

IN THE APPEAL COMMITTEE OF THE COUNCIL FOR THE BUILT ENVIRONMENT

DATE: 24 AUGUST 2010

In the matter between:

SEABATA DINTHE

APPELLANT

and

SOUTH AFRICAN COUNCIL FOR THE ARCHITECTURAL PROFESSIONS

RESPONDENT

held at Pretoria on 12 March 2010 and 17 May 2010 before Chairperson: Ms E van der Hoven; Ex-Judge IWB de Villiers, and Mr G Damstra.

JUDGMENT

IWB DE VILLIERS

INTRODUCTION:

- (1) This is an appeal to the Appeal Committee of the Council for the Built Environment (CBE) from a decision of the South African Council for the Architectural Professions (SACAP). It concerns the examination results of the Appellant in the Professional Practice Examination (PPE) which Appellant wrote on 22 March 2006. The Respondent, SACAP, informed the Appellant on 22 May 2006 that he had failed the examinations.

Appellant contends that he passed the examinations and that SACAP should, accordingly, have registered him as a professional architect in terms of sec 19(2)(a)(ii) of the Architectural Profession Act, No 44 of 2000, (APA). Alternatively, Appellant contends that even if he failed the PPE, SACAP is nevertheless obliged to register him as such by reason of certain deficiencies in SACAP's procedures. SACAP contends that Appellant failed the examination and is, accordingly, not entitled to be registered as a professional architect. Furthermore, that whatever deficiencies there may have been in SACAP's procedures, Appellant is not entitled to be registered as such if he failed the PPE.

- (2) At the hearing of the appeal the Appellant appeared in person, while Mr Leslie appeared on behalf of SACAP.
- (3) At the commencement of the hearing Mr Leslie submitted that the appeal had not been noted timeously. The Appeal Committee suggested that it would be best to hear the merits of the matter and to decide this issue with the merits of the appeal. The parties agreed to this procedure being followed.
- (4) Sec 35(1) of the APA provides that any member of the public whose interest and rights are affected by a decision made by SACAP may, within 90 days of being furnished with SACAP's reasons for such decision, appeal to the Council for the Built Environment (CBE) against that decision in terms of sec 21 of the Council for the Built Environment Act, 43 of 2000 (CBEA).

Sec 21(1) of the CBEA provides that any person who is aggrieved by a decision of any of the councils for the professions (which includes SACAP) may, within 30 days of becoming aware of such decision, in writing appeal to the CBE and that the CBE must consider and decide the appeal.

Sec 21(3) of the CBEA provides that the CBE must appoint an Appeal Committee consisting of persons whose experience or speciality is set out.

Sec 21(4) of the CBEA provides that the Appeal Committee must conduct the appeal in accordance with sec 33 of the Constitution.

Sec 33(1) of the Constitution provides that "everyone has the right to administrative action that is lawful, reasonable and procedurally fair".

The Promotion of Administrative Justice Act, No 3 of 2000 (PAJA) has, in terms of its preamble, been enacted to give effect to the rights set out in sec 33 of the Constitution.

Sec 3(2)(a) of the PAJA provides that "a fair administrative procedure depends on the circumstances of each case".

- (5) This is not an appeal in the ordinary sense of the word. No hearing took place before SACAP. Save for the minutes of the relevant meeting, there is no record

of any proceedings which took place before SACAP. Appellant was not present at the meeting. No witnesses testified before SACAP.

The powers of the Appeal Committee are not set out in the CBEA or the APA save to say that the Appeal Committee must "decide the appeal" (see 21(1) read with secs 21(3), (4) and (5) of the CBEA).

In this matter the function of the Appeal Committee is, in my view, to investigate the matter afresh and to decide whether on the evidence before it SACAP erred in refusing to register the Appellant as an architect. It is, in my view, an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information. See Administrator South West v Jooste Lithium Myne (Edms) Bpk 1955(1) SA557(A) at 564-5 and SABC v Transvaal Townships Board 1953(4) SA160(T) at 176; Tikly and others v Johannes N.O. and others 1963 (2) SA 588 (T) at 590G; Caledonian Airways v Transnet 1977(1) SA 466 (T).

- (6) At the hearing before the Appeal Committee, the Appellant gave evidence and thereafter Mr Leslie called two witnesses on SACAP's behalf, namely Ms Tertia Jacobs and Mr Marius Heunis. During final argument, Mr Leslie requested, and was granted leave, to place further written argument before the Appeal Committee in relation to whether it is entitled in law to grant condonation if it were found that the appeal was late. At the same time leave was granted to the Appellant to reply in writing thereto.

A few days after judgment was reserved on 17 May 2010, the Appellant wrote a letter dated 21 May 2010 to the Appeal Committee containing certain further arguments relating to matters which had been raised during final oral argument before the Committee.

In reply to such letter the CBE administration, on the instruction of the Appeal Committee, pointed out to the parties that the Appeal Committee had not requested Appellant to write such a letter and that he had apparently done so of his own accord. They were informed that the Appeal Committee was not entitled to consider the contents of Appellant's letter unless SACAP has had an opportunity of replying to the contents thereof.

On 18 June 2010 SACAP's attorneys denied the contents of Appellant's letter in so far as it is inconsistent with what SACAP has already placed before the Committee. SACAP did not admit that Appellant's letter has any status before the Committee.

In my view SACAP has, through its attorneys, accordingly had an opportunity of replying to the contents of Appellant's letter and has exercised such opportunity by denying the contents of the letter, in so far as it is inconsistent with what SACAP has already placed before the Committee. The Committee is accordingly entitled to consider what Appellant has said in his letter. I shall deal with it below.

WAS THE APPEAL LODGED TIMEOUSLY?

- (7) I shall deal, firstly, with the question whether the appeal was lodged timeously or not. As indicated, sec 21(1) of CBEA provides that any person who is aggrieved by a decision of the councils for the professions may within 30 days of becoming aware of such decision in writing appeal to the CBE.
- (8) Sec 35(1) of APA provides that any member of the public whose interests are affected by a decision made by SACAP may-
 - (a) within 30 days from that person becoming aware of the decision, request SACAP in writing to furnish him or her with its reasons for that decision;
 - (b) within 90 days from the date on which SACAP furnished him or her with its reasons for that decision and after giving notice to SACAP, appeal to the CBE against that decision in terms of sec 21 of CBEA.
- (9) Mr Leslie argued that sec 35(1) of APA is not applicable in this case since Appellant is not a member of the public whose interests and rights are affected by a decision made by SACAP. In this regard he compared sec 24(1) of APA which provides for an appeal to SACAP from a decision of a committee refusing to register an applicant. However, sec 24 makes no provision for such an appellant to appeal to the CBE if SACAP were to refuse to register him. The only way in which such an appellant could appeal to the CBE would be in terms of sec 35(1), assuming, of course, that he is a member of the public. I see no reason why the Legislature would have intended that such an appellant would not be regarded as

a member of the public. The meaning of those words is wide enough to include the Appellant. There is, in my view, no reason why Appellant should be deprived of a right to appeal to the CBE against such a decision. To my mind, sec 35(1) is, *prima facie*, applicable in the instant case.

- (10) *Prima facie* there is a conflict between the provisions of sec 21(1) of CBEA and sec 35(1) of the APA since the former provides for an appeal to the CBE within 30 days of becoming aware of the decision while the latter provides for an appeal to the CBE within 90 days after SACAP has furnished its reasons for its decision.
- (11) The first step in interpreting apparently conflicting provisions is to attempt to reconcile them. In my view, it is not possible to do so.

However, the APA is the later Act: it is number 44 of 2000 while the CBEA is number 43 of 2000.

It is necessary to bear in mind a well-known principle of statutory construction, namely, that statutes must be read together and that the later one must not be so construed as to repeal the provisions of the earlier one, unless the later statute expressly alters the provisions of the earlier one or such alteration is a necessary inference from the terms of the later statute (Wendywood Development (Pty) Ltd v Rieger and another 1971(3) SA28(A) at 38 A-B).

- (12) In my view, it is indeed a necessary inference from the provisions of sec 35(1) of the APA that the Legislature intended that sec 21(1) of the CBEA, relating to the time within which an appeal was to be launched, would be amended by sec 35(1) in so far as an appeal from SACAP to the CBE was concerned. Accordingly, Appellant could appeal to the CBE within 90 days from the date on which SACAP furnished him with its reasons for its decision.
- (13) On 21 August 2009 ("B" 345) SACAP's registrar informed Appellant by email that SACAP was upholding its communication to Appellant that he had failed the Professional Practice Examination and that it would not register him as a professional until such time as he had passed the examination. SACAP's reasons for not registering the Appellant appear from the email.

- (14) On 25 August 2009 ("B" 346) Appellant replied by email that he was considering the litigation route to force SACAP to prove that he had indeed failed the examination.
- (15) The Appellant filed his notice of appeal with the CBE and SACAP on 1 October 2009. See Appellant's email to the Registrar of SACAP with copies to the CBE dated 1 October 2009 which form part of the correspondence under flag no 9 of exhibit "A".
- (16) If one accepts that Appellant had 90 days from the 21 August 2009 to appeal to the CBE, he has obviously brought his appeal timeously.

MAY LATE LODGING OF THE APPEAL BE CONDONED?

- (17) If I am wrong in finding that the appeal had to be lodged within 90 days, and it had to be lodged within 30 days, I am of the view that the Appeal Committee is entitled to condone such late lodging of the appeal.
- (18) The composition of the Appeal Committee, as appears from sec 21(3) of the CBEA, and the way it functions in terms of sec 21(4) of that Act, strongly resemble an ordinary court of law. It may be seen as court of first instance where an appellant who is dissatisfied with a decision of council for the professions may seek recourse. This is a relevant consideration in deciding whether the legislature intended that the Appeal Committee should have the right to grant condonation where an appeal has not been noted within the allotted time. See Phillips v Direkteur van Sensus 1959(3) SA 370(A) at 373H-374A. At 374H-375A the following was said:

"Indien die termynbepaling in die onderhawige geval so uitgelê word dat dit nie verleng kan word nie, dan is die effek van sodanige vertolking, dat dit vir alle praktiese doeleindes na verloop van dertig dae 'n reg van toegang tot 'n Hof vir appellant ontnem word en wat meer is 'n Hof van eerste instansie, want die raad is die eerste liggaam by wie dit appellant sy saak gaan stel."

Although the Appellant had the right to state his case before SACAP, the Appellant would be denied his right to argue his case before a court of first

instance if he were to forfeit his right of appeal by not appealing within the allotted time.

- (19) Mr Leslie argued that the Appellant has not applied for condonation. The Appellant has not filed a formal application for condonation but I consider that he has, in effect, during argument informally applied for condonation. All the facts relevant to an application for condonation are already before us.

DO THE FACTS JUSTIFY CONDONATION?

- (20) A relevant fact is that SACAP did not draw Appellant's attention to the fact that, if he wished to appeal against its decision he had to do so within 30 days. To my mind, it was SACAP's duty to have drawn the Appellant's attention to the fact that if he wished to appeal against its decision, he was entitled to do so within 30 days and would have to file his appeal with the CBE, with notice thereof to SACAP (secs 21(1) and (2) of the CBEA, see also sec 3(2)(d) of PAJA). Unfortunately all SACAP did in its letter to Appellant of 21 August 2009 ("B" 345) was to state that, should he wish to litigate against it, such legal action would be opposed. Appellant has, to my mind, obviously been prejudiced by SACAP's failure to inform him of his right of appeal and the time within which he was obliged to exercise such right. Appellant had already on 3 August 2009 communicated with Mr Gwazube, the Chief Operations Officer of the CBE, to ask him for his advice in the matter. On the same day Gwazube unwittingly wrongly advised the Appellant that, in terms of sec 24(1) of the APA, Appellant could appeal to SACAP within 30 days after refusal of his registration by one of its committees. Further, that if SACAP did not provide a satisfactory response within the 60 day period stipulated in se 24(1), the CBE could function as an appeal body in the matter (flag no 2 of bundle "A").
- (21) However, after receiving a copy of SACAP's letter to Appellant, dated 21 August 2009 ("B" 345), Gwazube telefaxed a letter to the Appellant on 21 September 2009, stating that in his opinion "the matter could be heard by the CBE", but that Appellant had to complete the CBE's appeal form, of which he sent him a copy, and prove that the appeal had been served on SACAP (flag no 8 of bundle "A").

- (22) On 1 October 2009 Appellant returned the said appeal form, which had been completed and signed by him, to Gwazube and provided a copy to SACAP (see flag 9 of exhibit "A"). The appeal was, accordingly, lodged on that day.
- (23) If SACAP's letter to Appellant, dated 21 August 2009, had informed him that he was entitled to appeal against SACAP's decision within 30 days by lodging his appeal with the CBE, it is probable that Appellant would have lodged his appeal timeously.
- (24) Appellant's notice of appeal was filed about 10 days late. Taking into account all the circumstances I am of the view that Appellant's failure to lodge his notice of appeal timeously should be condoned.

THE MERITS OF THE APPEAL:

- (25) I now turn to the merits of the appeal. As indicated, Appellant wrote two examination papers in SACAP's Professional Practice Examination on 22 March 2006. On 22 May 2006 Ms Tertia Jacobs, the then Registrations Administrator at SACAP, as indicated, one of SACAP's witnesses at the hearing of the appeal, wrote a letter to the Appellant informing him "with regret" that he had not passed the examination and that an outline answer to the examination would be available on request as from a certain date (exhibit "B", 114). It appears that the outline answer was indeed later provided to the Appellant by Ms Jacobs at his request. She also informed Appellant that the next professional examination would be written on 9 October 2006 and attached an application in regard thereto.
- (26) On 7 June 2006 Appellant replied by letter to SACAP, marked for attention of Ms Tertia Jacobs, that he was "not entirely happy" with the result because the examination mainly concerned contract administration which he did day in and day out which made it one of the easiest examinations he had ever written for SACAP, and yet he had failed. He urgently needed information regarding access to the papers he had written and possibly remarking thereof. He also requested the contact details of SACAP's President should he need to write directly to him ("B", 107A). It seems that this letter was probably not received by SACAP, since a copy thereof is not in the bundle prepared by SACAP for the hearing of the

appeal, exhibit "B". The CBE Administration probably received a copy of the letter from the Appellant.

- (27) There is no indication in bundle "B" that Appellant's letter of 7 June 2006 was replied to. However, it appears that the Appellant was probably in continuous oral communication with members of SACAP's administrative staff about the matters he had raised in his letter dated 7 June 2006.
- (28) On 9 January 2007 Appellant sent an email to Ms Rina du Toit at SACAP relating to his earlier query. According to the evidence of Ms Jacobs, Ms du Toit was the secretary of the Registrar of SACAP at the time. The email sent to Ms du Toit is unfortunately illegible ("B", 110), but Mr Leslie informed the Appeal Committee during the hearing that the contents thereof had been agreed upon and this was not disputed by Appellant. It reads as follows: "Please come back to me as soon as you have got the information of my exam. I am worried that this has taken almost 8 months to solve. All I need is to see the copies of my scripts with the answers Tersia has already sent to me. The reasons being that the exam I wrote was the most simple exam I have ever written in the council so I will be happy to see my marked scripts" (transcript Vol 2, 17/5/10, at 4:100-5:107).
- (29) On 27 January 2007 Ms Jacobs replied on SACAP's behalf, referring to Appellant's enquiry to Ms du Toit ("B", 108-9) and said: "Herewith a guide as to the mistakes made by yourself in the examination". Thereafter she dealt with each question in the two papers in considerable detail. She suggested in several passages that Appellant should look at the outline answers that had been provided to him. In relation to some answers the marks scored by the Appellant were set out. Certain mistakes made by Appellant in his answers were mentioned, eg. "you started interpreting the question wrong" and "the question was answered poorly and please look at the question again". Numerous hints were given, eg. "...I would suggest that you could perhaps do an arbitration course."

The penultimate paragraph of the letter reads: "Please note that this is a brief reply on your request. I would suggest that you attend more courses or work closer with your employer. It is noted that you do attend site meetings but make sure that the procedures are within the guidelines. Please note that this is my

opinion and not that of the council or examiners and this is purely to try and assist you with the problem areas you might have.”

The last paragraph of the letter reads: “Please look at my suggestions and I would definitely advice (sic) that you attend a course on arbitration. This will help a great deal.”

As will appear later, this letter plays an important role in the appeal. Appellant testified that he received the letter. However, he did not reply to it.

- (30) Ms Jacobs testified that she is familiar with the marking style of the two examiners of the PPE at that time, namely Messrs Finsen and Bryant. She pointed out that the scripts written by the Appellant have no markings anywhere in the scripts themselves. However, at the end of the two examination books the marks awarded for each answer appear in handwriting. She testified that this was the marking style of Finsen, with whom she had worked over a long period of time. She testified that because of Appellant's complaints she and the Registrar asked Bryant, the other examiner, to remark the Appellant's papers. Bryant also identified the problem areas in Appellant's papers so that Appellant could prepare for the examination if he were to write it again. Ms Jacobs testified that in her letter she repeated the marks and comments which Bryant had given her.
- (31) Appellant argued that Ms Jacobs's abovementioned evidence is untrue. However, he did not really challenge the truth of her abovementioned evidence during cross-examination. I shall deal with this more fully below.
- (32) On 20 February 2007 Ms Sedica Davids, the then Acting Registrar of SACAP, wrote a letter to the Appellant noting that he had “on several occasions contacted SACAP with regard to understanding the reason for not passing the examination which he sat on 22 March 2006” (“B” at 110A). Ms Davids referred to the examination outline which had been emailed to him by Ms Jacobs in late 2006. However, no mention was made of the abovementioned letter which Ms Jacobs had addressed to Appellant on 27 January 2007 (“B” 108-9). Ms Davids's letter closed with the following:

“We are dealing with this case as a matter of urgency, as we are reviewing all our processes”.

There was no copy of the letter in bundle "B". A copy was probably furnished to the CBE Administration by the Appellant.

It does not appear that Ms Davids followed up her letter of 20 February 2007 by writing a further letter to the Appellant to advise him of how SACAP was dealing with his case. As she had said that they were "dealing with this case as a matter of urgency" one would have expected Ms Davids to have done so.

- (33) When Appellant pointed out to Ms Jacobs in cross examination that Ms Davids never mentioned in her letter of 20 February 2007 that his scripts had been remarked, she replied that unfortunately Ms Davids was "a very new acting Registrar at the time and she had no idea what was really going on in the offices at the time". Asked why she did not advise Ms Davids, she replied: "Because she did things without my knowledge" (transcript 17/5/10 at 14:409-414). Ms Davids has left SACAP's employ. She was not called to give evidence. Ms Jacobs has also left SACAP's employ but, as indicated, was called by SACAP to testify.
- (34) Appellant testified that he received Ms Davids's said letter ("B" 110A). Apparently he did not reply thereto. On 20 February 2007 Ms Jacobs unsuccessfully tried to telefax an item, probably Ms Davids's letter of even date, to the Appellant (see her note on "B", 111). It appears from the note and her evidence that she also unsuccessfully tried to telephone Appellant on his landline and cellular telephone, as well as on his telephone in Bloemfontein. Communications between Appellant and SACAP were apparently not easy.
- (35) On 2 April 2007 Appellant asked Ms du Toit by email whether there had been any progress in the matter. He made no reference to Ms Davids's letter of 20 February 2007 (bundle "B", 322). Ms Davids replied by email on the same day that they were in the process of analysing his scripts and would inform him as soon as they were able to do so ("B", 322). Appellant asked Ms Jacobs under cross-examination whether she had any knowledge of this. She replied in the negative and repeated that the Acting Registrar at that time did not consult the staff on registration matters (transcript 17/5/10 at 27:803-807). It appears that Ms Davids did not follow up her email of 2 April 2007. She appears to have been somewhat lax in dealing with correspondence.

- (36) On 3 May 2007 Appellant addressed an email to Ms Davids asking whether there had been any progress in the matter, saying that he was getting frustrated thinking about the time it was taking to get the matter finalised (“B”, 321).
- (37) It is to be noted that Appellant sent copies of his said email to Mr Malcolm Campbell, the President of SACAP at the time, as well as to Ms Jacobs.
- (38) On 3 May 2007 Ms Davids replied to Appellant by email that “we have dealt with your matter and SACAP resolved that you be granted a re-examination at SACAP’s costs”. She asked Appellant whether this had been communicated to him by Ms Jacobs as she had been instructed to do (bundle “B”, 321).

Under cross-examination Ms Jacobs said that if she had received such an instruction she would have acted on it (transcript 17/5/10 at 27:812-815). Apparently she received no such instruction since Ms Davids’s communication to Appellant regarding the re-examination appears to be SACAP’s first communication to that effect.

- (39) On 5 May 2007 Appellant replied in a long email (“B” 320) to Ms Davids’s email of 3 May 2007. Once again Appellant sent copies of his email to Campbell and Ms Jacobs. In the first two paragraphs Appellant stated: “Firstly to respond to your query; I still haven’t received any correspondence in this regard at all. I appreciate your response greatly but not entirely happy with the resolution in that it doesn’t respond to my attached request initiated in June 2006 in which the core of my query (sic), **wanted to understand how I failed** (Appellant’s accentuation). I asked for my marked papers to be made available to me so that I can see how/where I made misstates (sic). What Tertia did was to send me the answer sheets without copies of my marked papers which is what I asked for.

“Last time when I spoke to you over the phone you said that my papers were send (sic) to external person to moderate/evaluate. Then the next question; if this was done what was the outcome of this process? What did the moderator conclude?”

In his evidence in chief Appellant testified that at some stage Ms Davids informed him over the telephone that his scripts were not marked. They agreed, however,

that she would give his scripts to the President of SACAP at the time, Campbell, to mark (transcript 12/3/10 at 5:5-10). When Appellant was later recalled by the Committee after Ms Jacobs had given evidence, he testified that the reference to the "external person" who was "to moderate/evaluate", as stated in his abovementioned email ("B"320) was indeed Campbell (transcript 17/5/10 at 35:1064-36:1071). It is, however, important to note that Appellant makes no mention in his email that Ms Davids informed him at the time of such conversation that she had found that his scripts had not been marked or that she could not understand how he had failed if his papers were not marked. Such averments were made, for the first time, by Appellant two years later, namely on 20 May 2009 ("B" at 329). In his email of 5 May 2007, Appellant twice refers to "my marked papers" ("B" 320). If Ms Davids had already informed him on or before 5 May 2007 that his papers were unmarked, one would have expected Appellant to have repeated what she had told him.

Further on in his email of 5 May 2007 ("B" 320) Appellant said: "By merely offering to pay the cost of the exam is not satisfying my query....What are the reasons for SACAP to want to pay for my Exam?" It seems that he was distrustful of SACAP's offer and thought there must be some ulterior reason why it was making him the offer.

- (40) On the same day, 5 May 2007, Ms Davids answered by email (copied to Ms Jacobs and Campbell), acknowledging receipt and stating that she would respond by 8 May 2007 ("B" 320). It seems, however, that Ms Davids failed to do so. Exhibit "B", which is a bundle of documents compiled by SACAP, contains no such response by her. This lapse, together with other previous lapses on her part, support the inference that Ms Davids was lax in properly attending to her correspondence.
- (41) On 1 June 2007 Appellant sent an email ("B" 324) to Ms Davids, with a copy to Campbell, which he commenced as follows:

"I am now at the point where I believe that this matter will never be resolved to my satisfaction since it is very clear that SACAP has dismally failed to prove to me how one get (sic) to pass or fail the exam. **This clearly demonstrates the widely held view that SACAP pick and choose who pass and get registration and who doesn't** (Appellant's accentuation) and mainly at the

expense of previously disadvantaged individuals like me....I went out of my way to prove it and I have no doubt in my mind that I have confidently proved it". It is to be noted that Appellant expected SACAP to prove how he came to pass or fail the examination and that he inferred from SACAP's failure to prove same that SACAP was acting improperly in passing or failing candidates.

Appellant closed his email as follows: "I think that this matter has been dragging for very long and it is very clear that there won't be any resolution soon and there seem to be none in the horizon; **I think that we should now lay this matter to rest** (his accentuation) and will register with SACAP in another life if SACAP exist (sic) in that life".

The email was apparently received by Ms Davids since it appears in bundle "B", submitted by SACAP.

Once again, it appears from "B" that Ms Davids did not reply to Appellant's email. She was apparently not attending to her correspondence. It is important, however, that Appellant had decided "to lay this matter to rest" and that he apparently accepted at that stage that there was nothing else he could do about it.

- (42) Appellant's email of 1 June 2007 ("B"324) did, however, elicit a response from Campbell on 3 June 2007 ("B" at 326). In his evidence in chief Appellant, referring to this email from Campbell, testified that he (Campbell) "admitted that he indeed was given my scripts to mark and....that he was give(n) the original of my scripts" (transcript 12/3/10 at 5:13-15). Appellant also testified that in his email Campbell mentioned that he had lost the documents but that he would continue searching for them (same transcript at 6:15-20). Appellant is not correct in stating that Campbell admitted that he was given Appellant's scripts to mark. Campbell says ("B" 326) he would "peruse" the scripts, but that he realised it would not be wise to review it. As will appear below, Ms Jacobs did not agree with Appellant's suggestion in cross-examination that Campbell would mark the scripts. She said he would discuss the matter with Appellant and "sort" it out with him. See below.
- (43) The contents of Campbell's email are hearsay since Campbell did not testify. However, the fact that Appellant himself referred to the contents of Campbell's

email during his evidence in chief, permits us, in my view, to have regard to the contents of such email ("B"326), at least, in so far as it is supported by other evidence.

Much of what Campbell says in his email accords with other evidence before us. It is probable that the "external person, referred to by Appellant, who would "moderate/evaluate" Appellant's papers (B" 320) was indeed Campbell.

Ms Jacobs testified under cross-examination by Appellant that Campbell was asked by a Committee of SACAP "to look at Appellant's file and to basically sort out the whole thing (transcript 17/5/10 at 18:531-19:540). Later on in her cross-examination Ms Jacobs said: "The president had to sort out, he had to deal with the problem and say what they were going to do with this. He must come up with a reply to tell you Mr Dinthe that is what we're going to do or that is what we are going to do and that was the instruction from the Council to Mr Campbell" (transcript 17/5/10 at 19:566-20:571). She added that Appellant "kept calling and kept asking and Campbell was instructed by the Council of (or?) the Committee to sort out, to deal with you because at one time you were in Cape Town if I remember correctly and Mr Campbell is based in Cape Town" (19:572-576).

Asked what Campbell was going to do with the papers and whether he was going to mark them or sort out, Ms Jacobs replied: "Sort out. Sort out so that we would not be here today. Sort out" (20:577-578). Appellant put it to her that Campbell would mark the papers. She replied: "No, he would not mark it – how can Mr Campbell mark it? He would, he was supposed to discuss it with you and come to a, and say what are we going to do with you – are you going to, when are you going to write the exam or what are we going to do with you, with what is going to happen on this" (20:579-585). Ms Jacobs could not testify as to what happened afterwards (20:586-588).

- (44) Campbell refers in his email to "our relationship" which made him realise, that although he had received Appellant's "exam paper" from the SACAP staff in order to review it because of Appellant's "frustrations around his matter", it would not be wise for him to review "the paper" and that it should be done by an independent party.

It seems that the scripts were never "reviewed" by an "independent party" because they got lost while in Campbell's possession. Later, after they were found, they were re-marked by Heunis who also failed the Appellant.

The first and second paragraphs of Campbell's email read as follows:

"In October 2006, after you had informed about your frustrations around this matter, and in particular (sic) about the manner in which you were ignored by the SACAP staff, I requested to see a copy of your exam paper, which was handed over to me in an envelope and which I brought back with me to Cape Town to peruse. I immediately realised that it would not be wise for me to review the paper (given our relationship), and this should be done by an independent party, independent from me as well as from the existing Examiners. At the time, the Registrar had resigned, and the matter then awaited the appointment of the Acting Registrar, Sedica Jacobs, in January 2007 before it could be taken forward. You had since communicated with Sedica, and in consultation with me, she convened a meeting of the Registration's Committee, at which she proposed, and it was accepted, that a re-mark of your paper be undertaken by an independent party. This could have been towards the end of February. In attempting to implement this decision, it emerged that the copy I had been issued with was the original, and that no other copy existing at SACAP. I was then requested to return the copy in my possession. Despite and (sic) extensive search through all my SACAP and CBE related files, which are extensive, I have been unable to locate your paper. I have been hounded by Sedica on a regular basis, who has reported to me your growing anger at the fact that the matter is taking so long to being brought to a conclusion.

"I wish to apologise for adding to the anxiety suffered by both yourself and Sedica on this matter. I will continue to search for your paper, which I can only assume has found its way into another unrelated file. My exceedingly busy programme has meant that I have been unable to complete a thorough search of these files as yet."

It is important to note that Campbell referred to the first portion of Appellant's email ("B" 324), which Appellant had accentuated, by closing his email to Appellant as follows:

"Although professionals from historically disadvantaged backgrounds may in the past have had grounds for feeling that they had been prejudiced, with Sedica's role I can now with full confidence say that this is certainly not the case". ("Sedica" obviously refers to Ms Sedica Davids, the Acting Registrar).

How, when and by whom the Appellant's scripts were found does not appear from the evidence placed before us. It is probable that Campbell found them at some stage and forwarded them to SACAP. They were produced at the hearing before us and have been marked as exhibits "E" and "F". Photocopies thereof also appear in exhibit "B" (15-40).

Appellant testified that he did not reply to Campbell's email, nor did he communicate or comment upon the contents of Campbell's email to SACAP. It seems that Appellant did not, as a result of Campbell's email to him ("B" 326), reconsider his standpoint that "we should now lay this matter to rest" ("B" 324), which he had written about 3 days before he received Campbell's email. Although Campbell's email to Appellant was not copied to SACAP, it is probable that SACAP obtained a copy of his email from him because it forms part of the bundle, exhibit "B", which was prepared by SACAP from the documents in its possession.

- (45) There the matter rested for about twenty-two months. Appellant again took up the cudgels on 7 April 2009 in a letter ("B" 327) to the Registrar of SACAP (containing no reference to Ms Jacobs or Ms Davids) in which he stated that he had given SACAP enough time to investigate the matter but that he had not yet received a convincing answer on whether he had passed or failed the examination, and asked what had happened to his examination scripts. He expressed the opinion that SACAP could not prove that he had indeed failed the examination. If SACAP was not able to prove that he had indeed failed, by producing the marked scripts which he had requested from the beginning, it would be only fair if SACAP were to grant him registration without any further delay.

It is to be noted that Appellant stated that he had given SACAP enough time to do an investigation as to what had happened to his examination scripts and that he had received no convincing answer or factual evidence whether he had passed or failed the exam and what had happened to his examination scripts. This remark

was probably not quite fair since, as indicated, Appellant had expressly informed SACAP that he had decided "to lay the matter to rest" in his email of 1 June 2007 ("B" 324).

Appellant did not state in his letter that he had been informed by Campbell in June 2007 that he had mislaid his examination scripts and was unable to locate them. It seems that Appellant was probably banking on his scripts being irretrievably lost.

In his letter Appellant, for the first time requested that, if SACAP was unable to prove that he had failed, by producing the marked scripts, he should be granted registration without any further delay. Apparently this was his new plan of action to obtain registration, knowing that SACAP was probably unable to produce the marked scripts.

The fact that Appellant's letter of 7 April 2009 ("B"327) is in bundle "B", prepared by SACAP, shows that SACAP received the letter. There is, however, no indication that there was any reply from SACAP's side to the letter.

- (46) On 7 May 2009 Appellant wrote an email ("B" 332) to SACAP's website, referring to an email he sent to Ms Jacobs's email address in 2006 and to which he had received no "call/response". It is not clear to what email he was referring. Appellant made no reference to his letter dated 7 April 2009 ("B" 327) which he had addressed to the Registrar. He was informed by the new Registrations Officer, Ms Nita Schmidlin, that Ms Jacobs had left SACAP in 2007 and that her email address was no longer in use (at "B" 331). Ms Schmidlin requested Appellant to forward his query directly to her and said that she would try to assist him.

Appellant reacted by email on 11 May 2009 and attached previous correspondence. Unfortunately the particulars of such correspondence do not appear from his email. Appellant added that if more information was needed SACAP's President would know more about the case ("B" 330 foot and 331 top). On 19 May 2009 Appellant sent another email to Ms Schmidlin that he had not yet heard from her ("B" 330). On the same day Ms Schmidlin replied (at "B" 330) that she would look into the matter, adding: "Please note however that it has

never been the practice to make marked exam scripts available to the applicants that wrote the exam". (Ms Jacobs testified to the same practice).

- (47) Appellant replied on 20 May 2009 (at "B" 329) saying: "...what I know is that there were no marked papers. I mean my papers were not marked and as a result the Registrar, Ms Sedica Davids at the time couldn't understand how I failed if the paper (scripts) were not marked and then the papers were given to someone to rectify the issue or evaluate/moderate and the papers got lost in the process before that "rectification/moderation" could be done".

This is the first time that Appellant mentioned that Ms Davids had told him that his papers were not marked. He continues ("B" 329) that the papers "were given to someone to rectify the issue or evaluate/moderate the papers and the papers got lost in the process before that "rectification/moderation" could be done". This obviously refers to the same discussion between himself and Ms Davids to which he referred in his email to her on 5 May 2009 ("B" 320) in respect of which Appellant testified that the papers had been sent to Campbell to moderate/evaluate. Yet, when he recorded ("B" 320) the latter discussion with Ms Davids, Appellant made no mention that Ms Davids had told him that his papers were unmarked or that she could not understand how he had failed if his papers had not been marked. It seems as if Appellant has changed his version of what took place during his said discussion with Ms Davids.

- (48) On 28 May 2009 Ms Schmidlin emailed ("B" 329) the Appellant that "I went through the records of the 2006 Professional Practice Exam.... From the record of the results it is noted that you did not pass the exam, as you obtained an average mark of 44%". This is the average mark which Finsen had awarded the Appellant.
- (49) On 29 May 2009 Appellant reiterated by email ("B" 328) that "the registrar at the time informed me that **my scripts were not marked** (accentuation by Appellant). thus prompting them to be given to the President to look into them and then the president "lost" them".

Appellant's email makes it very clear, in my view, that Appellant has changed his version of his discussion with Ms Davids because he says that her disclosure to him that his scripts were not marked "prompted them to be given to the President

to look into them and then the President lost them". This clearly refers to the fact that his scripts were handed to Campbell and that Campbell lost them. The discussion between Appellant and Ms Davids (set out in Appellant's email at "B" 320), where she told him that his papers were sent to an external person to moderate/evaluate and which Appellant testified related to Campbell (transcript 17/5/10 at 35:1064-35:1071), refer to the same incident, yet there ("B" 320) Appellant makes no mention of Ms Davids telling him that his papers were unmarked. Indeed, Appellant testified that "by that time (i.e. the time of "B" 320) I didn't know that they were not marked at all" (do at 35:1044-1063).

- (50) On 5 August 2009 the Appellant appealed to SACAP in terms of sec 24(1) of the APA ("B" 333 read with par 13 at "B" 336).
- (51) On 14 August 2009 a special meeting of SACAP was held (exhibit "I"). The minutes relating to Appellant read as follows:

"The Registrar introduced this case to the meeting and mentioned that Seabata (Appellant) wrote PPE in March 2006 and failed, but he did not believe that he had failed. He (Seabata) approached the previous Registrar and he was advised that his paper was no marked.

"Seabata is giving SACAP an ultimatum to register him as a Professional Architect based on the fact that he was told his paper was not marked and thereafter mislaid.

"This was discussed at length and it was **resolved that:**

- Council's default could not translate into a condonement, due procedure must be followed
- Candidates must be assessed
- Seabata should be orally assessed and a panel appointed by Council would interview him. Prof G Steyn and P Crafford were requested to be part of the panel".

(52) On 21 August 2009 ("B" 345) the Registrar of SACAP wrote a letter to Appellant in which he was informed:

"(a) On 22nd May 2006, you received correspondence from SACAP indicating that you failed the examination, which SACAP is upholding.

"(b) You did request to peruse your scripts, which are unfortunately no longer in possession of SACAP, therefore your request cannot be addressed as the scripts no longer exist.

"You are further advised that the fact that your scripts are no longer available does not render the examination process flawed in any way as you were informed that you had failed in May 2006.

"SACAP does not have the authority to automatically pass you on these grounds. If you feel the process was flawed, you have to be retested as per the rules and regulations of Higher Education Institutions which are governed by the Higher Education Act of 1997.

"Your rights in terms of sec 33 of the Constitution are also not being violated in any way in that SACAP does not have the information and documentation that you are requesting in its possession any longer.

"SACAP shall not register you as a professional until such time that you have written and passed the Professional Practice Examination. You were advised at the time by the previous Registrar that SACAP would afford you the opportunity to write the exam free of charge. That offer still stands.

"Kindly be advised that should you wish to litigate against the Council (SACAP) such legal action shall be opposed".

(53) A further letter was written by the Registrar to Appellant on the same day, ie. 21 August 2009 ("B" 345A) in which he was advised that the "Council had ruled in addition that Appellant would be afforded the opportunity to be tested in terms of your Professional Practice knowledge orally (instead of through sitting the written exam) by a panel of two examiners".

- (54) Appellant did not take up the said offers and the appeal to the CBE followed, as indicated above.

THE GROUNDS OF APPEAL:

- (55) In his CBE Appeal Form ("A" flag 1), dated 1 October 2009, the Appellant stated his grounds of appeal as follows:

"2.1 I wrote the SACAP exam on 22nd March 2006, which I believe/confident (sic) I passed.

2.2 SACAP informed me that I failed and immediately requested my answer scripts, which were eventually found ± 12 months later and they were unmarked (Appellant's accentuation).

2.3 SACAP suggested and undertook to give these unmarked scripts to its President to remark/moderate, of which the results of that process were never made available to me.

(Therefore)

(1) How did SACAP come to the conclusion that I failed when my scripts were never marked, by the examiner (and) second time by its President.

(2) One and only reason SACAP is refusing my registration, is not that I failed the exam, but because SACAP lost my scripts".

Appellant stated the relief which he seeks as follows:

"CBE to exercise powers invested in it by the Act (and) other regulatory authority over SACAP (and) based on unfair manner I have been treated due to SACAP's

internal deficiencies, instruct SACAP to register me as Pr.Arch without further delay.”

- (56) As indicated, the Appellant’s original examination scripts have in the meantime been found and form part of the exhibits before us. There is no dispute that these are Appellant’s original examination scripts.

WERE THE SCRIPTS MARKED OR NOT?

- (57) The first issue is whether the scripts were marked or not. The first paper (exhibit “E”) bears the figure “43” noted boldly in manuscript within a white square of about 15 x 10 cm which appears on the front cover, about 5 cm to the right of the Appellant’s name. Anyone looking at the front page of the script could hardly fail to see the figure “43”. The same applies to the second paper on which the figure “44” appears in approximately the same position.
- (58) There are no marks or markings appearing in the part of the scripts where Appellant has written his answers. But, on the last page of each examination book marks are indicated in handwriting opposite numbers which are obviously the numbers of the questions. In the first paper the marks total “43” which have, on the face of it, been written by the same hand which wrote “43” on the front page of the examination book. The same appears in the second paper, where the marks are totalled to “44”.
- (59) If one accepts that Ms Davids said to Appellant that the papers were not marked and that she could for that reason not understand how he had failed (about which I have strong doubts), the question arises whether Ms Davids could have looked at the papers and have inferred that they were not marked.
- (60) It is possible that Ms Davids may have looked at the papers superficially, did not see the figures written on the front page thereof and did not see any marks or markings alongside or under the answers of the Appellant, and that she may have inferred, incorrectly, that the papers were not marked. However, had she examined them carefully, she would undoubtedly have seen the figures written on the front pages of the scripts, as well as the summaries of the marks awarded by the examiner at the end of the scripts. If Ms Davids did infer that the papers had not been marked, but had taken the trouble to ask Ms Jacobs, the Registration

Officer, in charge of examinations, about them, the latter would, undoubtedly have enlightened her that Finsen had marked the papers and have shown her his marks appearing thereon.

In the light of Ms Jacobs's testimony, it is likely that Ms Davids did not communicate with Ms Jacobs about the matter and that, for that reason, did not find out that Finsen had marked Appellant's scripts, that Bryant had remarked them and that Ms Jacobs had written a letter to Appellant on 27 January 2007 ("B" 108-9) to guide him in regard to the mistakes he had made in the examination.

If Ms Davids indeed inferred that the papers were not marked, the probable reason is that she did not examine the scripts carefully, did not see the figures on the front pages of the scripts, nor the summary of marks awarded at the end thereof, and did not speak to Ms Jacobs about the matter.

- (61) The Appellant did not in cross-examination attack Ms Jacobs's evidence that she could, by looking at the way the scripts had been marked, infer that it was Finsen who had marked them. In my view, there is no reason whatsoever to doubt Ms Jacobs's evidence in regard thereto. I accordingly find that the Appellant's scripts were indeed marked by Finsen and that he awarded the marks which appear from the original scripts, exhibit "E" and "F".
- (62) During argument at the end of the case, and in his letter to SACAP, dated 21 May 2010, referred to above, the Appellant submitted that Ms Jacobs's evidence in relation to the letter to him dated 27 January 2007 ("B" 108-9) is untrue. Ms Jacobs testified that she and the Registrar had requested the second examiner, or moderator, Bryant, to remark the Appellant's scripts and that the marks awarded by Bryant were the marks she referred to in her letter. She testified that the comments and suggestions in her letter were based on information she had obtained from Bryant.
- (63) When Appellant argued at the end of the hearing, that Ms Jacobs had lied about this, I asked him why he had not suggested that to Ms Jacobs when he cross-examined her. Although Appellant is a layman as far as the law is concerned, he is an intelligent person, as his letters and evidence show. His questions in cross-

examining Ms Jacobs show that he was able to confront her on a number of other issues.

- (64) Ms Jacobs's evidence in chief was relatively short, about 4½ pages (transcript 17/5/10 p2:22 to 6:144). Appellant's lengthy and detailed cross-examination extended from p6:147 to 22:635, about 15½ pages. After re-examination, I questioned the witness, whereupon Appellant asked the witness some further questions (29:867-30:891).

MS JACOBS'S EVIDENCE:

- (65) Because of the importance of Ms Jacobs's evidence, and the belated challenge by Appellant of a portion of her evidence, I intend dealing with her evidence in some detail. In her evidence in chief Ms Jacobs testified that she was the Registrations Administrator of SACAP. She started working for SACAP in 1996 and worked there until 2007. Basically, the whole administration process of the examination was done by herself. She explained the process as follows. Once the exams were done and all papers had been returned, they had to be marked by Ivan Finsen and Dave Bryant. They would normally split the papers between the two examiners. She would notify candidates of the exam results. The whole process took approximately 2½ months. She has no architectural qualification. Her qualifications are in accountancy.
- (66) Ms Jacobs testified that Finsen and Bryant were the only examiners in 2006. She described the difference between the marking style of the two examiners. Finsen would never give any comment or marks within the paper. He would just have the marks at the back of the examination book. Bryant would give her a sheet with the results on it and would also make notes within the exam book to tell them if there were any areas where he thought the candidate lacked knowledge, however, not at every question. Looking at the photocopy of Appellant's first paper ("B" 15 to 48) she was asked whether she could see from the marking style who marked the paper. She replied: "Ivan Finsen". Asked how she saw that, she replied that there was no marking anywhere. At the last page he had written the numbers of the questions with the marks next to them and the total at the bottom. The witness looked at Appellant's second paper ("B" 29-40) and was asked who marked it. She again replied: "Ivan Finsen". Asked why, she replied that there were no markings anywhere within. The question numbers and the

marks were at the back of the paper. Ms Jacobs testified that she would not give the two papers to separate markers.

- (67) Ms Jacobs identified the letter, dated 27 January 2007, from SACAP to Appellant "B" 108-109, as having been written by herself. Asked why the marks mentioned in her letter did not correlate (with the marks in Appellant's examination scripts) she replied that SACAP had received a letter from Appellant that he was not happy with the exam results. In this regard she referred to the email at "B" 110, dated 9 January 2007. Mr Leslie pointed out that the letter was illegible but that they had agreed what it says. (I have conveyed this more fully above). *Inter alia* Appellant wrote that all he needed was to see copies of the scripts since the exam was the most simple one he had ever written with SACAP. The witness explained that it was a decision of Council that a candidate does not get a copy of his script. She was asked to continue with her explanation why the marks awarded by Finsen and the marks mentioned in her letter ("B" 108-109) do not correlate. She said she asked Bryant to remark the paper for them. She faxed the paper to him and she used the marks Bryant had awarded, for her reply to Appellant. Asked what the comments in her letter were based on, she said she had to get advice from Bryant to assist her to give feedback to Appellant as to what his problem areas are so that Appellant could prepare efficiently when he did the exam again. Asked about question 3 at "B" 109 where she said the candidate scored 7 out of 16 instead of out of 40 she said that it was obviously a typing error on her behalf.
- (68) In cross-examining Ms Jacobs Appellant told her that, to the students calling in to SACAP, she was like the face of SACAP. They did not even know the registrar and they were dealing with her. He asked her whether she was working very closely with the registrar in terms of registrations and preparing for the exams. She confirmed it.
- (69) Appellant asked her about Finsen. She said that he had been the president of SACAP for approximately 8 years. Malcolm Campbell was the president in 2006. Finsen was a consultant to the council in his capacity as the examiner of the council. Finsen presented workshops in his private capacity to prepare candidates for the examination. The exam was set up by Finsen. The moderator was Bryant. The markers were Finsen and Bryant. Finsen was now deceased. Appellant suggested to the witness that Finsen was making money from the

She replied that she had attended every single workshop Finsen had. His whole aim was not to make money but to prepare the candidates for their profession. He invited her to the workshops because she wanted the knowledge to be able to assist the candidates in their future. Anybody not attending the workshops could pass the exam. Appellant asked her what SACAP did to ensure that everything was done above board. She replied that she could promise him that everything was always done above board. She explained the procedures relating to the exams.

- (70) Appellant suggested to Ms Jacobs that there was a conflict of interest for Finsen to do the workshops and make money out of it. Ms Jacobs disagreed. She said that Appellant was more interested in the fact that Finsen made money than (in the fact) that he tried to prepare candidates for the exam and to go out and function as professional people. She asked Appellant if he would do a job without being paid. Appellant regarded it as an unfair question. Appellant repeated that there was a conflict of interest. Finsen was making money out of the workshop and at the same time he was an examiner. The Chairperson told Appellant that he had exhausted the topic. She asked him to move on.
- (71) Appellant asked Ms Jacobs why she had left SACAP. She replied that she worked 16 hours per day, 7 days a week and that she eventually became extremely ill.
- (72) Appellant told Ms Jacobs that what she had said about giving his scripts to Bryant to remark was very interesting. He asked her who made the decision to go that particular route. She replied that she and the Registrar discussed Appellant's queries and they decided that it would be remarked by Bryant.
- (73) Appellant pointed out that on 20 February 2007 the registrar wrote him a letter ("B" 110A) but never even mentioned that his scripts were remarked. Ms Jacobs replied that the letter was written by Ms Sedica Davids, "a very new acting Registrar at the time and she had no idea what was really going on in the offices at that time" (transcript 17/5/10 at 14:411-412). Appellant asked why she did not advise Ms Davids, to which the witness replied: "Because she did things without my knowledge" (at 14:413-414). Referring to the same letter, Appellant put it to the witness that Ms Davids would have informed Appellant, to allay his fears about the fairness of the process or outcome that his papers had been given to a

second examiner to remark. The witness replied that she could not answer him on that. She testified that at that time Ms Davids had been Acting Registrar for most probably three weeks. Appellant put it to the witness that that was crucial information. She replied that she could unfortunately not answer him. She testified that Ms Davids asked for the files, took them and that was it. So she could not answer in respect of Ms Davids's response to Appellant's query. Appellant repeated the question that the Registrar would have mentioned to him (in her letter) that they had taken (the scripts) to Bryant to remark and that they had come to the same conclusion (ie. that he had failed). The witness repeated that unfortunately she could not answer for what Ms Davids had said to him (in her letter) (at 15:146-16:463).

- (74) Appellant put it to Ms Jacobs that it would be illegal not to give candidates their scripts. She replied that she was not a council member and that she followed her instructions.
- (75) Appellant put it to Ms Jacobs that the examiner and the marker should have been two different people in terms of quality control. She asked what would be the difference. He replied that "these bodies would be independent" (at 17:493). The witness asked what the difference was because there was an examiner and a moderator.
- (76) Appellant put it to Ms Jacobs that Ms Davids telephoned him and said "Seabatha you've been trying to get hold of your papers and eventually we managed to get them" and that she added: "Seabata I don't know how you failed because these papers were not marked" (do at 18:531-5). The witness laughed and said: "I'm sorry, Mr Dinthe, you've got proof that your papers was marked here by Mr Finsen. And why the papers were not in the office, Malcolm Campbell, the president of the council at one stage was instructed by the council in one the – what committee was it – Education Committee – to look at your file and to basically sort out the whole thing. That is why it was not in the office because Mr Malcolm Campbell had the file" (do at 18:531-19:540).
- (77) Appellant repeated his question: "Ms Davids said to me: Seabatha, I've got your papers here in front of me – I don't understand. These papers are not marked". The witness replied: "Because she obviously did not look at the back of the book to see that it was. They was (sic) marked at the back of the book where it says

number and then the mark you got for the paper” (at 19:543-546). Appellant said to the witness that she had said (earlier) that she worked very closely with the Registrars. The witness replied: “Yes, unfortunately not with Ms Davids, as it might have been with the others”. She repeated that she did “not work as closely with the Acting Registrar Sedica Davids as I did with the previous Registrar” (at 19:547-552).

- (78) Appellant put it to Ms Jacobs that she would have been the right person to stop Ms Davids from giving the documents to Malcolm Campbell because she (Ms Davids) was insisting they had not been marked and that Ms Jacobs would have said: What is the purpose in taking them to Malcolm? That would have been the third time around of marking. Ms Jacobs replied: “Unfortunately Ms Davids did not consult staff when she did certain things. So I cannot answer that because she didn’t consult us, the staff. She was a new Registrar with new ideas. So she did not consult us when she did certain things. I’ve just explained to you I didn’t work with the Registrar and Registrations department as we did previously” (at 19:555-565).
- (79) Appellant asked: “So when these papers were given to Malcolm they were marked for the first time. What was the purpose of giving them to the president?” She replied: “Because the president had to sort out, he had to deal with the problem and say what were they going to do with this. He must come up with a reply to you to tell you Mr Dinthe that is what we’re going to do or that is what we are not going to do and that was the instruction from the Council to Mr Campbell” (at 19:566-20:571). She explained that Appellant “kept on calling and kept asking and Mr Campbell was instructed by the Council of (sic) the Committee to sort out, to deal with you because at one time you were in Cape Town if I remember correctly and Mr Campbell is based in Cape Town” (at 20:573-6).
- (80) Appellant asked Ms Jacobs what Campbell was going to do with the papers: mark them or sort them out. She replied: “Sort out. Sort out so that we would not be here today. Sort out” (at 577-578). The final outcome would have been to say that he failed or passed. Asked whether Campbell would mark the papers, she replied: “No, he would not mark it – how can Mr Campbell mark it? He would, he was supposed to discuss it with you and come to a, and say what are we going to do with you...when are you going to write the exam or what are we going to do with you, with what is going to happen on this” (at 20:579-585).

- (81) Appellant asked Ms Jacobs why candidates were told they had failed or passed, instead of telling them what percentage they had obtained in the examination. She replied: "Because that was a judicial decision, made by Council many years ago and they kept to that decision. I was just told that we're not allowed to give marks to the candidates...." (at 20:595-21:602).

Her last sentence probably explains why Ms Jacobs did not in her letter to him of 27 January 2007 ("B" 108) furnish Appellant with all the marks which Bryant had awarded to him for each question he had answered.

APPELLANT'S SUBMISSIONS IN HIS LETTER DATED 21 MAY 2010

- (82) I now turn to Appellant's letter, dated 21 May 2010, addressed to the Chairperson of the Appeal Committee, to which I have referred to above. Appellant submits that Ms Jacobs "went out of her way to respond to correspondence sent to Ms du Toit, (PA to Registrar) apparently without the Registrar knowing" (my underlining). The "correspondence" referred to is Appellant's email sent on 9 January 2007 ("B" 110) in which Appellant, as indicated, enquired about his earlier query to SACAP (transcript 17/5/10 at 4:97-5:108). Appellant is mistaken where he states that Ms Jacobs responded to his email "without the Registrar knowing" "because she testified that she and the Registrar decided that the Appellant's scripts would be remarked by Bryant (at 14:387-393). After Bryant had re-marked Appellant's scripts Ms Jacobs responded to Appellant's enquiry on 27 January 2007 ("B" 108). The Registrar to whom Ms Jacobs referred in her aforesaid evidence was clearly the predecessor of Ms Davids.
- (83) In the second paragraph of his said letter of 21 May 2010 Appellant states that the reason Ms Jacobs was called as a witness was for her to confirm that the marks she "gave" (in her letter to him at "B" 108-9) were totally different to the marks which appeared on his scripts (my underlining). In par 4 of his said letter Appellant says "the marks were given arbitrarily by the witness (Ms Tertia Jacobs)..." (my underlining). There is no basis whatsoever for stating that Ms Jacobs "gave" the marks referred to in her letter ("B" 108-9) or that she gave such marks "arbitrarily" or otherwise. Appellant's contention conflicts with Ms Jacobs's evidence that the marks referred to in her letter ("B" 108-9) were obtained from Bryant who had been asked, with the Registrar's approval, to remark Appellant's

scripts. In any event it is completely improbable that Ms Jacobs would have sucked the marks and the comments mentioned in her letter from her thumb. It is quite apparent from her letter, as well as from her evidence, that she was attempting to help the Appellant because he could not understand why he had failed and she wanted to provide him with a guide as to the mistakes he had made in the examination. Ms Jacobs made a very favourable impression as a witness. I have not the slightest doubt that her evidence as a whole, and in particular in regard to her said letter, is credible and trustworthy and that the Committee may with confidence rely on the truth of her evidence.

- (84) The Appellant's argument in the 3rd paragraph of his said letter of 21 May 2010, that Ms Jacobs "has been coached to be dishonest in her testimony" is also without any factual foundation and improbable. The evidence given by Ms Jacobs is probable and trustworthy. She gave her evidence in a forthright manner. There is no reason whatsoever to find that she "has been coached to be dishonest in her testimony".
- (85) The arguments contained in the 5th paragraph of Appellant's said letter of 21 May 2010 that SACAP had a discussion with Ms Jacobs to get SACAP out of this tight corner," that she "went out of her way to cover up what was wrong within the organisation", or that she "invented" her evidence, are all totally unfounded and improbable. If such a suggestion had been put by Appellant to Ms Jacobs, I have not the slightest doubt that she would have refuted it. It is unfair to criticize Ms Jacobs and SACAP while Appellant did not put this to Ms Jacobs when she was giving evidence.
- (86) In the 6th paragraph of Appellant's said letter of 21 May 2010 he suggests that if he had enough time to study Ms Jacobs's evidence, he would have done better. He never asked the Committee for time to study her evidence. I am sure that if he had asked for time to study her evidence before cross-examining her, he would have been granted a reasonable opportunity to do so.
- (87) In the first paragraph, on p2 of Appellant's said letter of 21 May 2010 in sub-par (A), he submits that SACAP "squandered its responsibility of fairly marking my scripts in the first instance". This is incorrect. The scripts show that they were fairly marked. (I shall deal more fully below with the question whether the marks awarded by Finsen are fair.) The marks have been identified by Ms Jacobs as

those of Finsen. There is no reason to doubt that evidence. It also accords with all the probabilities. The submission that SACAP "should not be granted another chance 44 month(s) later to do so", is unfounded and wrong. SACAP is not asking for "another chance" to mark the scripts. Appellant's scripts were marked by Finsen, and thereafter by Bryant. Heunis's evidence supports the finding of Finsen (and apparently Bryant also) that Appellant has not passed. Appellant's submission that he could have sat for another exam in October 2006 or March 2007 is unfounded. He was informed by letter on 22 May 2006 that he had not passed ("B" 114). In the same letter he was informed that "the next professional practice examination will be written on 09 October 2006. An application is attached". He could have re-written the exam on that date. He never suggested otherwise in his evidence or in any of his letters to SACAP.

- (88) In sub-par B on p2 of his said letter of 21 May 2010 Appellant submits SACAP "has done everything procedurally wrong and unethical to cover up their defaults...". To my mind, this submission is unfounded. SACAP has in no way done anything procedurally wrong or unethical. The fact that some of Appellant's letters or emails were not answered or fully answered by the administration of SACAP is probably due in some cases to Ms Davids not complying with her duties, or in not consulting staff who knew more about Appellant's queries than she did, to changes of SACAP's staff and the fact that Appellant's scripts were unfortunately lost by Campbell, and remained lost for a considerable time before they were found.
- (89) I did not "order" that SACAP should call Ms Jacobs as a witness, neither did the Committee order SACAP to do so, as Appellant suggests in the paragraph following sub-paragraph B on p2 of his said letter of 21 May 2010. When Mr Leslie wished to close SACAP's case after he had called only one witness, namely Heunis, on the first day of the hearing, on 12 March 2010, I pointed out to him that the Appeal Committee had not been provided with any answers from SACAP's side in regard to Ms Jacobs's letter (at "B" 108-109) and that she would probably be able to give the Committee an answer as to why the marks she mentions in her letter differ from the marks that were actually awarded to him in his examination scripts (which appear from the Appellant's original scripts). Appellant had, at that stage in his evidence already drawn the Appeal Committee's attention to such difference, but no reasons therefore had been furnished to the Appeal Committee in cross-examination of Appellant, or

otherwise. See transcript 12/3/10 at foot of 67 and top of 68. I pointed out to Mr Leslie that this was not an ordinary civil case and that if Ms Jacobs was not called to testify the Committee would not be properly fulfilling its investigative duties, especially in the light of Appellant's averments during the hearing of dishonesty on the part of SACAP (at 68 foot). The hearing was adjourned at Mr Leslie's request in order to call Ms Jacobs as a witness.

- (90) When the hearing recommenced on 17 May 2010 Mr Leslie called Ms Jacobs to testify. I have already fully dealt with her evidence. In my view, Ms Jacobs has completely clarified any problem arising from the difference between the marks mentioned in her letter to Appellant of 27 January 2007 ("B" 108-9) and the marks appearing on the Appellant's scripts. Indeed, Ms Jacobs's evidence has clarified many other aspects of the matter which would otherwise have remained unclear.
- (91) Relating to the Appellant's submissions in his said letter of 21 May 2010, under the heading "First Hearing" on p2 the following may be noted: When I reminded Mr Leslie that the Committee had not been provided with answers from SACAP's side in regard to the letter of Ms Tertia Jacobs ("B" 108-9), Mr Leslie's first reaction was that the letter was written "in her personal capacity" probably because she states, towards the end of her letter: "Please note that this is my opinion and not that of the council or examiners and this is purely to try and assist you with the problem areas you may have" ("B" 109). However, I pointed out to Mr Leslie that the letter had been written on an official letterhead of SACAP and I reiterated that Ms Jacobs could be able to give the Committee a reply why the marks mentioned in her letter are apparently different from the marks which were awarded by the examiner (transcript 12/3/10 foot of 67 and top of 68).
- (92) Relating to Appellant's submissions in his said letter of 21 May 2010, under the heading "Second Hearing" p2, if he really suspected that Ms Jacobs and SACAP "sat and strategized a way out of this damning evidence", one would have expected Appellant to confront Ms Jacobs with such suspicion. He did not do so. There is, in any event, no "damning evidence". The difference between the marks awarded by the examiner and those mentioned in Ms Jacobs's letter of 27 January 2007 ("B" 108-9) has been fully explained by Ms Jacobs in her evidence. Her evidence is furthermore in accordance with the probabilities. There is also no reason to infer that SACAP and Ms Jacobs "strategized a way" out of any evidence. As indicated, it is unfair to Ms Jacobs and SACAP to make

such suggestions at this late stage, without having given Ms Jacobs a fair opportunity to answer thereto in cross-examination.

- (93) At the foot of p2 of Appellant's said letter of 21 May 2010 in par 1 at the foot of p1, he states that Ms Jacobs did not provide "the new marker's marking report like the latest marker" (i.e. Heunis). Ms Jacobs testified that it was Bryant's custom to write his marks and comments on a sheet of paper. Neither Appellant nor anyone else asked her what had happened to that sheet of paper nor did Appellant at any stage call upon SACAP to produce the document. I doubt very much whether the document still exists. Apparently it does not form part of the documents in SACAP's possession which have been included in exhibit "B". In any event, it seems likely that the main contents of that sheet of paper have been incorporated in Ms Jacobs's letter of 27 January 2007 ("B" 108-9). There is, in my view, nothing suspicious about the fact that the sheet of paper has not been produced.
- (94) Relating to par 2 at the top of p3 of Appellant's said letter of 21 May 2010, it is correct that in respect of certain answers in Appellant's scripts no mention is made in Ms Jacobs's letter of 27 January 2007 ("B" 108-9) of the marks awarded in regard to such answers. Neither the Appellant nor anyone else asked Ms Jacobs why that was so. It may have been purely an omission on her part, or it may have been that, on account of SACAP's policy of not providing a candidate with the marks he had achieved in an examination, she had intentionally not provided Appellant with all the marks. See transcripts 17/5/10 at 20:595-21:602 where Ms Jacobs said: "...I was just told that we're not allowed to give marks to candidates....that was my instruction...you don't give candidates their marks". The Appellant's submission that the omission of the marks may have been due to Ms Jacobs's "own concoction of the truth, hiding SACAP's defaults" is, once again, unfounded and improbable. Why would she provide Appellant with a guide as to the mistakes made by him in the examination, as she states at the beginning of her letter, and thereafter concoct the truth by omitting certain marks awarded by Bryant? In any event, there was nothing to concoct since Finsen (and probably Bryant also) had failed the Appellant. Once again, it is unfair to Ms Jacobs to suggest these untruths, or even fraud, on her part without having put it to her in cross-examination.

- (95) I turn to par 3 at the top of p3 of Appellant's said letter of 21 May 2010. As indicated above, Ms Jacobs and the Registrar decided that Appellant's scripts would be remarked by Bryant (transcript 17/5/10, at 14: 387-393). Appellant's submission to the contrary is unfounded. Appellant also relies on the third last sentence of Ms Jacobs's letter ("B" at 108-9) where she says: "Please note that this is my opinion and not that of the council or the examiner and this is purely to try and assist you with the problem areas you might have". Ms Jacobs was not asked any question about this sentence. Probably she only intended to say thereby that the letter contained her opinion, that it was unofficial and purely to assist the Appellant with the problem areas he might have had.
- (96) In regard to the four sub-paragraphs following par 3 on p3 of Appellant's said letter, it is true that he is a layman, but , as indicated, it is unfair to Ms Jacobs and SACAP that Appellant makes out Ms Jacobs as a liar and a fraud who has "strategized" with SACAP to deliver "false and lying evidence", while Appellant has not given her an opportunity of rebutting such imputations during his lengthy cross-examination of the witness. Furthermore, Appellant's failure to cross-examine Ms Jacobs on these aspects of her evidence, cannot be held against SACAP or Ms Jacobs and cannot improve Appellant's case against SACAP.
- (97) Although, as indicated above, there are strong reasons to doubt the truth of the Appellant's version that Ms Davids told him that his scripts were unmarked and that she could not understand how he failed if his scripts were not marked ("B" 329), I shall accept in his favour that he was indeed given such information by Ms Davids.

DID APPELLANT PASS THE EXAMINATION?

- (98) As indicated above, I am satisfied that if Ms Davids did tell Appellant that his scripts were unmarked, it is probable that Ms Davids mistakenly thought that the scripts were unmarked. As indicated, I accept, as a fact, that Finsen marked the Appellant's papers and that he awarded the marks which are reflected on the last page of each of the two exam books, and that he placed the total of such marks on the front page of the books. Probably Ms Davids did not observe these marks and wrongly assumed that the papers had not been marked. According to Ms Jacobs, Mrs Davids did things on her own without consulting staff. She was newly appointed as acting registrar and was probably unaware of Finsen's

marking methods and did not discuss Appellant's scripts or his complaints with other members of the staff, otherwise she may have discovered that her inference was wrong. See in this regard Ms Jacobs's evidence (transcript 17/5/10 at 18:581-19:565).

- (99) Finsen has, in the meantime, died, but his marks and method of marking are well-known to Ms Jacobs and she was able to identify Finsen's marks on Appellant's scripts. Ms Jacobs's evidence was most convincing and probable. Appellant's attacks on her credibility and trustworthiness are, as indicated, totally unfounded.
- (100) As indicated, Ms Jacobs informed the Appellant on 22 May 2006 by letter that he had not passed the examination. According to Finsen's marks, Appellant got 43% for the first paper and 44% for the second. In her evidence Ms Jacobs said that if a candidate achieved below 50% in either paper he would fail. A further requirement was that a candidate's average for both papers should be 60% (transcript 17/5/10 at 22:648-23:669). There can be no doubt that Appellant failed the examination and that he was timeously and properly informed thereof.

In my view, the whole problem in this matter was caused by Appellant's refusal to accept that he had failed and his insistence on seeing his scripts. Despite Ms Jacobs's letter ("B" 108-9) which provided him with a guide as to the mistakes he had made in the examination, he still refused to accept that he had failed. Even at the hearing where it was, to my mind, proved beyond reasonable doubt that he had failed, he insisted that SACAP should be ordered to register him, not because he had passed, but because SACAP had refused to show him his scripts. He even went so far as to aver that SACAP had "engineered" his failure of the examination. In my view, it is clear that SACAP did not "engineer" Appellant's failure and that Appellant failed because he did not possess the required knowledge to pass the examination. This will appear more fully below from a consideration of the marks that were awarded to Appellant by Finsen, Bryant and Heunis, and the comments of Bryant and Heunis in respect of Appellant's answers.

To my mind, it is unnecessary to decide whether SACAP was correct or not in refusing to make Appellant's scripts available for inspection. Even if SACAP's attitude in this regard is unjustified, that would, in my mind, be no reason to order SACAP to register the Appellant as a professional architect, if he indeed failed the

examination. The crucial question is, accordingly, whether Appellant passed the examination or not.

During argument at the end of the case, Appellant was asked whether the Appeal Committee should look at his answers in his papers and the outline answers, Appellant's answer was that "whether the answers were correct (or not), that is water under the bridge, because they have compromised the whole examination process already" (transcript 17/5/10 at 55:1721 to 56: 1733). When asked whether the Appeal Committee should look at his papers, Appellant replied: "...do you want a direct answer? Don't go and look at that, look at the process that's been compromised....." (at 56: 1751 to 57: 1758). In spite of Appellant's said attitude, I consider that it is essential to determine whether Appellant has passed or failed the examination. To my mind, the process has not been compromised. If Appellant did not pass, whatever transpired thereafter is really irrelevant to the question whether he should be registered by SACAP as a professional architect.

- (101) Although Bryant, according to Ms Jacobs, remarked the scripts, at her and the Registrar's request, we do not know what marks Bryant granted in respect of all the answers in the two papers. All we have are the marks in respect of certain questions, as set out in Ms Jacobs's letter of 27 January 2007 ("B" 108-9). The purpose of the letter was, of course, not to inform Appellant of the marks he had achieved, but to provide him with "a guide as to the mistakes made by yourself in the examination".

It is probable, in my view, that Bryant also failed the Appellant. Although we only know his marks in respect of certain questions, we know that Appellant scored 25 marks out of 55 for paper 1's questions 1, 3 and 5, which equals 45,5% for those questions. For paper 2 Appellant scored 11 marks out of 50 for questions 1 and 3, which equals 22% for those questions. From the remarks made by Bryant in respect of the remaining questions ("B" 108-9) one can infer that Appellant probably did not do well in those questions and failed the examination from Bryant's point of view.

HEUNIS'S EVIDENCE

- (102) Further confirmation that Appellant failed the examination is to be found in the evidence of Mr Marius Heunis, the first witness called on behalf of SACAP

(transcript 12/3/10 at 50 et seq). He is a professional architect with SACAP. He has twenty years experience in the architectural profession. He graduated in 1990. He started marking PPE scripts in September 2008. He has marked in excess of 250 scripts since then. SACAP approached him and asked him to look at Appellant's scripts objectively, as he did with every paper, and to evaluate them. He was not told anything about the background of the matter, apart from it having evolved into a legal matter. He is not aware of Appellant's previous results for the examination. He was sent copies of the scripts save that the two last pages of each containing the marks awarded by Finsen, were not provided to him. The copies he marked were handed in as exhibits "G" and "H". On the front cover of the copies sent to him "43" appears on paper 1 and "44" on paper 2. He did not pay any attention to those numbers. He assumed they were numbers in the order of being submitted or handed in by the candidate. He did not understand they were the marks awarded to Appellant by the first marker. No other marks were reflected inside the copies of the scripts which he marked. The back pages of the original scripts containing question numbers and marks for each question, were not sent to him. When giving evidence, it was the first time he had access to such information and the numbers "43" and "44" (on the front pages) then made sense to him. He confirmed that the contents of his report (exhibit "D") is true and correct. His report is dated 3 March 2010. According to his report Appellant achieved 49% in paper 1 and 39% in paper 2. The marks awarded for the answers to each question are set out in his report (exhibit "D") as well as the reasons for such marks. I shall return to this in greater detail below.

- (103) Under cross-examination by the Appellant, Heunis said that he was remunerated for the work he did for SACAP in assisting them twice a year with the marking of the Professional Practice Examination. In par (e) under the heading "Paper 2" in par 2 of Exhibit "D" he stated that "although 0 marks were given, one could grant 4 marks for effort, at the Registrar's discretion, in which event Paper 2 will amount to 43%". Appellant asked why the witness would be so generous with 4 marks. He replied that he thought how Appellant had struggled through the question and that he would grant 4 marks for his efforts in trying to assess the amounts in question. Asked why he did not feel sorry for Appellant and just give him 50% as the overall mark, he replied that he rated the papers objectively based on the model answer. Asked whether he usually gave students marks out of generosity, he replied that he does not usually do that. He granted 4 marks for effort, not to pass him, but for him to achieve as much as was reasonably possible. He cannot

pass anybody because he feels sorry for him. Appellant put it to the witness that it was extremely coincidental that the mark he arrived at (i.e. 44%) was the exact mark arrived at by the previous examiner. The witness replied: "Not at all, I only find it as a confirmation that the two individual markers assessed and evaluated both papers based on the facts given in the model answers and experience.....It should be a clear indication that the marks are in fact quite accurate". Appellant asked him whether there was a suggestion that he should arrive at a particular result. The witness: "Categorically, not. I did not have any insight to the previous results and I am in fact not aware who marked the previous paper, so not at all". Appellant asked the witness whether he would be able to recommend to SACAP that he should pass. The witness replied: "No, not at all, because.....even if the 4 marks are granted, the total required to pass is still insufficient".

- (104) Heunis was informed by the Committee that Finsen was the previous examiner of Appellant's papers. Heunis answered that he knew Finsen, but that he was not aware that he was the marker of the papers. Asked what Finsen's status was in the architect profession, he replied that he was highly regarded, a superb individual, a brilliant architect, an excellent mediator and excellent contract administrator. He personally had the utmost of respect for him.
- (105) In evaluating Heunis's merits as a witness, and more particularly whether the marks he awarded and the comments he made in respect of the Appellant's answers were fair and reasonable or not, one should, in my view, have regard to the questions in the two papers, as well as the outline answers (bundle "B" at 5-14), as well as the marks which Heunis awarded to the Appellant and his comments. From an evidential point of view, the marks awarded by Finsen and Bryant and the latter's comments are hearsay, although it has in my view, been established as a fact that Finsen marked the Appellant's papers, that Bryant remarked them, that they awarded the marks to which I have referred earlier, and that Bryant made the comments which were recorded by Ms Jacobs in her letter to Appellant, dated 27 January 2007 ("B" at 108-9).
- (106) Question 1 of Paper 1 counted 20 marks (bundle "B" at 5). Heunis states in his report (exhibit "D") that there are 12 requirements to be met in the answer and that the Appellant sufficiently referred to 7 of these. He says: $20 \text{ (marks)} \div 12 \text{ (requirements)} = 1,667 \text{ marks per requirement}$, thus $7 \times 1,667 = 12 \text{ marks}$.

I agree that the outline answer to this question provides for 12 requirements to be met. It seems to me that Heunis was rather generous in finding that Appellant has sufficiently referred to seven of the requirements. It is noteworthy that Finsen awarded the Appellant only 7 marks and Bryant only 8 marks for his answer to this question. It seems to me that Finsen and Bryant are probably nearer the mark than Heunis in their evaluation of Appellant's answer.

- (107) Question 2 of paper 1 counted 20 marks ("B" at 6). Heunis awarded Appellant 8 marks for his answer. He says in exhibit "D" that Appellant failed to address the core issue of the question, being the assessment of the contractor's ability to perform the building work. Instead the candidate elaborated on how the contractor should be evaluated to become an accredited and approved vendor of the client. He states that certain requirements, although dubious, were referred to and 8 marks were given for the benefit of the doubt. Finsen awarded 6 marks. No mark of Bryant's for this question is mentioned in Ms Jacobs's said letter.

I agree with Heunis' comments. Appellant has, to my mind, missed the point of the question. Once again, I would rather agree with the mark awarded by Finsen than with that of Heunis. Heunis again appears to be over generous. It is to be noted, however, that both Heunis and Finsen are agreed that Appellant's answer should be rated well below 50%, with which I agree.

- (108) Question 3 of paper 1 counted 20 marks ("B" at 6). Heunis awarded Appellant 10 marks for his answer "for reasonably adequate references..." (exhibit "D"). Finsen awarded Appellant 8 marks while Bryant awarded 9 marks. He added: "The fee scale question seems to cause a problem for most candidates and the same with you". Appellant, in my view, failed to answer the part of the question where he was required to "give an example of a building project in which all three types of work occur", i.e. alterations, additions and restorations. He also failed, in my view, to answer the final part of the question at all, namely "in undertaking such type of project, without bills of quantities, what safeguards would you employ to ensure that the total fee may be correctly calculated". Heunis' mark of 50% appears to be rather generous. Finsen's award of 8 marks appears to me to be more appropriate, which equals 40%.

- (109) Question 4 of paper 1 counted 25 marks (bundle "B" at 7). Heunis awarded Appellant 12 marks for his answer. He says (exhibit "D"): "the candidate appears

indecisive and cannot conclusively distinguish between mediation and arbitration. It appears as if the candidate assumes that the two processes are equal. There is also no reference to the process of establishing a dispute. 12 marks were given for reasonably accurate listing of the advantages and disadvantages between litigation and arbitration (or mediation as referred to by the candidate)". Finsen awarded 14 marks ("B" at 28). It does not appear what marks Bryant awarded but his comment on Appellant's answer is as follows: "This question posed on arbitration and mediation. Please note that mediation is not an alternative because it does not give a binding rule it requires a settlement. This question was answered in a previous paper in great detail and candidates seem to copy the answer instead of using their knowledge and discretion in this regard. You must please look at the difference and I would suggest that you could perhaps do an arbitration course."

In my view, Finsen's 14 marks are over generous. The question specifically required a description of two alternative processes whereby a binding ruling could be obtained which would resolve the dispute and establish the architects' right to be paid their fees. To confuse arbitration and mediation, as Appellant does, no less than three times in the course of his answer, shows that he does not at all understand the difference between the two concepts. Other parts of his answer where he discusses the advantages of litigation and the disadvantages of what he calls "mediation/arbitration", do not make sense. In the light hereof I do not agree with Heunis' view that Appellant gave "reasonably accurate listing of advantages and disadvantages between litigation and arbitration (or mediation as referred to by the candidate)". Nevertheless I consider that the 12 marks awarded by Heunis, are more appropriate than the 14 marks awarded by Finsen.

- (110) Question 5 of paper 1 counted 15 marks ("B" at 8-9). In summary, what particular aspects of a contractor's programme of construction should the principal agent critically examine and consider? What purpose will the programme serve for the contractor, the principal agent and the employer?

Heunis observed as follows: "The candidate repeats a number of issues in an attempt to fill the page, however 7 marks were awarded for reasonably accurate references. The purposes are combined into one category for all 3 the parties concerned and individual purposes are not stated or separated as requested". Bryant and Finsen both awarded 8 marks. Bryant's comments are as follows:

"Here you needed to describe two alternative processes in using the Client Architect Agreement. Please remember that you are the principal agent and your duties is (sic) to make sure that the contractor utilize (sic) his resources to the optimum. Time is always an (sic) factor and look (sic) practical completion."

In my view, Appellant has not succeeded at all in answering the first or second parts of the question. I agree with Heunis that Appellant "repeats a number of issues in an attempt to fill the page". The 8 marks awarded by Finsen and Bryant I regard as too generous. Although Heunis' award of 7 marks is rather generous as well, it is, in my view, more acceptable than the 8 marks awarded by Finsen and Bryant.

- (111) In summary, I regard Finsen's total award of 43% for the first paper to be probably more appropriate than the 49% awarded by Heunis. Probably Finsen was too generous himself in respect of the 14 and 8 marks which he granted in respect of the answers to questions 4 and 5 respectively, and should have awarded the 12 and 7 marks respectively which Heunis awarded in respect of such answers. There can be no doubt that Appellant failed the first paper.
- (112) I now turn to the second paper. Summarized, the first question is whether a contractor, who has failed to bring the works to practical completion by the date for practical completion, is liable to the employer for penalties, notwithstanding that the employer has taken occupation of the works. The question counted 10 marks. Heunis awarded 2 marks. He stated: "in Q1, it is obvious that the candidate does not possess a sufficient understanding of the different stages of completion". It is unnecessary to quote the rest of his comments. Finsen awarded 6 marks. Bryant awarded 4 marks. Bryant commented: "JBCC contract needs a little work and it is advisable that you contact the CIA for workshops in your area. You need to look at the date of practical completion here which you did not and what the consequences are." I agree with the 2 marks which Heunis has awarded. I consider Finsen's award of 6 marks as too generous. Bryant's award of 4 marks is, to my mind, more appropriate than Finsen's.
- (113) Question 2 of the second paper counted 10 marks. Heunis says in his report that "The candidate left Q2 for last and failed to calculate the contract adjustment value correctly. The value was calculated as less than half of what it ought to be. Although 0 marks were given one could grant 4 marks for effort, at the Registrar's

discretion, in which event Paper 2 will amount to 43%". Finsen awarded 3 marks. It does not appear from Ms Jacobs's letter what mark Bryant awarded. His comment reads: "Please look at the outline given to you on this question. You needed to look at the preliminaries. This was a different question not in the ordinary and you should look at how the calculation is done."

Judging by the outline, the Appellant's answer is completely off the mark. Finsen's mark (of 3) is in the same vicinity as Heunis' 4 marks. Possibly he also granted the 3 marks "for effort" as Heunis has done.

- (114) Question 3 of paper 2 is divided into five sub-questions, each counting 8 marks (bundle "B" at 11-12), totalling 40. Heunis stated in his report (exh "D") that "19 marks were granted for Q3 for adequate references, however it is clear that the procedures of giving notice of default and establishing a dispute, are not adequately comprehended." We do not know what marks Heunis granted in respect of each sub-question. Finsen awarded 15 marks for question 3, while Bryant granted 7 marks. (Ms Jacobs's letter states that "7/16" was awarded, but she testified that the "16" was a typographical error and should have read "40").
- (115) Question 3.1, summarized, is whether a contractor who has not been paid on an interim certificate, but who has been given no reason for such failure to pay, can start arbitration proceedings. Appellant's answer ("B" at 32) seems to be completely wrong and misses the point entirely. Finsen was generous and gave him 2 marks out of 8. As indicated we do not know what marks Heunis awarded for each sub-question. Bryant did not indicate what marks he granted in respect of each sub-question but he did comment on each of Appellant's answers to question 3 which I do not consider necessary to repeat.
- (116) Question 3.2, in summary, was whether an employer may refuse to pay an interim payment certificate on the grounds that he disagrees with the principal agent's valuation in an interim payment certificate. Finsen awarded 3 marks out of 8. It appears to be a fair mark.
- (117) Question 3.3, in summary, was whether an employer is entitled to refuse payment in respect of an interim payment certificate on the grounds that the financial institution financing the project considers insufficient work had been done to

justify a further payment. Finsen awarded 2 marks out of 8. It appears to be a fair mark.

- (118) Question 3.4, in summary, was to advise a contractor who had not received an interim payment certificate which was overdue and where the employer had dismissed the principal agent and had not yet made a new appointment. Finsen awarded 4 marks out of 8, which, in my view, is a fair mark.
- (119) Question 3.5, in summary, was whether an employer was justified in paying only R15 000 of a certificate for R25 000 on the grounds that the financial institution financing the project did not pay for unfixed materials and goods on site. Finsen awarded 4 marks out of 8, which in my view, is a fair mark.
- (120) As indicated, Finsen granted 15 marks for question 3, while Heunis and Bryant granted 19 and 7 marks respectively. I regard Finsen's total of 15 as fair.
- (121) Question 4 consists of two sub-questions each counting 10 marks. Heunis apparently deals with question 4 in sub-par (c) under paper 2. He says "14 marks were given for a reasonably adequate interpretation of the question, however the candidate appears unaware of the requirements for the PA to issue written instructions (17.3) and does not regard this as important". Heunis does not state what mark he awarded in respect of each of the sub-questions of question 4. Finsen awarded 6 out of 10 for question 4.1 and 7 out of 10 for question 4.2, that is a total of 13 out of 20. Heunis' and Finsen's marks for question 4 are, therefore, quite close to one another. Bryant's marks for question 4 were not supplied in Ms Jacobs's letter. However, he comments as follows: "You needed to discuss (an?) oral instruction to the contractor. Please look at clause 17.3 in the JBCC contract regarding this. Please read further and discuss this at great length."
- (122) Question 4.1 deals with a JBCC Principal Building Agreement. In summary, the question is whether the contractor is obliged to repair hail damage where the works are damaged before practical completion and the principal agent has given an oral instruction to the contractor to repair the damage. Finsen's award of 6 marks out of 10 for Appellant's answer to the question is quite generous, in my view.

- (123) Question 4.2 deals with the same agreement. In summary, the question is whether a contractor is obliged to repair hail damage where the works have been damaged after practical completion and the principal agent has given a written instruction to the contractor to repair the damage. In my view, Finsen's award of 7 out of 10 is fair.
- (124) Heunis' award of 14 out of 20 for question 4 is quite generous. Finsen's award of 13 out of 20 seems to be more reasonable.
- (125) Question 5 counted 20 marks. Finsen awarded 7 marks. Heunis gave 4 marks "for effort". He states that "the candidate incorrectly calculated the amount of days revision to the date of practical completion without costs and those with costs." Bryant's marks for this question do not appear from Ms Jacobs's letter. Bryant comments as follows on Appellant's answer: "This question was answered poorly and please look at the question again."
- (126) In summary, question 5 poses certain problems relating to delays due to lack of certain bending schedules, from the side of the structural engineer, and to heavy rains. The building was being built under a JBCC Principal Building Agreement. The question was by how many working days the date for practical completion should be extended and, if preliminaries had been priced at R5 000 per day, by how much should the contract value be adjusted in respect of such delays?
- (127) It appears that Appellant was completely at sea in his answer. Finsen's 7 marks seem rather generous. Heunis granted 4 marks for effort, which appear reasonable.
- (128) In summary, Heunis arrived at a total of 39% for paper 2, subject to a possible further 4 marks for effort, at the Registrar's discretion in respect of question 2. Finsen arrived at a total figure of 44%. I would regard a total of 38% as reasonable for paper 2.
- (129) As appears from the foregoing, Finsen and Heunis were, in my view, quite correct in failing the Appellant in each of the papers. Appellant's average for both papers also constitutes a fail. I am satisfied that Finsen and Heunis acted fairly and impartially in marking Appellant's papers. Indeed, as indicated, in respect of certain answers in the papers they were, to my mind, generous, and in some

cases, even over generous in awarding marks to Appellant. As indicated above, it seems probable that Bryant also failed the Appellant.

- (130) Ms Jacobs was accordingly quite correct in informing Appellant on 22 May 2006 that he had not passed the examination (bundle "B" at 114). SACAP was accordingly correct, to my mind, in upholding that Appellant did not pass the examination.

WHAT CAUSED THE DELAYS?

- (131) It is unfortunate that Appellant's letters to SACAP were not always answered. Sometimes it may have been due to such a letter not reaching SACAP, eg. Appellant's letter dated 7 June 2006 ("B" 107A), which did not form part of the bundle prepared by SACAP for the hearing of the appeal. It seems that for purposes of the appeal, a copy of the letter has been provided to the CBE administration by Appellant. However, Appellant's letter to SACAP dated 7 April 2009 ("B" 327) did form part of the said bundle, and was received by SACAP but was not replied to.
- (132) On the other hand, a letter which Ms Jacobs wrote on SACAP's behalf on 27 January 2007 ("B" 108-9), was received by Appellant according to his testimony, but was not replied to by him. Similarly a letter which did not appear in the said bundle, written by Ms Davids to Appellant on 20 February 2007, was received by Appellant ("B" 110A), and was also not answered by him. It seems that a copy of that letter may also have been provided to the CBE administration by Appellant.
- (133) As indicated, Appellant pointed out to Ms Jacobs, in cross-examination that Ms Davids did not mention in her letter to him of 20 February 2007 ("B" 110A) that his scripts had been remarked. As indicated, Ms Jacobs replied that Ms Davids was a "very new acting Registrar at the time and she had no idea what was really going on in the offices at the time". Asked why she did not advise her, Ms Jacobs replied "Because she did things without my knowledge" (transcript 17/5/10 at 409-414).

It seems that Ms Davids's conduct in not communicating properly with her staff, in not answering letters and emails which had been addressed to her, and in not

following up undertakings to the Appellant to write to him and keep him informed, also resulted in insufficient communication with Appellant. These problems may have led to Ms Davids's departure from SACAP's employ.

- (134) Another important factor which created difficulties and delays was that Appellant's scripts had been mislaid during or about February 2007, while they were in Campbell's possession ("B" at 326). When SACAP informed Appellant on 21 August 2009 that it was upholding the communication from SACAP to him indicating that he had failed the examination ("B" at 345), the scripts had apparently not yet been found since the letter states that Appellant's scripts "are no longer available". However, on 11 March 2010 SACAP's attorneys mentioned in a letter to Appellant that the scripts had been found (exhibit "J").
- (135) Another reason for the delays was that Appellant stated in an email to Ms Davids ("B" 324-5) that he thought "that we should now lay this matter to rest". However, one year and ten months later Appellant apparently changed his mind and demanded registration "without any further delay" because SACAP was unable "to prove that I indeed failed by producing the marked scripts" ("B" at 327).

The delays and problems which arose on SACAP's side do not, of course, justify Appellant's request to be registered as a professional architect. The fact remains that he did not pass the Professional Practice Examination and that the APA only allows SACAP to register a person as a professional architect if he has passed that examination.

FURTHER SUBMISSIONS OF APPELLANT

- (136) The Appellant states in his said grounds of appeal that the "one and only reason SACAP is refusing me registration, is not that I failed the exam, but because SACAP lost my scripts" (Appellant's Appeal Form "A" flag 1). The averment is, in my view, clearly unjustified and incorrect. SACAP refused registration for only one reason, namely that he had not passed the examination ("B" at 103, 329 and 345). Appellant's averment in the said Appeal Form that SACAP had treated him in an unfair manner is, in my view, completely without merit.
- (137) During his evidence Appellant suggested that SACAP had "engineered" his failure of the examination. There is no merit whatsoever in the suggestion. The

Appellant's failure in his examination scripts was due to himself and no one else. The same applies to Appellant's averment ("B" 324) that "SACAP pick and choose who pass and get registration and who doesn't". There is no evidence to justify this speculation by Appellant. Appellant's averments of racial discrimination being the cause of his failure is also completely unfounded. There is no evidence to substantiate this.

(138) The relevant part of sec 19(2)(a)(ii) of the APA provides as follows: "The council must register the applicant in the relevant category and issue a registration certificate to the successful applicant in the prescribed form if, after consideration of an application, the council is satisfied that the applicant-

- (a) in the case of a person applying for registration as a professional-
 - (i)
 - (ii) has passed any additional examinations that may be determined by the Council".

The Professional Practical Examination is the examination referred to in sec 19(2)(a)(ii).

Since the Appellant has not passed the said examination, SACAP is not entitled to register him as a professional and is quite correct in refusing to do so.

(139) Despite the abovementioned deficiencies in communicating with the Appellant, SACAP has, in my view, gone out of its way to try to assist the Appellant in every possible way. It started with Ms Jacobs's letter to Appellant dated 22 May 2006 informing him with regret that he had not passed the examination but offering him, on request an outline answer to the examination, informing him that the next professional practice examination would be written on 9 October 2006 and attaching an application therefore ("B" 114). The President of SACAP, Campbell personally assisted Appellant in October 2006, when Appellant informed him of his frustrations around the matter, by requesting to see a copy of his exam papers which were handed to him in an envelope ("B" 326). Unfortunately Campbell mislaid Appellant's examination papers and they were not found till much later. Ms Jacobs's letter to Appellant of 27 January 2007 gave him a comprehensive guide as to the mistakes he had made in the examination and how he should go about preparing to re-write it. In May 2007 SACAP resolved that Appellant be

granted re-examination at SACAP's cost ("B" at 321). On 21 August 2009 SACAP repeated its offer that he could write the exam free of charge ("B" at 345). In addition he was afforded the opportunity to be tested on his Professional Practice knowledge orally by a panel of two examiners. During the course of the hearing and during argument SACAP repeated such offers but Appellant consistently refused all such offers.

(140) There is no merit in the appeal.

TIME WITHIN WHICH AN APPEAL IS TO BE DECIDED?

(141) One final aspect deserves mention. Sec 21(5) of the CBEA requires that "The appeal committee must decide an appeal within 60 days from the date on which the appeal was lodged".

The facts of this case illustrate that the said requirement constitutes an impossibility. As indicated, the appeal was lodged on 1 October 2009. According to the sub-section the appeal had to be decided within 60 days from that date, which would bring one to approximately the end of November 2009. However, even if everyone concerned had acted throughout with the greatest expediency, it would have been impossible to decide the appeal before that date.

I have no knowledge of all the steps which followed after receipt of the notice of appeal. The CBE administration apparently had to call on SACAP to prepare a bundle of documents which could be used at the hearing. Presumably a similar call was made on the Appellant. Thereafter the documents had to be collated and sufficient copies thereof had to be made. The CBE had to appoint an Appeal Committee to hear the matter.

On 9 February 2010 the CBE Administration set down the hearing of the appeal for 12 March 2010. On that date the hearing commenced but it was postponed, after hearing Appellant's and Heunis's evidence, to the first available date, being 22nd April 2010. Due to unforeseen problems, the further hearing had to be further postponed to 17 May 2010 on which day the hearing was concluded and judgment reserved. As indicated, further written argument had to be supplied and the record of the last date of hearing had to be typed which only became available on 23 June 2010. On 21 May 2010 the Appellant wrote a letter to the

Chairperson of the Appeal Committee containing further argument. As indicated, SACAP's attorneys only reacted thereto on 15 June 2010. This judgment has, for reasons which speak for themselves, also taken some time to prepare.

In practice, it is impossible, in my view, for an Appeal Committee to decide an appeal within 60 days from the date on which the appeal was lodged. The law does not compel the performance of impossibilities. See Ex parte MacKenzie 1960(1) SA793 (W) at 796E-F. Accordingly the Appeal Committee is not bound by the provisions of sec 21(5) of the CBEA.

It is, of course, necessary that appeals brought to the CBE are heard as soon as possible and that the Appeal Committee should decide appeals as soon as reasonably possible. The CBEA Administration should therefore do all in its power to bring Appeals to the CBE before the Appeals Committee as soon as possible.

CONCLUSION

(142) The appeal is dismissed.


IWB de Villiers

I agree



Ms E van der Hoven (Chairperson)

I agree


G Damstra