. The conduct of the Investigating Committee amounted to a dereliction of its statutory duties. The consequence of this regrettable conduct was obviously an unjustified finding in contravention with the regulatory framework.

31. Be that as it may, when the hearings were called before the Disciplinary Tribunal and the Council –they had to observe the regulatory framework. In particular, they had to observe the fundamental principles of natural justice. Section 3 of PAJA outlines the essentials of a fair procedure, and we need not repeat its contents. We could not find that there was a grave departure in procedural fairness under PAJA, however, there were other serious violations of PAJA. We will return later in dealing with PAJA.

32. When the Appellant was charged, the Respondent in the first hearing failed, refused and/or neglected to attend a pre-hearing meeting which was called for by the Appellant as contemplated in paragraph 6.1 of Board Notice 5 of 2021.

33. Paragraph 6.2 of Board Notice 5 of 2021, expressly provides as follows:

> *"In the event a pre-meeting hearing is held, the purpose of such meeting shall be to curtail and limit the issues in dispute and agree on those not in dispute. The discussions may include but is not limited to the following headings:*
>
> *(a) Prejudice;*
>
> *(b) Settlement;*
>
> *(c) Admissions sought;*
>
> *(d) Disputes regarding the duty to present evidence first and onus of proof;*

(e) Proof by Affidavit;

(f) Responsibility for copying and preparation of bundles;

(g) Status of the documents; and

(h) Estimated duration of the hearing."

34. Had the Respondent complied with paragraph 6.2 of Board Notice 5 of 2021 by acceding to the Appellant's request for a pre-hearing meeting, various issues would have been narrowed down. Charges 1 and 3 would have been withdrawn at such pre-hearing meeting. We draw a negative procedural inference.

35. The Respondent's failure to comply with paragraph 6.2 of Board Notice 5 of 2021 flies in the face of, *inter alia,* Section 33 of the Constitution and Section 3 of PAJA.

36. The Disciplinary Tribunal was not properly constituted. To this end, the Respondent did not comply with section 30(2) of the Act in that some of the Tribunal's members were not those envisaged therein. This alone would make the decision of the Tribunal reviewable, wrong in law and *void ab initio*.

37. There are no clear reasons why the Complainant was not called to give evidence. As will be elaborated more fully herein below, the mere fact that, *inter alia,* the Disciplinary Tribunal's decision is peppered with overviews and findings stemming from the Complainant's grounds of complaint -warranted that the Complainant should have been called to

testify and the Appellant should have been afforded an opportunity to challenge the veracity of the Complainant's evidence. This did not happen. We draw a negative evidentiary inference.

38. The aforesaid vitiated the proceedings before the Disciplinary Tribunal. Put differently, just for these reasons alone the disciplinary proceedings before the Tribunal were irregular and void. Section 6(2)(b) of PAJA makes non-compliance with "*mandatory and material procedure or condition prescribed by an empowering provision*" susceptible to review. It also contravenes the Act. In our view, this would make the decision of the Tribunal reviewable and wrong in law.

39. The decision of the Tribunal was totally unreasonable in the circumstances. Due process was littered with irregularities. As aforesaid, a peremptory pre-hearing meeting was refused, evidence was not fully presented and the representations of the Appellant were not meaningfully considered. No reasonable decision maker could have come to the conclusion(s) reached by the Disciplinary Tribunal.

40. The Appellant was denied a fundamental opportunity to question the Registrar and Ms Mashile during the disciplinary enquiry before the Disciplinary Tribunal.

41. Rule number 3 of the Rules provides that:

> *"The summons for a witness to attend a disciplinary hearing contemplated in Section 31(3) of the Act must be substantially in the form of Annexure B"*

42. Rule number 4(1)(c) of the Rules provides that:

> *"A party must serve a document on the other party:*
>
> *by faxing or emailing a copy of the document to the person's fax number or email address or a number chosen by that person to receive service"*.

43. We noted that Rule 3 –published on Board Notice 64 of 2017 on 12 May 2017 –read alone, is ambiguous in that no express mention is made on who may issue the summons for a witness. This is compounded by Rule 4 making reference to "a party". A specimen of the required Subpoena is contained on Annexure B of the Rules. We reiterate our view that the Rules –read alone are unclear on who is empowered to issue the Subpoena,

44. Be that as it may, Section 31(3) (a) of the Act provides that:

> *"The disciplinary tribunal may, for the purposes of a hearing, subpoena any person-*
>
> *(i) who in its opinion may be able to give material information concerning the subject of the hearing; or*
>
> *(j) who it suspects or believes has in his or her possession or custody or under his or her control any book, document or object which has any bearing on the subject of the hearing*

to appear before the disciplinary tribunal at the time and place specified in the subpoena, to be questioned or to produce a book, document or object."

45. Section 31(3)(b) provides that:

"A subpoena issued in terms of paragraph (a), must –

(a) be in the prescribed form;

(b) be signed by the chairperson of the disciplinary tribunal or, in his or her absence, any member of the disciplinary tribunal …".

46. The said prescribed form is contained on Board Notice 5 of 2021 marked Annexure B – Subpoena for Witnesses.

47. We pause at this juncture to record that, notwithstanding the CBE being governed by regulatory framework, the CBE has, *inter alia,* a Policy on the Conducting of Appeals. Such Policy is express, very clear and unambiguous. We noted with considerable concern that the Respondent does not have its own internal Policies and Procedures in place. Had the Respondent formulated and adopted its own relevant Policies – extrapolated from prescribed regulatory framework –there would not be a lacuna between the Rules and the Act as aforesaid.

48. It is inexplicable why the Disciplinary Tribunal did not deem it befitting to secure the attendance of the Registrar and Ms Mashile at the proceedings. This is notwithstanding the Appellant having notified the

Disciplinary Tribunal that he wished to question them on various pertinent aspects. The Disciplinary Tribunal was delict in its duties by failing to comply with Section 31(3) of the Act. In contrast, the Disciplinary Tribunal Committee –chaired by an Advocate who is qualified in law and has the appropriate experience -elected to rather criticize the Appellant (a layperson in legal aspects and formalities) for having attempted to secure their attendance at the disciplinary proceedings by erroneously issuing his own subpoena -in contravention of Section 31(3) of the Act.

49. A disciplinary enquiry is not a trial.

50. The test was two-fold:

50.1 first and foremost, due to the Appellant's request -the Disciplinary Tribunal Committee was obliged to assist the Appellant by issuing a subpoena as envisaged by Section 31(3) of the Act; and

50.2 second, whether the Disciplinary Tribunal Committee deemed it prudent or held the view that the Registrar and/or Ms Mashile were –in their opinion competent or compellable witnesses to give material information concerning the subject of the hearing.

51. We hold the view that the Registrar and Ms Mashile would –most certainly, have been material witnesses whose evidence would have enabled the Disciplinary Tribunal Committee to make an informed decision on the matter.

52. As aforesaid, we noted, with considerable concern that the decision of the Disciplinary Tribunal is peppered with the Complainant's grounds of complaint –which were not put to the Appellant in the form of charges and Rulings were made by the Disciplinary Tribunal Committee on charges which were withdrawn and not before the Disciplinary Tribunal Committee for their determination. Case in point, the paragraphs in question are, *inter alia* –6.10, 6.14, 6.25, 6.26, 6.27,6.28, 6.29 and 6.30. This is a serious flaw –both in fact and law.

53. We further noted that much ado was made in paragraphs 6.7, 6.8 and 6.9 of the Disciplinary Tribunal decision of irrelevant case law which pertained to the original complaint which was not before the Disciplinary Tribunal Committee for determination.

54. Paragraph 6.33 of the Disciplinary Tribunal Committee's decision makes reference to Charge 3. This surely cannot be factually correct as the Disciplinary Tribunal Committee found the Appellant not guilty of Charge 3.

55. We now turn to the Appeal before the Respondent's Council.

56. Paragraph 14.4 of the Board Notice 5 of 2021 provides that the "*council must conduct appeals in a lawful, reasonable and procedurally fair manner*." Unfortunately, the appeal continued in the grossly irregular path of the Council. Nothing was lawful, reasonable or procedurally fair.

57. First, given what had transpired before the Tribunal, it was a serious material error of law for the Appeal to have continued. We can only assume that even the Appeal Body did not apply a mind of its own. This

is fortified by the record of how the proceedings were rushed and the striking fact that no submissions were made by the Respondent during the Appeal hearing. One can reasonably fathom that the outcome of the appeal hearing was preconceived and the appeal proceedings were merely a farce and a sham.

58. The Appellant was not informed of any time limits nor of the procedure to be followed in presenting his case prior to the Appeal Hearing. The Appellant was given unreasonable confined time limits within which to make his submissions. This was exacerbated by two Council Members indicating that they needed to leave the hearing at certain times. Unprofessional and absurdity is an understatement.

59. Notwithstanding the fact that the record reflects that the Council's Appeal proceedings were Chaired by Dr Sitsabo Dlamini ("Dr Dlamini") who is identified as Presiding Council Member –we noted, from the mechanical recording of the appeal proceedings provided that Dr Dlamini in his capacity as Chairperson of the Council's appeal proceedings initially provided the Appellant a period of five (5) minutes within which to make his submissions. The President of the Council, namely, Mr Charles Ntsindiso Nduku ("Mr Nduku") then allocated a time period of thirty (30) minutes within which the proceedings were to be finalised. Dr Dlamini –in turn, advised that he had to leave in fifteen (15) minutes and that Mr Nduku was well aware of his other commitments.

60. It is noteworthy that in the midst of the Appellant's submissions, pursuant to the lapse of sixteen (16) minutes into the appeal

proceedings, the Appellant was interjected and told to wrap his submissions up in five (5) minutes.

61. It is further evident from the recording that the proceedings were closed by Mr Nduku. We can only presume –with concern that, Dr Dlamini – the Chairperson of the proceedings had presumably left as he had indicated from the onset that he had other commitments. This not only raises eyebrows but begs questions why the appeal hearing was set down in the first place on a date which was not suitable for the Chairperson or why the Chairperson double booked himself and/or why the proceedings were not postponed to another suitable date.

62. Overall, we drew an adverse inference on the rushed and grossly irregular manner in which the appeal proceedings were conducted. What exacerbates matters considerably is the fact that two (2) high ranking / senior officials of the Council –being its President -Mr Nduku and Vice President -Mrs Letsabisa Shongwe ("Mrs Shongwe") were present during such grossly irregular and improperly constituted proceedings. They both seemingly turned blind eyes and condoned such gross irregularities and contravention of regulatory framework. This brings about serious causes of concern on the integrity of the Respondent's Council as a whole under the leadership and direction of Mr Nduku and Mrs Shongwe.

63. The fact that the Appellant was denied a fundamental opportunity to interrogate the Respondent's case at the Appeal hearing and reply thereto was procedurally irregular and in contravention of the regulatory framework. Nothing was lawful, reasonable or procedurally fair.

64. Rule 10(4) of the Rules provides that:

> *"Council must conduct appeal in a lawful and procedurally fair manner"*.

65. Rule 10(5) of the Rules provides that:

> *"A Council member hearing an appeal must not have been a member of the Investigating Committee which dealt with the matter"*.

66. Paragraph 14.5 of the Board Notice 5 of 2021 echoes Rule 10(5) by providing that no member of the appeal must have been a member of the Investigation Committee (which dealt with the matter). The Respondent –in open disregard of the regulatory framework saw it fit to completely disregard this fundamental provision.

67. From our analysis of the record, we established that three members of the Investigation Committee presided over the appeal proceedings. Such members were Ms Mandisa Daki –who was the Chairperson of the Investigating Committee, Mr Vusi Phailane and Mr Lufuno Motsherane / Nematswerane.

68. This is not only disturbing and grossly irregular -but flies in the face of the regulatory framework, in particular, Rule 10(4) and Section 33 of the Constitution. The Respondent's appeal, therefore, contravened a mandatory and material procedure set out by the Act, Rules and Board Notices.

69. The above completely rendered the appeal itself grossly irregular and susceptible to be reviewed and set aside. In our view, the Respondent acted contrary to, *inter alia,* the Rules, paragraphs 14.4 and 14.5 of Board Notice 5 of 2021. This voids the entire process.

70. We hold the view that the Respondent's appeal decision is materially tainted by a primary illegality -the consequence of which effectively renders such decision a 'fruit of a poisonous tree'

71. It bears mentioning that we drew a negative inference on the Respondent's failure and/or refusal to provide the Appellant the electronic recordings of the disciplinary proceedings before the Disciplinary Tribunal and the fact that the Respondent unilaterally elected to exclude pages 108 to 159 of the Appellant's submissions from the record of documents submitted to the Respondent's Appeal Committee which presided over the appeal hearing.

72. Finally, we point out that the Respondent's appeal proceedings were rushed and the Appellant was notably limited in making representations. It was not clear on what basis that this was done. In our view, this was procedurally unfair. Everything else before the Respondent was unlawful and unreasonable. It flouted the regulatory framework.

73. Flouting of the regulatory framework appears to be a norm for the Respondent. This cannot be allowed to continue unabated. The CBE is statutorily obliged to intervene. The CBE is empowered with oversight functions aimed at, *inter alia,* promoting and maintaining sustainable

built environment and sound governance of the built environment professions. To this end, the CBE must intervene.

74. In all these circumstances, we are of the view that the proceedings before the Disciplinary Tribunal and the Appeal Body are void and the resultant decision(s) must be set aside.

75. We are not confident that the Respondent (all bodies) could still be tasked with hearing the matter against the Appellant. As such, we make the following order:

75.1 The ruling, and sentence against the Appellant, is overturned entirely;

75.2 The Appellant is cautioned to ensure that clear and concise written agreements in accordance with prescripts of relevant regulatory framework are concluded with clients;

75.3 The Appellant is hereby discharged;

75.4 In accordance with, *inter alia,* Section 4 (L) of the CBE Act, the Council of the CBE is hereby directed to investigate or initiate investigations into the conduct of the Registrar –Adv Fiduli, Ms Hlophe and Ms Mashile;

75.5 In accordance with, *inter alia,* Sections 3(a), (b), (c), (f), (i) and 4(f), (j), (k)(iv), (o) and (z), we hereby recommend that the Council of the CBE issues directives to the Respondent to draft, adopt and implement clear and concise Policies on:

75.5.1 Disciplinary Codes and Procedures; and

75.5.2 The Conducting of Appeals.

Such Policies should be formulated in accordance with relevant prescribed regulatory framework.

75.6 We hereby recommend that the Council of the CBE directs the Respondent to provide the CBE copies of the said Policies referred to in paragraph 75.5 hereinabove within a period of sixty (60) days from date of issuing such directives.

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

JAMES NDEBELE – Appeal Committee Chairperson

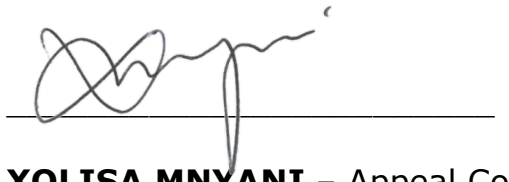
Date: 4 July 2022

Place: Johannesburg

MARIA PASCHINI – Appeal Committee Member

Date: 4 July 2022

Place: Johannesburg



XOLISA MNYANI – Appeal Committee Member

Date: 4 July 2022

Place: Johannesburg