

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

In the appeal between

THABO ZACHARIA HLABELA

Appellant

and

ENGINEERING COUNCIL OF SOUTH AFRICA (ECSA)

First Respondent

ASIENE THOMSON NEBOTALO

Second Respondent

BEFORE:

Mr. S Makubung – Appeal Chairperson

Mr. D Riley – Member

Mr. S Banza - Member

DECISION

INTRODUCTION

1. This appeal comes before us in terms of Section 21 of the Council for Built Environment Act of 2000, Act 43 of 2000 ("the CBE Act").
2. Section 21 of the CBE Act permits any person who is aggrieved by a decision of the professional body, such as the Engineering Council of South Africa ("ECSA"), to appeal that decision to the Council for Built Environment (CBE) within 30 days of becoming aware thereof.

3. The Appellant lodged an appeal against the “decision” of the First Respondent on the grounds set out by the Appellant in his Notice of Appeal.
4. The tricker to the Appellant’s appeal was the purported decision of ECSA contained in the letter from ECSA to Mr Hlabela dated the 14th June 2021. This letter formed part of the Appeal Record 1: Appellant’s Bundle. The letter appears on page 34 of the Appeal Record 1. We deal with this letter in details herein below.

THE PARTIES

5. The Appellant is, as per the heading of notice of appeal, Thabo Zacharia Hlabela. However, paragraph 4 of Notice of Appeal, page 3 of Appeal Record 1 states that the “Appellant” is Mogoba Maphuti and Associates (Pty) Ltd.
6. The First Respondent is ECSA.
7. The Second Respondent is Asiene Thomson Nebotalo.
8. We made an observation relating to the actual Appellant before us. While notice of appeal refers to Mr. Thabo Zacharia Hlabela as the Appellant, the same document, on page 3 thereof refers to Mogoba Maphuti and Associates (Pty) Ltd as the “Applicant” in the matter. The “Applicant”, as intended by Mr Hlabela who is the deponent to the affidavit, means the Appellant. On the papers before us, Mr Hlabela and Mogoba Maphuti and Associates (Pty) Ltd are two different persons. The complainant before ECSA was Mr Thabo Zacharia Hlabela. He, and only he can be the Appellant in this matter. However, because of the decision we arrived at it is not necessary to decide this point. We merely record an observation.

LATE FILING OF DOCUMENTS

9. It is apposite to deal with the late filing of documents during the exchange of documents in the course of this appeal process. Generally, the Appeals Committee does not take a rigid position with regard to the late filing of documents. The Committee is readily amenable to condone late filing of documents on good cause

shown. The Committee also condoned, in some instances where good cause was shown, late filing of an appeal.

10. The Committee's position is informed by the provisions of Section 21(4) of the CBE Act which enjoin the Committee to conduct the appeal in accordance with Section 33 of the Constitution.

11. However, in this Appeal the late filing of opposing papers by ECSA attracted our attention. The ECSA papers were filed after the close of business on the eve of the hearing date, the 09th December 2021. The papers were sent without any single motivation for condonation for late filing of the documents. Moreso, the legal representative for ECSA had to attend the hearing of the Appeal via Microsoft Teams. This was so despite the fact that the notice of set down provided the parties with physical address for physical attendance.

12. After the First Respondent submitting reasons for late filing of opposing papers and withdrawal of the objection to late filing by the Appellant, we accepted the opposing papers into record. We also allowed the legal representative of ECSA to appear via Microsoft Teams.

13. We put it on record that we were not pleased with ECSA's conduct in this matter. As the regulator of the profession, we expect it to comply with rules and regulations of the CBE and the CBE Act. We expect that it should take matters of discipline, code of conduct and prosecution of complaints and appeals seriously. We accept that there may be sound grounds where a party (including ECSA) will be late with filing of documents but we expected ECSA to take trouble and explain reasons for filing its papers on the eve of the hearing. This was not done. We had to extract reasons out of ECSA. This conduct is, indeed, frowned upon.

POINTS IN LIMINE

14. At the beginning of the hearing, we raised the issue of jurisdiction whether or not there is a decision by the First Respondent against which an appeal should be lodged and heard in terms of Section 21 of the Act. This is so because in absence

of the decision, the Appeals Committee has no jurisdiction to decide on this appeal. We deal with this shortly herein below.

15. The First and Second Respondents raised various *points in limine* against the Appellant's appeal papers. For the decision we arrived at, it became unnecessary to decide all *points in limine* but one of jurisdiction which was also raised by the First Respondent.

IS THERE A DECISION BY ECSA?

16. Section 21 of the Act empowers us to decide the appeal only where there is a decision of any of the registered professional councils. Before we can decide this appeal, there must be a decision from the First Respondent.

17. The purported decision from the First Respondent against which this appeal lies is found on page 34 of Appeal Record 1 – Appellant's Bundle. Due to the importance of this letter we quote it verbatim.

“SUBJECT: COMPLAINT BY THABO HLABELA (200770125) AGAINST ASIENE THOMSOM NEBOTALO (980194) & MUANDI GEORGE NDUVHENI (201580795)

1. *We refer to the above-stated subject matter.*
2. *Subsequent to receiving a formal complaint, an investigator was appointed to conduct an investigation with the sole objective of determining any unprofessional conduct against Mr Nebotalo and Mr Nduvhani.*
3. *The Investigation Committee considered the investigation report and resolved as follows:-*
 - 3.1 *That there is no evidence that the Respondent transgressed any rule of the Code of Conduct for Registered Persons.*
 - 3.2 *No further action will be taken by the Engineering Council of South Africa (ECSA) in this regard.*

4. *This therefore brings the matter to its conclusion, and the file will duly be closed.*

5. *We hope you find the above in order.*

Yours sincerely”

18. The purported decision is vague and susceptible to more than one meaning. On the face of it, it informs the Appellant of the decision of the investigating committee in paragraph 3 thereof. It does not communicate the decision of the First Respondent (ECSA). It merely states that “the Engineering Council of South Africa (ECSA) will not take further action in this regard”. It further states that the matter is brought to conclusion and the file will be duly closed.

19. The ambiguity prompted us to investigate the matter with the First Respondent’s legal representative. His submission before us was that there is no decision. He proceeded to provide us with chronology of events which led up to the letter quoted above. He specifically submitted that the investigation by the investigator was concluded on the 10th December 2020. The investigation report dated 8th February 2021 served before the investigating committee on the 11th May 2021. He emphatically submitted that this is how far the matter went internally. It has not been decided by the First Respondent.

20. Mrs Carla De Beer (who appeared physically on behalf of the First Respondent) confirmed that the investigation report served before 11 members of the investigating committee including the chairperson and his deputy thereof.

21. The First Respondent’s legal representative could not provide us with the date of sitting of the First Respondent to consider the report of the investigating committee. This is indeed in line with his submission that the investigation report served no further than the investigating committee.

22. Counsel for the Second Respondent made course with the submission that there is no decision of the First Respondent.

23. The Appellant's Counsel argued before us that the letter quoted above constitutes a decision of the First Respondent.
24. He supported his submission with the correspondence between the Appellant and the First Respondent on page 65. This is the letter dated the 22nd June 2021 from the Appellant to the First Respondent requesting reasons for the decision.
25. Prior to the letter of the 22nd June 2021 the First Respondent addressed an e-mail to the Appellant on the 18th June 2021 stating the procedure to appeal the decision of the **investigating committee** (own emphasis).
26. We could not agree with the Appellant's submission. The letter quoted above does not constitute the First Respondent's Council decision. The e-mail of the 18th June 2021, appearing on page 188 of the Appeal Record 1 – Appellant's Bundle advises the Appellant of the "process which must be followed should the Appellant wish to appeal the decision of the Investigation Committee". Though the e-mail later sets out the appeal procedure against the decision of the Council same does not constitute a decision envisaged in Section 21 of the Act. As submitted by the Counsel for the Second Respondent the e-mail contains a generic procedure for appeals.
27. Section 28(4) of the Engineering Profession Act, of 2000 (Act 46 of 2000) is plain about what the investigating committee must do after concluding its investigation. It provides that investigating committee must, after the conclusion of the investigation, submit a report making recommendations to the council. The council must consider this report and decide on it. In this case, the First Respondent submitted before us, that this did not happen. The council has not decided the matter.
28. We put to the legal representative of the First Respondent as to what must the Appellant expect from the First Respondent in light of his submission that the First Respondent has not decided the matter. He responded that the Appellant must "expect a decision from the First Respondent or at the very least that the First

Respondent will consider the investigation report out of which a decision will be made”.

29. Accordingly, this Appeal falls to be dismissed on the basis that there is no decision by the First Respondent against which an appeal can be lodged as envisaged in Section 21 of the Act.

DECISION

30. The appeal is hereby dismissed on the basis that the CBE Appeal Committee lacks jurisdiction to decide it absence First Respondent’s decision. The matter is referred back to the First Respondent to decide on it.

COSTS

31. The Appellant asked for punitive legal costs against the First Respondent on the basis that the First Respondent’s conduct misled the Appellant into believing that the First Respondent made a decision against which an appeal could be lodged. On the basis of the “misleading conduct of the First Respondent” (so the submission went) the Appellant employed counsel and other professionals to assist him.

32. The First and Second Respondent also asked for costs on party and party scale. The First Respondent also asked for the administrative costs of the appeal.

33. The CBE Act does not make provision for awarding administrative costs. Neither does it provide for awarding of party and party costs against the losing party. Section 21(5) of the CBE Act empowers us to decide the appeal. It can be argued that the power to decide on the appeal includes the power to decide on costs.

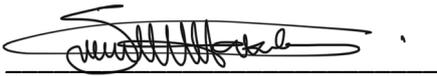
34. However, it is not customary for Section 21 appeals committee to award administrative and/or legal costs against the losing party let alone punitive costs.

35. CBE appeal process is less formal than the ordinary court process. It is intended to be the cheapest process for parties. It is the most effective dispute resolution mechanism available to ordinary members of public and amongst the registered persons. To impose legal costs against the losing party as a matter of course will, in our views, have a chilling effect on the effective prosecution of the appeals by the ordinary members of public and amongst the registered person.

36. Accordingly, we make the following decision:-

- i) The appeal is dismissed.
- ii) The matter is referred back to the First Respondent to decide on the matter.
- iii) No order as to costs.

THUS DONE AND DATED AT JOHANNESBURG ON THIS THE 20th DAY OF DECEMBER 2021.



MR S MAKUBUNG



MR. D RILEY



MR. S BANZA

Appearance:

For the Appellant:

Mr. P Bellin

Mr. L Khan

Ms. L Pelser

For the First Respondent:

Mr. Z Mzulwini

Ms. C De Beer

For the Second Respondent:

Mr. P Coetzee

Mr. A Makwarela

Ms. R Sikhipa