

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: Yes / No
(2)	OF INTEREST TO OTHER JUDGES: Yes / No
<u>31/10/2024</u>	
DATE	SIGNATURE

Case No: 2022-051255

In the matter between:

HLABELA, THABO ZACHARIA

First Applicant

MAGOBA MAPHUTHI AND ASSOCIATES (PTY) LTD

Second Applicant

and

NEBOTALO, ASIENE THOMSON

First Respondent

ENGINEERING COUNCIL OF SOUTH AFRICA

Second Respondent

COUNCIL FOR THE BUILT ENVIRONMENT

Third Respondent

ANDERSON VOGT AND PARTNERS, CONSULTING
CIVIL, STRUCTURAL & GEOTECHNICAL ENGINEERS

Fourth Respondent

CHAIRPERSON OF THE ENGINEERING COUNCIL
OF SOUTH AFRICA'S INVESTIGATION COMMITTEE

Fifth Respondent

JUDGMENT

This judgment is deemed to be handed down upon uploading by the Registrar to the electronic court files.

Gilbert AJ:

1. The applicants seek to review a series of decisions taken during a disciplinary process in terms of the Engineering Profession Act 46 of 2000 ("the EP Act") and the Council for the Built Environment Act 43 of 2000 ("the CBE Act").
2. The second applicant ("MMA") was contracted by the Gauteng Department of Roads and Transport ("the Department") to maintain certain roads within the province of Gauteng ("the contract"). The first applicant is the CEO of MMA.
3. The contract is described as a routine road maintenance contract, which entails the repair and maintenance of a certain section of road regarding potholes and other defects to ensure public safety. It is a contract for 36 months with a fixed budget.
4. The first respondent is a professional civil engineer duly registered with the Engineering Council of South Africa in terms of the EP Act.

5. The first respondent, through a close corporation of which he is the sole member, was appointed by the Department as the engineer responsible for the design, administration and management of the contract on the Department's behalf.
6. There is no dispute that the EP Act and its Regulations and Code of Conduct for Registered Persons¹ applies to the first respondent.
7. The applicants were dissatisfied with the professional conduct of the first respondent in discharging his responsibilities as the Department's appointed engineer for the contract, contending that the first respondent had breached various provisions of the Code of Conduct.
8. The applicants lodged a complaint with the Engineering Council of South Africa in terms of the EP Act.
9. The complaint is comprehensive, with what is subsequently described by the applicants in their founding affidavit as four primary grounds of complaints.
10. The complaint would give rise to what the applicants describe as four "decisions" that the applicants contend are to be reviewed and set aside in these review proceedings.
11. The second and third respondents are the Engineering Council of South Africa (the "Engineering Council") and the Council for the Built Environment (the

¹ The Code was published under BN41 in Government Gazette GG 40691 of 17 March 2017 pursuant to section 27 of the EP Act.

“CBE”), who are the statutory councils established under the EP Act and the CBE Act respectively.

12. The remaining respondents, being the fourth, fifth and sixth respondents, are what can be described as the makers of four ‘decisions’ in relation to the complaint, and which decisions applicants seek to review and set aside.
13. It is only the first respondent who has opposed these proceedings and who has delivered any opposing papers, in this instance an answering affidavit.
14. The second, fourth and fifth respondents, effectively those respondents falling within the ambit of the EP Act, appointed attorneys of record and delivered a notice to abide. Although these respondents in their notice to abide reserved their right to participate in these reviews proceedings and deliver an explanatory affidavit and to advance oral argument, they did not do so.
15. The fifth and sixth respondents, who effectively performed an appeal function in relation to the complaint in terms of the CBE Act, have not participated in any form in these proceedings. These respondents too then adduced no evidence as to what transpired before them in relation to the statutory process that unfolded arising from the applicants’ complaint against the first respondent.

THE STATUTORY FRAMEWORK

16. It is appropriate to consider the statutory framework to give context to the complaint and the four “decisions” in relation to that complaint.

17. Section 27 of the EP Act provides that the Engineering Council must, in consultation with the CBE, voluntary associations and registered persons, draw up a Code of Conduct for registered persons and may draw up a Code of Practice. As set out above, there is no dispute that the Code of Conduct as gazetted applies to all registered persons, including the first respondent.
18. Section 27(3) of the EP Act provides that a failure to comply with the Code of Conduct by a registered person constitutes improper conduct.
19. Section 28 of the EP Act provides:

“28. Investigation of charge of improper conduct

- (1) The council must refer any matter brought against a registered person to an investigating committee contemplated in section 17 if-*
 - (a) the council 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.*
- (2) 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.

...

- (4) *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."*

(my emphasis)

20. As appears from my emphasis in the preceding paragraph, it is obligatory that:

- 20.1. the Engineering Council must upon receipt of a complaint refer the complaint to an investigating committee;
- 20.2. the investigating committee must investigate the matter and must obtain evidence to determine whether or not in its opinion the registered person concerned may be charged and, if so, the charges to be recommended to the Council;
- 20.3. the investigating committee must, after conclusion of the investigation, submit a report to the Engineering Council making its recommendations.

21. Section 29(1) of the EP Act provides:

"29 *Charge of improper conduct*

- (1) *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 improper conduct if the council is convinced that sufficient grounds exist for a charge to be preferred against such a registered person."

22. Although not clear to me what is envisaged by the threshold that the Engineering Council must be '*convinced*' that sufficient grounds exist for a charge to be preferred against a registered person,² what is clear is that the Engineering Council can only decide whether it is so '*convinced*' after considering the report of the investigating committee.
23. From what is set out above, the investigating committee performs an essential role in the disciplinary process, and that is to investigate the matter, to obtain evidence and to produce a report. Without the investigating committee doing so, the Engineering Council will not be in a position to discharge the duties placed upon it with the disciplinary process, including that imposed upon the Council in terms of section 29(1) to decide, after considering the investigator's report, whether it is convinced that sufficient grounds exist for a charge to be preferred against a registered person.
24. Section 29 continues to provide *inter alia* for a charge sheet, a plea of guilt and other related issues.

² For the Engineering Council to be '*convinced*' appears to introduce a particularly high threshold, but whether this is so, and whether desirably so in the context of statutory disciplinary proceedings for purposes of the objectives described in paragraph 1 of the Conduct of Conduct, need not be decided in these proceedings.

25. Section 30 provides that where the registered person *inter alia* denies the charge, the Council must appoint a disciplinary tribunal to hear the charge of improper conduct.
26. Sections 31 and 32 then provide respectively for the disciplinary hearing to be conducted before the disciplinary tribunal and the proceedings after that hearing.
27. Section 33 provides for an appeal to the Engineering Council against the decision of the disciplinary tribunal. Notably, this appeal is at the instance of a registered person who is found guilty of improper conduct who wishes to appeal to the Council against the finding of the disciplinary tribunal or against the sentence, or both. This section does not provide for an appeal at the instance of some other aggrieved person, such as a complainant.
28. Section 35 of the EP Act provides:

"35 Appeal against certain decisions of council

- (1) 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 or her in writing with its reasons for that decision;*
 - (b) within 90 days from the date in which the council furnished him or her with its reasons for that decision and after giving notice to the council, appeal to the CBE against that decision in terms of*

section 21 of the Council for the Built Environment Act, 2000.

- (2) *A person referred to in subsection (1) may, after giving notice to the council or the CBE, as the case may be, lodge a notice of appeal with the registrar of the appropriate High Court within one month from the date of the decision of the council or the CBE."*

29. It is clear from section 35(1)(b) that a complainant, who I will accept for present purposes is a member of the public whose interests and rights are affected by a decision made by the Council, may appeal to the CBE against the Council's decision in terms of section 21 of the CBE Act. In the present instance, this is what the applicants would do.

30. It appears from section 35(2) that it is not obligatory for a complainant aggrieved with a decision of the Engineering Council to first approach the CBE before approaching the High Court. It may be that the High Court can be approached directly, i.e. without first appealing to the CBE (and so without exhausting an internal remedy), and this by way of lodging a notice of appeal with the registrar of the appropriate High Court.

31. Section 21 of the CBE Act provides:

"21 Appeal

- (1) *Any person who is aggrieved by a decision of any of the councils for the professions may upon payment of the prescribed fee and, within 30 days from that person becoming aware of such decision, in writing appeal to the*

council, and the council must consider and decide the appeal.

- (2) *The appellant must submit a copy of the appeal against a decision of a council for the profession and any documents or records supporting such appeal, to that council for the profession and furnish proof of such submission for the information of the council.*
- (3) *The council must appoint an appeal committee consisting of-*
 - (a) *a professional who has appropriate experience;*
 - (b) *a person qualified in law and who has appropriate experience; and*
 - (c) *a person who specialises in the professional field concerning the appeal.*
- (4) *The appeal committee must conduct the appeal in accordance with section 33 of the Constitution.*
- (5) *The appeal committee must decide an appeal within 60 days from the date on which the appeal was lodged, and inform the appellant and the council concerned accordingly."*

32. Turning to a closer consideration of the investigative function to be undertaken by the investigating committee appointed by the Engineering Council, as seen above, sections 28 and 29 of the EP Act make it obligatory that the complaint must be referred to an investigating committee, who is required to investigate the matter, obtain evidence and make its recommendations in a report to the Council and for the Council to then consider the report for purposes of deciding whether a charge is to be preferred against the registered person.

33. The Engineering Council published "Rules for Inquiry into Alleged Improper Conduct".³

34. The Rule for Inquiry, in section 1 under the heading "Introduction" provides that:

"1.1 It is acknowledged that the Council is mandated to take any steps it considers necessary for the protection of the public and the environment in their dealings with registered persons for the maintenance of the integrity and the enhancement of the status of the engineering profession.

1.2 In pursuance of the Council's right and obligation mentioned in 1.1 above, the Council must investigate an act of alleged improper conduct by a registered person and/or investigate a complaint, charge or allegation of improper conduct against a registered person brought by any person.

1.3 An investigation mentioned in 1.2 above is directed towards the professional conduct of a registered person, and does not intend to recover damages on behalf of any person, or enforce specific performance against any person and as such, is not meant to replace civil and/or criminal litigation.

1.4 It is furthermore acknowledged that the Council may take any steps which it considers necessary where, as a result of engineering related undertakings, public health and safety is prejudiced.

1.5 Where a registered person or persons registered with different Built Environment Professions are involved in the same subject

³ In Government Gazette GG 40691 of 17 March 2017 ("Rules for Inquiry").

of investigation, the Council will share relevant information with such other Councils and Stakeholders.”

35. The Rules for Inquiry, which were directly referenced by the applicants in their founding affidavit, provides in Rule 3.1 for the form of the complaint, which is to be in the form of an affidavit or an affirmation, which must detail the specific act or acts relating to the alleged improper conduct, together with supporting evidence.⁴

36. Rule 3.1.2 provides that:

“The CEO, upon receipt of a complaint referred to in paragraph (a) with information of conduct which prima facie points to improper conduct by a registered person must refer the complaint to the investigating committee to determine whether the registered person should be charged.”

37. In this instance, the complaint was referred to an investigating committee and it therefore need not be considered whether it is permissible for the Rules for Inquiry to provide for the CEO to first decide whether *prima facie* the conduct points to improper conduct by a registered person before the complaint is referred to an investigating committee in circumstances where section 28 of the EP Act does not contain any such qualification for the referral of a complaint to an investigating committee.

⁴ I do not proffer any view as to whether the Rule is overly restrictive in its prescripts for a complaint.

38. Rule 3.2 provides *inter alia* for certain rights to be afforded to a registered person as the respondent to the complaint, such as the right to respond to the complaint and all other evidence considered against him to her.
39. Rules 3.2.4 and 3.2.5 then provide in relation to the appointment of an investigator (who must also be a registered person in terms of the EP Act)⁵:

“3.2.4 The Manager: Legal Services may appoint an investigator.

3.2.5 The investigator must investigate the matter and obtain evidence to determine whether or not, in its opinion, the registered person concerned should be charged and if so, make a recommendation to the IC.”

40. It is in the Rules for Inquiry that provision is made for the appointment of an investigator. No provision is contained in the EP Act itself as to the appointment of an investigator. In the present instance, the applicants take no issue with the appointment of the investigator.
41. Rule 3.3 of the Rules for Inquiry, under the heading “Resolutions by IC after conclusion of an investigation” provides, of some relevance in relation to the second and third decisions that are the subject of these review proceedings, that:

“3.3.1 In the event that the IC resolves that there is insufficient evidence of improper conduct, the matter will be dismissed.

3.3.2 In the event that the IC resolves that there is evidence of improper conduct, however the conduct warrants a written

⁵ See definition of ‘Investigator’ in Rule 2.11.

warning, the legal personnel would issue the Respondent with an Advisory letter and close the case."

42. Rule 3.3.7 provides that:

"In the event that the IC resolves that there is evidence of improper conduct, charges will be preferred against the Respondent and the matter referred to a disciplinary hearing."

43. The Rules for Inquiry then continue in relation to such issues as the preparation for the disciplinary hearing, the procedure at the disciplinary hearing as well as a lodging of an appeal in terms of section 33 of the EPA by a registered person who is found guilty of improper conduct
44. Against this statutory framework, some general observations can be made in relation to the complaint in the present instance.
45. It is not necessary for a complainant, who as a member of the public would not necessarily be a registered person in terms of the EP Act, to assess whether or not the conduct complained of infringes the Code of Conduct, and if so, what particular articles. It is for the complainant to place before the Council the conduct complained of in sufficient detail, together with supporting evidence.
46. The complaint is a detailed document which describes not only the conduct complained of but also proffers, albeit unnecessarily so, the views of the applicants as to which articles of the Code of Conduct had been transgressed. The first respondent does not take issue with the form of the complaint.

47. It is then for the investigating committee to investigate the complaint, obtain evidence (which may be evidence in addition to that submitted by the complainant in terms of Rule 3.1.1) and so to be able to form an opinion whether the first respondent is to be charged and if so to recommend the charge or charges that are to be preferred against the first respondent.⁶
48. It will then be for the Council, after considering that report, to decide whether in terms of section 29(1) it is convinced that sufficient grounds exist for a charge to be preferred against the first respondent.
49. It is not for the applicants as complainants to adduce evidence of a *prima facie* case against the respondent or of a case that is such that the Council is convinced that sufficient grounds exist for a charge to be preferred against the respondent. That would undermine the purpose of the investigation committee, which is to investigate the complaint, obtain evidence and so determine and report whether in its opinion that the registered person concerned be charged.⁷
50. I will return to the central role played by the investigator and by the investigating committee later in this judgment.

⁶ Section 28(2) of the EP Act.

⁷ See the discussion later in this judgment, with reference to *Groundup News NPC and Others v South African Legal Practice Council and Others* 2023 (4) SA 617 (GJ).

THE COMPLAINT

51. The complaint constitutes a valid complaint which is required to be the subject of a proper investigation under the EP Act and the Rules for Inquiry.
52. The grounds of complaint that feature in the complaint are described under four headings in the first respondent's answering affidavit. It suffices for purposes of these review proceedings to summarise under the headings used by the applicants what the complaint is insofar as the conduct of the first respondent is concerned. In each instance the applicants set out the first respondent's conduct of which they complain and then further proffer their view of the articles of the Code of Conduct that have been transgressed and in what manner.

'Failure to assess claim no. 2'

53. During the course of performing under the contract, the second applicant MMA submitted a claim to the Department, which is described as Claim No. 2, for costs and expenses in a particular amount MMA alleged were owing to it for the execution of works under the contract. The applicants contend that the first respondent was required in his capacity as the Department-appointed professional engineer to evaluate this claim and issue a determination in accordance with the contract as to whether the claim was valid and sustainable. The applicants complain that the first respondent breached various articles of the Code of Conduct in that he failed to respond to the claim timeously (particularly within the timeframe set out in the contract) and in that he issued divergent determinations in relation to that claim. The applicants

complain that the first respondent belatedly made a determination on the claim for an amount substantially less than that claimed by MMA and that subsequently the first respondent would make a second determination that was considerably less than even the first determination. The applicants effectively contend that this divergence between determinations by the first respondent demonstrates that the first respondent failed to properly discharge his duties in making the determinations.

'The inadequate design of the M57 road closure'

54. During the course of the contract a sinkhole developed on the M57 road that was being maintained by MMA and which road fell within the ambit of the contract. This required road closures for safety purposes and which in turn required of the first respondent as a professional engineer to design the road closures. This professional design by the first respondent required the first respondent specifying the necessary signage for those road closures so as to forewarn the public, and particularly road users, in relation to the hazards created by the road closure.
55. The applicants contend that the first respondent did not act professionally in designing these road closures including in relation to such signage as the first respondent as the professional engineer required of MMA as the contractor to put in place for purposes of warning road users.
56. The applicants give considerable detail as to what they contend were inadequacies in the design made by the first respondent. The applicants also sought to make use of evidence in the form of testimony by a road user,

Mr Amos Tjiane, who was involved in a motor vehicle accident that the applicants contend was caused by the first respondent's inadequate road design and signage specifications.

57. Again, the applicants set out articles of the Code which in their view the first respondent transgressed by this misconduct.

'Failure to assess claim no. 6'

58. During the course of the contract, MMA submitted a claim, being claim No. 6, for costs and expenses, this time relating to the sinkhole traffic accommodation signs which were installed on the M57 arising from the sinkhole described above.
59. The applicants then continue that the first respondent issued a first determination in relation to this claim No. 6, disapproving of the claim on the basis that MMA could not claim for the costs and expenses of the signs. The applicants continues that subsequently the first respondent would issue a revised determination, approving claim No. 6 in totality.
60. As was the case with the first ground of complaint, the applicants contend that this constituted a contravention of the Code of Conduct in that again the divergence between the first and second determinations constituted misconduct.
61. The applicants again refer to articles of the Code that they contend were transgressed by this conduct.

'Nebotalo's obligation to administer the contract in terms of the contract's specification'

62. The applicants refer to a specification in the contract which requires of the first respondent as the engineer to demarcate any areas that were to be repaired and to then instruct MMA as the contractor to proceed with that repair work. The applicants then continue to explain, with reference to detail in the specifications, that the first respondent as engineer failed to comply with the provisions of the contract in that he failed to instruct MMA to commence with such repairs as required in terms of the specifications.

63. Once again, the applicants set out what in their view constitute the transgressions of the Code constituted by this conduct.

THE FOUR "DECISIONS" THAT THE APPLICANTS SEEK BE REVIEWED AND SET ASIDE

64. The four decisions that are challenged by the applicants are described as follows:

64.1. the 'first decision': the decision of the investigator (the fourth respondent) who was appointed in terms of the Rules for Inquiry to investigate the complaint and whose 'decision' manifests in its report of 8 February 2021;

64.2. the 'second decision': the decision of the investigating committee of the Engineering Council (being the fifth respondent) based upon the

investigator's report to the effect that no charges are to be preferred against the first respondent;

64.3. the 'third decision': the decision of the appeal committee of the Council for the CBE ("the CBE appeal committee") made on 21 December 2021. In that decision the CBE appeal committee found that the decision that was placed before it on appeal (i.e. the second decision) was not a decision of the Engineering Council itself (but rather of the investigating committee) and so not a decision over which it had appeal jurisdiction in terms of section 21 of the CBE Act;

64.4. the 'fourth decision': the subsequent decision of the CBE appeal committee on 21 October 2022 dismissing the appellants' appeal of the decision made by the Engineering Council not to proffer charges against the first respondent.

65. For purposes of clarification, and particularly in relation to the interaction between the second, third and fourth decisions, the following appears from the review papers.

66. It is clear that the investigating committee decided not to recommend charges against the first respondent. This is the second decision described above. The difficulty that would arise before the CBE appeal committee is whether that this decision of the investigating committee, as distinct from a decision by the Engineering Council itself, constitutes a decision that is capable of being appealed to the appeal committee of the CBE as established under the CBE Act.

67. Section 35(1)(b) of the EP Act provides for an appeal of the Engineering Council's decision to the CBE. Section 21(1) of the CBE Act correspondingly provides for a decision of the Engineering Council to be appealed to the appeal committee of the CBE. Section 29(1) of the EP Act provides that it is the Engineering Council that must make a decision after considering the report of the investigating committee whether to prefer charges against a respondent. This raises the question whether a decision by the investigating committee constitutes a decision of "*the council*" for purposes of triggering an appeal to the CBE or whether the investigating committee's decision in the form of its report must first serve before the Engineering Council and a decision then made by the Engineering Council in relation thereto.
68. It appears that the CBE appeal committee was of the view that a decision by the investigating committee itself would not suffice to trigger the CBE's appeal jurisdiction and therefore it had no jurisdiction to entertain the applicants' appeal of the decision of the investigating committee. For that reason the CBE appeal committee made the decision it did on 21 December 2021, which is the third decision described above.
69. It should be pointed out that the Rules for Inquiry, particularly Rules 3.3.1 and 3.3.2 envisage that the investigating committee itself can make a binding decision, and so the decision need not be made by the Engineering Council. This then creates room for an argument that should the investigating committee do so, that this effectively constitutes a decision of the Council and so does trigger the appeal jurisdiction of the CBE.

70. Fortunately, in the present instance, and as will appear below, I need not resolve this issue. What would happen in this matter is that the Engineering Council would, subsequent to the CBE appeal committee's refusal to engage in an appeal based on an asserted lack of jurisdiction (i.e. the third decision), revert that the decision of the investigating committee is that of the Engineering Council itself. This then cleared the path for the CBE appeal committee to hear the applicants' appeal.
71. The point is made by the applicants that it is not clear whether the Engineering Council in doing so is adopting the position the decision of the investigating committee was that of the Council from the outset, notwithstanding the absence of documents recording that to be the case, or whether it was only subsequently that the Engineering Council adopted the decision of the investigating committee and so *ex post facto* overcame the jurisdiction obstacle to an appeal to the CBE. Whatever the case may be, the applicants were then afforded an appeal hearing before the CBE appeal committee and which culminated in the CBE appeal committee's decision of 21 October 2022 dismissing the applicants' appeal, which is the fourth decision that the applicants seek to review and set aside.
72. Further, as will appear below, in my view the disciplinary process floundered at the first stage, namely at the investigation carried out into the complaint. It is therefore unnecessary for me to deal in any detail with the subsequent decisions, particularly those of the CBE appeal committee, whether the third or fourth decision.

73. Before moving on to what I am of the view is the central deficiency in the disciplinary process, namely that which constitutes the subject matter of the first and second decisions, it is appropriate to point out that the present proceedings are review proceedings in terms of the Promotion of Administrative Justice Act, 2000 ("PAJA"). Although fleeting mention is made to the review also being under the common law, nothing is said that regard in the papers that goes beyond what would fall within the ambit of a review under PAJA.
74. It should also be pointed out that the present proceedings are not appeal proceedings as envisaged in section 35(2) of the EP Act, being proceedings initiated in the High Court by way of notice of appeal with the registrar of the appropriate High Court. Although there may have been a suggestion of this in that the applicants sought condonation for failing to comply with the one-month time period provided for in section 35(2) for such a notice of appeal to be lodged with the registrar, upon an enquiry by me, the applicants' counsel, after taking instructions, confirmed that these constituted review proceedings in terms of PAJA and were not appeal proceedings as envisaged in section 35(2) of the EP Act. This clarification by applicants' counsel is well made because the relief as sought and as framed in the notice of motion is clearly relief based upon review proceedings rather than proceedings on appeal.
75. The first respondent's counsel too stated that from the first respondent's perspective that he considered these proceedings as review proceedings rather than appeal proceedings in terms of section 35(2).

76. In the circumstances, it is unnecessary for me to consider the nature and extent an appeal under section 35(2), such as what kind of appeal it would be, whether evidence is permissible on appeal or whether the parties are confined to the record before the Engineering Council, and how an aggrieved person would go about noting an appeal in the High Court.⁸
77. There is no obstacle to the applicants in bringing review proceedings in terms of PAJA. The existence of an appeal procedure such as in section 35(2) does not preclude an aggrieved person from seeking to review decisions that constitute administrative action as falls within the ambit of PAJA.⁹
78. Of course, once the applicants have elected to proceed by way of review proceedings in terms of PAJA, then I am not concerned with the merits of the decisions that may have been made, which would constitute the subject of an appeal in terms of section 35(2) of the EP Act as read with section 21 of the CBE Act. Whether such an appeal could also include what are typically grounds of review is not for me to decide as such an appeal is not before me.
79. This is important because much of the answering affidavit is dedicated to the merits of the decisions and then most of the replying affidavit then responds

⁸ Compare, for example, what appears to be a similar appeal process, albeit only in respect of a question of law, as provided for in the Community Scheme Ombud Services Act 9 of 2011 ("CSOS Act") and the divergent views expressed by the different divisions of the High Court as to what is constituted by a notice of appeal (for example, the full court decision of this division in *Stenersen & Tulleken Administration CC v Linton Park Body Corporate and Another* 2020 (1) SA 651 (GJ), not following *Trustees, Avenues Body Corporate v Shmaryahu and Another* 2018 (4) SA 566 (WCC) and *Durdoc Centre Body Corporate v Singh* 2019 (6) SA 45 (KZP).

⁹ By way of comparison, see *Turley Manor Body Corporate v Pillay and others* [2020] JOL 46770 (GJ) para 18 where the court found that the existence of an appeal procedure in terms of CSOS Act does not preclude a PAJA review.

to what are the merits of the decisions. As stated, the merits of the decisions are not before me.

WHY THE FIRST AND SECOND DECISIONS ARE INVALID AND TO BE SET ASIDE IN TERMS OF PAJA.

80. The applicants adopt the position that the investigator made a 'decision', in the form of his investigator's report dated 8 February 2021, that is distinct from the subsequent 'decision' made by the investigating committee on 11 May 2021. The applicant argues that both 'decisions', being the first and second decisions as described, are separately reviewable in terms of PAJA as administrative action that is procedurally unfair.
81. I raised with applicants' counsel whether investigator's 'decision' as manifests in the investigator's report constitutes administrative action in terms of PAJA. The submission was that it is so, based upon the Supreme Court of Appeal decision of *Minister of Defence & Military Veterans and Another v Mamasedi* 2018 (2) SA 305 (SCA).
82. In that matter, the respondent, a soldier, was absent from his army unit for more than 30 days and he was deemed dismissed in terms of the Defence Act, 2002. A board of enquiry was later convened to investigate the circumstances of his absence, and it recommended to the Chief of the Defence Force that he not be reinstated. The Chief accepted the recommendation and decided not to reinstate the respondent.

83. On review, the SCA found that the investigation by the board of enquiry that had been appointed to investigate the reasons for the respondent's absence without leave and to make recommendations followed by the decision of the Chief of the Defence Force, taken together, constituted administrative action as defined in section 1 of PAJA in that it was an exercise of a statutory power of a public administrative nature taken by an organ of State which adversely affected the respondent's rights, and which had a direct, external legal effect.¹⁰ The SCA pointed out that the procedure in that matter involved a two-stage process. The first stage was a board of enquiry which investigated the facts and made a recommendation. The second stage was the decision of the Chief of the Defence Force having considered the recommendation. The SCA found that:

"[14] In my view, the two-stage process in this case must be viewed holistically and be seen as affecting rights at each stage, as was held to be the case in Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae),¹¹ rather than as a bifurcated process involving, first, an investigation with no effect on rights and, secondly, a decision that affects rights, as was the approach in such cases as Cassem en 'n Ander v Oos-Kaapse Komitee van die

¹⁰ Para 15.

¹¹ *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) (2006 (1) BCLR 1; [2005] ZACC 14) paras 137 and 141 (Chaskalson CJ), 441 – 442 (Ngcobo J) and 672 (Moseneke J). See too *Administrator, Cape and Another v Ikapa Town Council* 1990 (2) SA 882 (A) at 889J – 890C; *Director: Mineral Development, Gauteng Region, and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA) (1999 (8) BCLR 845; [1999] 2 All SA 381) para 19; *Oosthuizen's Transport (Pty) Ltd and Others v MEC, Road Traffic Matters, Mpumalanga, and Others* 2008 (2) SA 570 (T) para 25.

*Groepsgebiederaad en Andere*¹² and *South African Defence and Aid Fund and Another v Minister of Justice*.¹³ The latter two cases, based as they were on the discredited 'classification of functions' approach to procedural fairness and the idea that a right to be heard only applied if it was impliedly incorporated into the empowering provision, are not compatible with s 33 of the Constitution.”

84. I am prepared to accept that the investigating committee's decision in terms of section 28 of the EP Act (i.e. the second decision) is administrative action and is reviewable, as distinct from a decision of the Engineering Committee itself in terms of section 29 of the EP Act. But I doubt whether the 'decision' in the form of the report of the investigator (i.e. the first decision), as distinct from the decision of the investigating committee (the second decision), constitutes administrative action. The investigator's investigation culminating in their report of 8 February 2021 is simply part of the investigative process, albeit a central part of the process in this particular instance,¹⁴ leading up to the decision of the investigating committee. But, as will appear below, I need not make a definitive finding on this aspect.

85. In relation to the second decision, which is administrative action and subject to PAJA (whether viewed distinctly as a decision of the investigating committee in terms of section 28 of the EP Act or together with the adoption of that decision by the Engineering Council in terms of section 29 of the EP Act), one of the grounds relied upon by the applicants is that the decision is

¹² *Cassem en 'n Ander v Oos-Kaapse Komitee van die Groepsgebiederaad en Andere* 1959 (3) SA 651 (A).

¹³ *South African Defence and Aid Fund and Another v Minister of Justice* 1967 (1) SA 263 (A).

¹⁴ While an investigation by an investigating committee is preemptory in terms of section 28 of the EP Act, the appointment of an investigator to assist the investigating committee is not (rule 3.2.4 of the Rules for Inquiry).

liable to be set aside in terms of PAJA because the investigating committee did not consider the investigator's report.

86. The applicants' contend that upon their reading of the minutes of the investigating committee meeting held on 11 May 2021, what transpired is that the Manager: Legal Services simply "*reported*" to the investigating committee on a list of complaints that had been investigated, which included the present complaint and that the investigating committee, based upon that manager's report, dismissed the complaint. The applicants argue that the minutes demonstrate that the investigating committee 'rubber-stamped' what the legal manager reported and without the investigating committee itself considering the investigator's report.
87. It is not clear from the minutes whether the investigating committee did consider the investigator's report or whether, as the applicants contend, the investigating committee rubber-stamped the recommendation made by the investigator not to prefer charges as reported by the legal manager and without itself considering the investigator's report.
88. During the hearing, I expressed circumspection in accepting that upon a fair reading of the minute a finding should be made of an allegation as serious as the investigating committee simply rubber-stamped what had been reported to it by the legal manager. On the other hand, as applicants' counsel submitted, to the extent that it was unclear from the minute or any other documents on record what the investigating committee did or did not do cannot redound to the detriment of the applicants as it was open to the

investigating committee or Engineering Council, who would have knowledge of what in fact happened and who had been cited as respondents, to clarify the position. There is merit in this submission because it may be expected of the investigating committee to have delivered at least an explanatory affidavit clarifying the factual position (without necessarily opposing the review) and especially where it is cited as a party to these proceedings and therefore given an opportunity to respond to the serious averment that it had rubber-stamped the investigator's report.

89. Nonetheless, I will again assume in favour of the first respondent that the investigating committee did in fact consider the investigator's report before making a decision that the complaint be dismissed. I say that this is in favour of the first respondent because if the investigating committee did not consider the report, as alleged by the applicants, then the decision of the investigating committee would be administratively unfair on any number of grounds under section 6 of PAJA.
90. Accepting then that the investigating committee did consider the investigator's report before making its decision on 11 May 2021, it is necessary to consider the remaining grounds upon which the applicants challenge the investigating committee's decision as being reviewable in terms of section 6 of PAJA.
91. Insofar as the manner in which the investigation was conducted, in this instance by the investigating committee through the appointed investigator as evidenced by the investigator's report, the applicants identify what it describes in their heads of argument as the following critical issues:

"44.1 Whether Nebotalo's design complied with the provisions of SARTSM and industry norms. It is submitted that this was the most critical piece of evidence that the investigator had to consider for purposes of the complaint regarding the inadequacy of Nebotalo's design, the accident claim, and claim no. 6. Hlabela states in his affidavit that the investigator did not ask him a single question regarding Nebotalo's design during his interview. The investigator did not interview the victim of Nebotalo's inadequate design, being Tjiane who would have unequivocally confirmed that the accident was caused because there were no signs warning him that there was a soft closure ahead.

44.2 The numerous contradictory recommendations and decisions that were made by Nebotalo regarding claim no. 6, which are common cause as set out in para 29 and 30 above.

44.3 Nebotalo's obligations in terms of the Contract which as set out in paragraphs 32 to 34 above, obliged Nebotalo to instruct MMA to complete the resurfacing works."

92. The applicants continue that in this regard the following provisions of PAJA were not complied with.

"45.1 Section 6(2)(b) in that the investigator did not investigate and obtain evidence in accordance with Rule 3.2.5 of the inquiry rules, and section 6(2)(e)(iii) in that the investigator did not consider relevant information because:

45.1.1 the investigator was required to obtain the most critical piece of evidence regarding the complaint, being Nebotalo's design. It is submitted that a failure to procure this piece of evidence on its own ought to render the first decision reviewable and set aside;

- 45.1.2 *the investigator was required to consider the Contract to see if Nebotalo was in fact obliged to instruct MMA to attend to the resurfacing work. Again, a failure to procure this piece of evidence on its own ought to render the first decision reviewable and set aside; and*
- 45.1.3 *the investigator did not consider the numerous correspondence between the parties regarding claim no. 6 which would have clearly demonstrated the contradictory manner in which he made his determination regarding such a claim. It is submitted that the failure to consider such correspondence ought to render the first decision reviewable and set aside.*
- 45.2 *Section 6(2)(f)(cc) in that with the information before the investigator, being the applicant's complaint and evidence that they provided, he ought to have concluded that Nebotalo contravened the code of conduct. It has been held that a rationality review is based on an absence of rationality between the information before the decision-maker and that which he relied on to form the basis of its decision. The information before the investigator was that members of the public who lived between the two road closures were not provided any warning of such road closures. Further, although the investigator acknowledges that applicants' complaint was that Nebotalo's design was inadequate, he does not address such inadequacy in his findings. As such, the first decision ought to be reviewed and set aside.*
- 45.3 *Section 6(2)(h) in that, for the reasons set out above as demonstrated above, the decision taken by the investigator was unreasonable. As such, the first decision ought to be reviewed and set aside."*

93. There grounds of review are well-founded. The investigator's report is a perfunctory document. It consists of only six pages, one of which is of two photographs. What appears from the report is that the extent of the investigation at the instance of the investigator was to discuss the complaint with the applicants as the complainants and with the first respondent.¹⁵ The report purports to set out what the complainants and first respondent¹⁶ had to say in those discussions.

94. The report then, without more, concludes:

- "a) Because the formation of a sinkhole within a road is an emergency, the Respondent instructed the Complainant to provide road signs, temporary by-pass and closures as a matter of urgency. This was appropriate in the circumstances.*
- b) The Complainant was unreasonable to expect the Respondent to certify the cost of new signs when he had borrowed the signs from other contractors.*
- c) The Complainant could not expect the Respondent to either pay the cost of repair of a motor vehicle which was involved in an accident, or to certify the cost for the Employer to pay. There was no justification for the Complainant to personally pay R13000-00 towards the repair cost.*
- d) It is not unreasonable for the Respondent to reject standby teams which do not include safety officers.*

¹⁵ Along with a candidate engineering technologist from the first respondent's office, who also was involved, potentially as a respondent, at that stage but peripherally, it would seem.

¹⁶ And the candidate engineering technologist.

- e) *There does not appear to be any evidence of defamation in any of the correspondence provided by the Complainant and the Respondent.*
- f) *It is not reasonable to blame the Respondent for the failure by the Employer to appoint another contractor."*

95. The report then states that "*Based on the above findings there is no evidence of any transgression by either Respondent*".
96. As appears from the report, and where there is no other evidence placed before the court as to what the investigator did, the investigator did not deal with the substance of the conduct complained of and detailed by the applicants. At most, the report dealt only with some facets thereof, and even then not the main features of the conduct complained of
97. Regarding the first grounds of complaint, which is the first respondent's divergent determinations in respect of the MMA's claim 2, these do not appear to feature in the investigator's report at all.
98. Regarding the second grounds of complaint, which is what the applicants contend is inadequate design of the road closure and its related signage requirements, there is no indication in the investigator's report that the investigator considered the adequacy of the design, which clearly is the central issue in the complaint on these grounds. What would have been expected of the investigator is to investigate what the facts were and where there was a dispute of facts, as there is in the present instance such as to the extent of the signage and the cause of the accident suffered by the road user,

Mr Tjiane, for the appropriate investigation to be made towards resolving those factual disputes. This would include, for example, and as pointed out by the applicants, an inspection *in loco* and to liaise with potential witnesses, such as Mr Tjiane whom the applicants made available. At the very least what would have been expected is an interrogation by the investigator, as a registered person itself and so presumably an expert, of the actual design by the first respondent and whether it was in its view adequate or not. This kind of analysis simply does not appear to have been done by the investigator.

99. Regarding the third grounds of complaint, being relation to claim 6, there too the investigator does not grasp the complaint, which is the divergent stance adopted by the first respondent in his determinations in respect of that claim.
100. Regarding the fourth ground of complaint, there too it is difficult to ascertain what in fact the investigators did investigate and find in relation to that ground of complaint.
101. Instructive as to what is expected of an investigating committee, albeit in the context of disciplinary proceedings under the Legal Practice Act, 2014, is a recently reported decision of Yacoob J in *Groundup News NPC and Others v South African Legal Practice Council and Others* 2023 (4) SA 617 (GJ). The investigating committee, which consisted of one person, was found not to have conducted a proper investigation and this rendered the investigating committee's decision liable to be set aside on review under PAJA. The investigating committee's investigation consisted of reading the documents that was placed before it. That prompted the respondent in that matter to argue

that such reading of the complaint constituted sufficient investigation. Yacoob J found that “[i]t may be that in some cases reading the complaint and response is sufficient investigation. It is not necessarily the case, and it is not so in this case”.¹⁷

102. Yacoob J then continued:

“[40] The committee has extensive investigative powers, which are set out in rule 40 of the LPC Rules. It chose, incomprehensibly, not to exercise them. It is required to do so. The committee is not a court which has to decide matters on pleadings and evidence placed before it by the parties. There is no onus on a complainant. A complainant simply has to bring conduct to the attention of the committee. Any other interpretation would be prejudicial to the public interest.

[41] The investigating committee does not function as a court. A complaint is not the same as motion proceedings, and a complainant does not bear any onus. The investigating committee has to investigate. It must follow up on the issues raised, obtain information and interview witnesses if the matter requires it. On the basis of the investigating committee's own response to this complaint, it was clear that this is a matter that required it.

[42] It is the disciplinary committee which must make the decision whether a case is made out, if the matter is referred to it, and whether the evidence is good enough to establish guilt of the legal practitioner.

[43] To expect a member of the public complaining about the conduct of a legal practitioner to bring a complete case would make a mockery of what the LPA seeks to achieve. The LPC is there to assist members of the public rather than to protect legal practitioners by making it

¹⁷ Para 37.

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 LPA, but also with its stated purpose”.

103. Later in the judgment, Yacoob J states:

“[47] ... to require that a complainant make out a case that is already complete and ready to be adjudicated upon by a disciplinary committee, makes a mockery of the scheme established by the LPA, and in fact belies the reason for the existence of the investigating committee, before a matter goes to a disciplinary committee. It is for the investigating committee to investigate whether reasonable and credible verification may be obtained, and if so, to obtain it, rather than to sit back and say to a complainant that they have not done so”.

104. Yacoob J concluded that “[b]y misconstruing its role, the investigating committee has committed an error of law”¹⁸ and “... the decision was so unreasonable that no reasonable person could have taken it”.¹⁹ The decision of the investigating committee was found to be reviewable and was set aside.²⁰

105. The same findings commends themselves in the present instance. As appears from the statutory framework set out above, the investigating committee fulfils a vital role. In this instance, the only material before the investigating committee was that constituted by the investigator's report (assuming in

¹⁸ Para 48.

¹⁹ Para 49.

²⁰ Para 51.

favour of the first respondent that the investigating committee at least considered the investigator's report and did not rubber-stamp the report). It is therefore necessary to look at the investigator's report to see whether it passes muster.

106. For the reasons set out above, the investigator's report does not pass muster.
107. The investigating committee failed to comply with a mandatory and material procedure as envisaged in section 6(2)(b) of PAJA in that the investigating committee did not conduct an adequate investigation before making the recommendation that it did to dismiss the complaint. The investigation, based on the record before the court, is that evidenced by the investigator's report and that report does not disclose an adequate investigation.
108. The investigating committee through the investigator failed to take into account the relevant considerations, which includes those is set out above and as identified by the applicants in their founding affidavit. At the very least, for example, a consideration of the design of the road closures and the related signage should have taken place, of which there is no evidence. The investigator's report does not refer to such a consideration having taken place. The investigating committee's decision is therefore liable to be reviewed in terms of section 6(2)(e)(iii).
109. I agree that the investigating committee's decision is liable to be reviewed on the grounds of section 6(2)(f)(ii)(cc) on the basis that the decision was not rationally connected to the information before the investigating committee. This is because of the perfunctory nature of the investigator's report. In the

absence of the investigator having considered that which was necessary for him to consider and given the perfunctory nature of the report, there is an absence of rationality between the information before the investigating committee, in the form of the comprehensive complaint and inadequate investigator's report, and its conclusion that the complaint is to be dismissed. As stated, much of the complaint does not feature in the report.

110. In the absence of an adequate investigation, the investigation committee's decision is also liable to be reviewed in terms of section 6(2)(h) on the basis that the decision is so unreasonable that no reasonable person could have made the recommendation that there is no evidence of any transgression.
111. The applicants also make a point that the investigating committee's decision, as distinct from the investigator's report itself, is unreasonable as contemplated in section 6(2)(h) of PAJA because if it had considered the report (which the applicants contend it did not, but which I have assumed in favour of the first respondent as having been so considered), the investigating committee would have realised what the applicants have pointed out are the substantial evidentiary and other gaps in that report and so the inadequacy of the investigator's report.
112. There are therefore multiple grounds upon which the investigating committee's decision (i.e. the second decision) is to be reviewed in terms of PAJA and found to be invalid and set aside.
113. Whilst it may be that the investigator's 'decision' as manifests in its report, which constitutes what the applicants have described as the 'first decision', is

subsumed by the second decision of the investigating committee itself, and so it is perhaps unnecessary for that 'first decision' to be separately reviewed and set aside, I nonetheless do so. It avoids a subsequent argument that the efficacy of the investigator's report somehow survives, despite that it is the inadequacy of that report that is the origin of the subsequent decisions being vitiated on review.

114. Although it does not necessarily follow that once a decision is successfully reviewed that the decision must be set aside as setting aside is a discretionary remedy that may be withheld depending on the circumstances,²¹ there are no circumstances in the present matter that militate against the court exercising its discretion in setting aside the first and second decisions. Nor did the parties argue otherwise.

WHY THE THIRD AND FOURTH DECISIONS ARE INVALID AND TO BE SET ASIDE IN TERMS OF PAJA.

115. The applicants submit that once the investigating committee's decision is found to be invalid on review and set aside, it must follow that the subsequent decisions, particularly those of the CBE appeal committee, must also be found to be invalid and set aside.

116. The applicants' counsel and the first respondent's counsel agreed in their submissions that in terms of the well-known decision of *Oudekraal Estates*

²¹ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at 246C-E. See also the discussion in Hoexter & Penfold *Administrative Law in South Africa* 3rd Edition (2021) Juta at pp 773 – 776.

*(Pty) Ltd v City of Cape Town and Others*²², once the investigating committee's decision is found to be invalid, so too must the decisions that follow upon it because those decisions depend for their validity upon the investigating committee's decision as a prior necessary administrative act.

117. Howie P and Nugent JA writing for the SCA in *Oudekraal* found:

"[31] Thus the proper enquiry in each case – at least at first – is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of a consequent act is dependent on no more than the factual existence of the initial act, then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court.

[32] But just as some consequences might be dependent for validity upon the mere factual existence of the contested administrative act so there might be consequences that will depend for the legal force upon the substantive validity of the act in question ..."

118. No argument was advanced that the third and fourth decisions, and more particularly the fourth decision as an appeal decision, had the potential of, and did cure, any procedural unfairness in relation to the second decision.²³

119. I therefore proceed on the basis accepted by the parties that the third and fourth decisions were dependent for their validity on the factual existence of

²² Above.

²³ See the discussion in *Wings Park Port Elizabeth (Pty) Ltd v MEC, Environmental Affairs, Eastern Cape* 2019 (2) SA 606 (ECG), para 41 to 45.

the initial act (i.e. the second decision) and so once that initial act is found to be invalid, so too the consequent acts are to found to be invalid.²⁴

120. I therefore need not find that the third and fourth decisions themselves are liable to be reviewed and found to be invalid on grounds set out in section 6 of PAJA or on any other ground other than on the basis that the validity of those two decisions were dependent upon the antecedent investigating committee's decision remaining valid.

121. Once the third and fourth decisions are found to be invalid, it is necessary to consider whether those decisions too, in the exercise of the court's discretion, are to be set aside. Although the third and fourth decisions are invalid as they are based on the antecedent invalidated second decision, it does not necessarily follow that those impugned decisions too must be set aside as a consequence of the invalidity. I adopt the approach suggested in *Hoexter*²⁵ that the court should exercise its discretion and apply its mind to whether the setting aside the consequent acts, in this instance the third and fourth decisions, would be just and equitable rather than their setting aside following automatically upon the investigating committee's decision being set aside.

122. Again, neither party advanced any reasons why the third and fourth decisions should not, in the circumstances, be set aside once the second decision was set aside.

²⁴ *Oudekraal* at para 31; *Seale v Van Rooyen* NO 2008 (4) SA 43 (SCA) at para 50C/D. See also discussion in *Hoexter* above at pp 764 – 765 on the 'second principle' extracted from *Oudekraal*.

²⁵ Above at pp 778 and 779.

123. As appears above, the investigating committee's decision is a vital component of the statutory disciplinary process. The applicants as the complainants and the first respondent are entitled to an adequate investigation followed by a decision in terms of the EP Act. A decision made on appeal for the first time is not an effective substitute for the decisions to have been made in an administratively fair manner in the first instance. This is especially so as the statutory framework specifically envisages that an investigation takes place with all that is attendant upon an adequate investigation. This is a different process to that which unfolds in an appeal to the CBE. Whatever the scope may be of the CBE appeal committee may be, it is not to investigate the complaint.²⁶

124. I therefore find that the third and fourth decisions are also to be set aside.

125. No issue has been raised by the parties whether separate orders setting aside the third and fourth decisions are necessary if the invalidity of those decisions must follow on the invalidity of the second decision.²⁷ As the applicants have in their notice of motion asked for these subsequent decisions to be reviewed as invalid and set aside,²⁸ and absent argument to the contrary, I am prepared to grant orders specifically setting side those decisions.

RELIEF

²⁶ Which also may have been relevant to an enquiry whether an appeal decision before the CBE appeal committee could have cured any procedural unfairness in the earlier decisions.

²⁷ See the debate in *Hoexter* above, at 778, 779, with reference to *Wings Park* above, para 46.

²⁸ Which may have been well-advised in light of *Wings Park* above, para 46 and 47.

126. The applicants seek that upon the decisions being set aside that the complaint is to be referred to a new investigator.
127. The consequence of so setting aside the four decisions is that the complaint would have to be considered afresh by the investigating committee of the Engineering Council. There is nothing in such an outcome that militates against the court setting aside the decisions.
128. Each of the decisions identified by the applicants are to be set aside, and the applicants' complaint referred back to the investigating committee of the Engineering Council.
129. It will then be for the Manager: Legal Services to decide whether to appoint an investigator in terms of Rule 3.2.4 of the Rules for Inquiry but if that occurs, it must be an investigator other than the fourth respondent
130. Whether or not the first respondent opposed these proceedings, it would still have been necessary for the applicants to bring these review proceedings. The appropriate order in the circumstances is that the first respondent should be liable for the costs of its opposition rather than also the costs of the application itself.²⁹
131. The applicants submitted that the cost of counsel, since Uniform Rule 67A came into effect on 12 April 2024, should be on Scale B, while counsel for the first respondent submitted that Scale C was appropriate. Costs will be

²⁹ See such order as granted and reasoned in paragraph 52 of *Groundup News* above.

awarded on the scale proposed by the applicants as the successful parties, particularly as that scale is more generous to the first respondent than the first respondent himself proposed.

132. An order is made as follows:

132.1. The decision of the fourth respondent dated 8 February 2021 is invalid and is set aside.

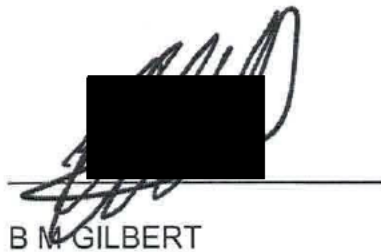
132.2. The decision of the investigating committee of the second respondent dismissing the applicants' complaint is invalid and is set aside.

132.3. The decision of the committee chaired by the sixth respondent, dated 21 December 2021 is invalid and is set aside.

132.4. The decision of the committee chaired by the sixth respondent, dated 21 October 2022, dismissing the first and second applicants' is invalid and is set aside.

132.5. The applicants' complaint is remitted to the second respondent (being Engineering Council of South Africa) to be placed before an investigating committee as provided for in the Engineering Profession Act, 46 of 2000 and that such investigator that may appointed is to be an investigator other than the fourth respondent and which fourth respondent is in no way to be involved in the fresh investigation.

132.6. The applicants' costs as occasioned by the first respondent's opposition are to be paid by the first respondent, including the costs of counsel and which costs of counsel from 12 April 2024 are on scale B.



B M GILBERT

Acting Judge of the High Court

Gauteng Division, Johannesburg

Date of hearing: 15 October 2024

Date of judgment: 31 October 2024

Counsel for the applicants: T Kgomo

Instructed by: C de Villiers Attorneys Inc
Johannesburg

Counsel for the first respondent: P J Coetsee

Instructed by: Makwarela Attorneys
Pretoria

Counsel for the second, fourth and fifth respondents: No appearance: abide

Counsel for the third and sixth respondents: No appearance.