

REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No: 17899/2008

In the matter between:

EDUARDO FERNANDES NUNES

Applicant

and

TRAUGOTT CRAWFORD

First Respondent

COUNCIL FOR THE BUILT ENVIRONMENT

Second Respondent

**SOUTH AFRICAN COUNCIL FOR THE
ARCHITECTURAL PROFESSION**

Third Respondent

JUDGMENT DELIVERED ON 23 MARCH 2010

Allie, J

[1] The applicant was appointed by the seller of certain immovable property, which formed part of a housing development in Silvertree Estate, to act as principal agent in the building agreement and as architect in the sale agreement.

[2] First respondent purchased a vacant property in the estate subject to the condition that a residence would be erected on the property for him.

[3] First respondent was compelled by the terms of the agreements, to take possession of the property at a stage when he believed that the building was incomplete and the work defective. First respondent's predicament arose from the certificate of practical completion and a certificate of completion issued by applicant.

[4] On 8 March 2004, first respondent lodged a complaint with the South African Council for the Architectural Profession (**SACAP**) who found that the applicant did not act in his capacity as architect only and there was no contractual relationship between applicant and first respondent. The SACAP decided not to investigate the conduct of the applicant and informed him of that decision on 18 July 2005.

[5] First respondent informed the SACAP that he intended lodging an appeal against its decision as early as 6 April 2005. For reasons stated later, first respondent only lodged his appeal with the Council for the Built Environment (**CBE**) on 12 June 2006 when it was clearly out of time.

[6] On 16 July 2007, the SACAP informed applicant, who had no knowledge of first respondent's appeal to the CBE, that on 4 December 2006, the latter ordered the SACAP to re-open the investigation into the complaint of first respondent.

[7] Applicant has since received the amended charge sheet of the SACAP.

[8] Applicant brings this application for review because he believes that he will not receive adequate re-dress at the SACAP disciplinary tribunal concerning his point that the appeal was heard without notice to him.

[9] The applicant, an architect and a registered person in terms of the Architectural Profession Act 44 of 2000 (**AP Act**) brings this application in terms of Section 8(1)(c) of the Promotion of Administrative Justice Act 3 of 2000 (**PAJA**), alternatively the common law, reviewing and setting aside the decision of the appeal committee of the CBE made on 4 December 2006, effectively reinstating the investigation of the merits of a complaint lodged by one, T Crawford, the first respondent, with the SACAP concerning alleged misconduct of the applicant.

[10] The applicant also seeks to review and set aside the decision of the appeal committee of the CBE to entertain the appeal on the following grounds: Firstly that no notice was given to the applicant as a party with an interest. Secondly the appeal was clearly out of time having been brought outside of the 90 day period contemplated in section 35(1) (b) of the AP Act. Thirdly because first respondent had failed to submit a copy of the appeal and record to the SACAP.

[11] The applicant seeks further that this court substitutes the decision of the appeal committee of the CBE with its finding that the appeal committee had no jurisdiction to hear the appeal alternatively with a finding dismissing the appeal.

[12] The applicant also seeks an order in terms of Section 7(2) (c) of PAJA, alternatively the common law, exempting him from having to exhaust any internal remedy that he has not yet exhausted, alternatively for an order in terms of

Section 9(1) (b) of PAJA extending the period in which judicial review ought to be brought in terms of Section 7(1) of PAJA to the date of institution of this application.

[13] Finally applicant seeks party and party costs from second respondent who opposed the application.

[14] It is common cause that:

14.1 The decision of the appeal committee of the CBE can be properly characterised as administrative action and accordingly falls to be reviewed under PAJA and the remaining common law powers of review that this court has.

14.2 The SACAP, misled the first respondent, a lay person, on 23 August 2005 by informing him that there is no provision for an appeal against a decision by the council not to proceed with disciplinary action against a registered person and by referring him to Sections 28 to 33 of the AP Act and not to Section 35 which deals with a member of the public's right to appeal to the CBE. The SACAP gave reasons for their refusal to proceed with disciplinary action against the applicant on 25 May 2005. Consequently 89 days had elapsed before the first respondent was advised incorrectly that he had no right of appeal.

14.3 First respondent lodged his appeal out of time.

14.4 Applicant brought this review without exhausting all the internal remedies available to him.

[15] The applicant sought to raise two further grounds for review in his supplementary submissions handed up on the day of the hearing before us. They are firstly that the appeal committee of the CBE heard additional information presented in the form of first respondent's expert report which went beyond the scope of the information placed before the SACAP when it made its decision. Secondly, that the appeal committee considered irrelevant information, namely the extent to which the JBCC Principal Building Agreement was adhered to in the formulation of the contract between first respondent and the seller from whom he purchased his property.

[16] On behalf of the second respondent Mr Breitenbach (SC) objected to those grounds being raised as they were not set out in the Notice of Motion and do not form part of the founding papers.

Failure to give notice of the appeal

[17] On behalf of the applicant, Mr Crowie (SC) argued that Section 21(4) of the CBE Act provides that the appeal committee must conduct the appeal in accordance with Section 33 of the Constitution. Section 33(1) provides that:

“Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.”

[18] It was submitted that as Section 3(1) of PAJA provides that: *“Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair,”* the CBE ought to have followed a similar procedure. It was argued that the appeal committee failed to comply with the requirements of Section 3(2)(b) of PAJA, alternatively the common law by failing to give the applicant the following:

18.1 Adequate notice of the nature and purpose of the appeal;

18.2 A reasonable opportunity to make representations at the appeal;

18.3 A clear statement of the administrative action constituting the appeal;

18.4 Adequate notice of his rights of review and/or internal appeal remedies;

18.5 Adequate notice of the right to request reasons in terms of Section 5 of PAJA.

[19] As a result, it was argued, applicant was not given an opportunity to:

19.1 Obtain assistance in the form of legal representation;

19.2 Present and dispute information and arguments at the hearing of the appeal;

19.3 Appear in person at the appeal.

[20] Mr Crowie for the applicant, argued that the CBE's appeal committee failed to implement the *audi alteram partem* principle and the procedure is accordingly flawed.

[21] Mr Breitenbach for the second respondent, argued that the CBE has the function of a statutory overseer of a number of professions in the built environment. He argued further that in that capacity it has no duty to inform the applicant of an appeal that it intended hearing.

[22] He advanced the argument that when the SACAP first considered the complaint by first respondent it did so in terms of Section 28(1)(b) of the AP Act.

[23] He submitted that the AP Act made no provision for the SACAP to give notice to the applicant at the stage when it referred the complaint to an investigating committee. Similarly, he argued, the appeal committee of the CBE was under no obligation to notify the applicant at the stage when it had to decide

whether sufficient grounds existed to cause the SACAP to investigate the complaint afresh.

[24] He submitted that the provisions of Section 28(3) of the AP Act implies that an investigation can be conducted without reference to the registered person whose conduct is being investigated. Section 28(3) reads as follows:

“An investigating committee may not question the registered person concerned unless the investigating committee informs that registered person that he or she:

(a) has the right to be assisted or represented and

(b) is not obliged to make any statement and that any statement so made may be used in evidence against the registered person.”

[25] He argued that effectively the appeal committee merely diverted the SACAP's decision not to initiate disciplinary proceedings against the applicant.

[26] I am not convinced that that is a correct interpretation of the implications of Section 28(3) which is clearly aimed at preventing prejudice to the registered person by protecting him/her from self incrimination. It does not intend to convey that at the stage of an investigation, the registered person may not be consulted at all, for to do so would mean that the SACAP would be acting on the version of a complainant only.

[27] Mr Breitenbach pointed out that PAJA excludes from its ambit, a decision to institute or continue a prosecution in Section (1)(ff).

[28] He argued that Section 3(1) of PAJA refers to administrative action that not only adversely affects a person but it must also materially affect a person. He submitted that the rationale behind the exclusion of the *audi alteram partem* principle from the decision to prosecute, is to be found in the fact that the affected person is entitled to a fair hearing in due course.

[29] In **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC)** at para 45 the court laid down guidelines of factors to be considered when deciding if the action is fair: *“What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and wellbeing of those affected.... The court should take care not to usurp the functions of administrative agencies.”*

[30] The decision of the appeal committee of the CBE is not akin to a decision to prosecute, in as much as, it is a decision to compel the SACAP to cause its

committee to investigate and if necessary bring disciplinary charges against the applicant. The decision to “*prosecute*” as it were lies with the SACAP.

[31] Section 6(2)(c) of PAJA provides for judicial review of administrative action where procedural unfairness is alleged. This is the primary basis of the review application before us.

[32] A decision to consider the appeal without notice to the applicant is prejudicial to the applicant because even though he would have the opportunity to defend himself at a disciplinary inquiry in due course, he should be allowed to address the second respondent on the merits before it makes a decision based on its *prima facie* view of the merits. The decision of the appeal committee undoubtedly has adverse and material effects for the applicant, who as a registered professional person will be subjected to the disciplinary process of the SACAP.

[33] The role and function of the CBE and the SACAP, like that of most statutory bodies governing a profession, is to mediate the competing interests of the professional person on the one hand and the public that they serve on the other hand in a reasonable, fair and transparent manner. Among the objects of the CBE listed in Section 3 of the CBE Act are the following germane ones:

33.1 “(a) to promote and protect the interests of the public in the built environment

33.2 (f) *to promote sound governance of the built environment professions*"

[34] Section 4 of the CBE Act has listed among the powers and duties of the council, the following:

"(m) to act as an appeal body with regard to matters referred to it in terms of the law regulating the built environment professions."

[35] Section 21 of the CBE Act sets out how an appeal to the CBE should be conducted. The legislature clearly contemplated compliance with the reasonable, just and fair administration provisions of Section 33 of the constitution by including Section 21(4) in the CBE Act in peremptory terms. Provision is also made for notice and the record to be given to the council of the profession concerned. There is no express provision in the CBE Act for either the appellant or the CBE to give notice to the registered person concerned and this is an aspect one hopes the legislature will address in due course.

First Respondent's Appeal to the CBE was out of time

[36] The applicant addressed in his papers, the fact that the first respondent brought his appeal to second respondent out of time by alleging that first respondent knew of his right of appeal as early as 6 April 2005 when he wrote as follows: *"I would appreciate it if you could send me, with your answer, copies of all statutory documents relating to the aims and activities of your council, any complaints and appeal procedures and details of your regulatory bodies."*

[37] The above quoted paragraph does not establish that first respondent knew that he had to lodge an appeal directly with second respondent. His letter is a mere request for information concerning appeal procedures.

[38] On 23 August 2005 the SACAP wrote to first respondent stating that *“there is no provision for an appeal against a decision by the council not to proceed with disciplinary action against a registered person.”* The same view of SACAP is expressed in a further letter of 30 August 2005 to first respondent and which appears to attach a legal opinion in support of its view.

[39] On 8 October 2005, the first respondent demonstrates in his letter to the SACAP an appreciation of Section 35(1) of the AP Act. He does not however show an understanding of the procedure that should be followed in seeking an appeal in terms of Section 35 as he merely asks the SACAP to implement the appeal section.

[40] On 2 November 2005, almost a month later, the SACAP responds by repeating parts of Section 21 of the CBE Act.

[41] On 10 November 2005 the SACAP informs first respondent that his appeal to the CBE would be out of time because it gave him the reasons for its decision on 25 May 2005.

[42] It is common cause that first respondent brought his appeal to the CBE when the time for doing so had long lapsed. The appeal committee looked at the prospects of the first respondent's complaint succeeding in deciding to condone the late lodging of the appeal.

[43] The appeal committee of the CBE decided to entertain the appeal because there was *"apparent confusion of the roles and responsibilities of all the parties that have over the past two years entered into correspondence and to enforce the time frames would defeat the ends of justice."*

[44] To the extent that the SACAP gave first respondent incorrect advice and tried to dissuade him from pursuing an appeal by presenting him with a legal opinion, the appeal committee's decision to condone the late lodging of the appeal cannot be criticised.

Factors considered by the Appeal Committee of the CBE

[45] In arriving at its decision that the SACAP investigate first respondent's claim, the appeal committee focussed primarily on the SACAP's approach of looking at the contractual relationship between first respondent and applicant. The appeal committee found that the SACAP prematurely aborted the investigation process without looking at the consequences of the certificates issued by applicant at the stages when he did so.

[46] The appeal committee stated in the penultimate paragraph of its decision that “*the SACAP should follow due process and constitute a disciplinary tribunal that will afford both parties an opportunity to present and argue their respective cases.*” Clearly the appeal committee was aware of the need for the *audi alteram partem* principle to be applied at the investigation.

[47] The administrative act complained of is adjudicatory in nature and did not involve, for example, a pure policy decision where exigencies could be proffered as an explanation for the failure to give notice. In **Steer Property Services (Pty) Ltd t/a Steer & Co v Estate Agency Affairs Board [2002] 3 All SA 103(C) at 113b-c** it was held that a failure to inform an estate agency of the date of the hearing of an appeal and of the opportunity to make oral or written representations at the hearing of the appeal constituted a breach of the *audi alteram partem* rule.

[48] The nature of the decision, the reasons given for the decision by the appeal committee of the CBE, the nature of the competing interests of applicant as a registered person on the one hand and the first respondent as an aggrieved member of the public on the other and the obvious impact of the decision on the career and reputation of the applicant are all relevant factors. The explanation by the CBE justifying its failure to give notice to the applicant is a mere reference to the absence of an express provision in the CBE or AP Acts requiring notice to the registered person at the appeal stage. These considerations cumulatively

considered, tip the scales of fairness and equity in favour of notice to the applicant.

[49] J. R De Ville in his work; **Judicial Review of Administrative Action in SA (2003) at 239** deals with multi-stage decisions as follows:

49.1 “The question that arises is at which point in the process the requirements of procedural fairness (and specifically the audi alteram partem rule) should find applicant. The more recent approach of the courts is to hold that one must enquire into the context of the whole decision-making process. What fairness requires is to be determined with reference to inter alia, administrative efficiency, the prejudice suffered at a specific stage of the process and the opportunities given to minimise or revise such prejudice at any later stage.”

[50] In **Director, Mineral Development, Gauteng Region and another v Save the Vaal Environment and others 1999 (2) SA 709 (SCA) at 718 D-E** the court decided upon the application of the *audi* principle before a decision could be taken to grant a mining licence. The court held that “it is settled law that a mere preliminary decision can have serious consequences in particular cases inter alia where it lays the necessary foundation for a possible decision which may have grave results.” In such a case the *audi* rule applies to the consideration of the preliminary decision (see **Van Wyk NO v Van der Merwe 1957(1) SA 181 (A) at 188B – 189A**).

[51] In *casu*, the appeal committee considered the prospect of success should the investigation by the SACAP be re opened. To that extent the applicant ought to have been afforded an opportunity to address the appeal committee on the prospects of success which is integrally linked to the decision to order the SACAP to re-investigate the complaint.

[52] Having arrived at that conclusion, the fact that the applicant has also delayed unduly in bringing this review, should be condoned to enable due process to occur at the stage of the appeal before the CBE. The interest of justice as contemplated by Section 9(2) of PAJA clearly justifies that condonation.

[53] While a referral of the appeal of first respondent back to the appeal committee of the CBE will have the effect of halting the SACAP's disciplinary process, it may only be doing so temporarily.

[54] A party is entitled to use any advantage afforded to it by due process and accordingly the applicant ought to have received notice of the appeal and the document upon which the appeal would be based. This court cannot conclude as counsel for the second respondent has urged it to, namely that applicant suffered no prejudice by virtue of *audi alteram partem* not being applied by the appeal committee of the CBE.

[55] First respondent as a member of the public is entitled to have his complaint that the applicant signed completion certificates for the building of his house prematurely, properly investigated by the SACAP unless the applicant can persuade the appeal committee of the CBE why such an investigation is doomed to failure.

[56] The prospects of success of first respondent's complaint have to be considered in deciding the appeal. This is an issue that the appeal committee of the CBE is best suited to deal with. This court will not lightly substitute its decision for that of the appeal committee. (see **Johannesburg City Council v Administrator, Transvaal & Another 1969 (2) SA 72 (T) at 76 D – G; Vries v Du Plessis NO 1967 (4) SA 469 (SWA) at 482; Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council 1999 (1) SA 104 (SCA) at 109; Steer Property Services supra**).

[57] The just decision of the appeal committee of second respondent is a prerequisite to the investigation process of the SACAP, a process that this court will not stifle, for to do so would be contrary to the interests of justice as outlined earlier. Accordingly this court exempts the applicant from exhausting all internal remedies that were open to the applicant to challenge the CBE's decision.

[58] We therefore conclude that second respondent convened its appeal committee without regard to the provisions of Section 21(4) of the CBE Act read

with Section 3(2)(b) of PAJA and Section 33 of the Constitution of the Republic of South Africa, 1996.

It is ordered that:

1. In terms of Section 8(1)(c)(i) of PAJA, this court sets aside the decision of the appeal committee of the CBE and remits the appeal back to second respondent for reconsideration after the CBE first applies a just and fair procedure as contemplated by PAJA, for all interested parties.
2. Second respondent shall pay the costs.

I agree



ALLIE, J



MADIMA, AJ