

BOARD NOTICE 98 OF 2011

ENGINEERING COUNCIL OF SOUTH AFRICA

**DRAFT RULES FOR INQUIRY INTO ALLEGED IMPROPER CONDUCT:
ENGINEERING PROFESSION ACT, 2000
(ACT NO. 46 OF 2000)**

ECSA herewith publishes the draft Rules in terms of Section 36(2)(a) of the Engineering Profession Act 46 of 2000, for public comment.

The closing date for submission of comments to ECSA through its website, www.ecsa.co.za or email address legal@ecsa.co.za is no later than 28 June 2011.

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SCHEDULE

Introduction

1. It is acknowledged that the *Council* is mandated to take any steps it considers necessary for the protection of the public and the environment in their dealings with *registered persons* for the maintenance of the integrity and the enhancement of the status of the engineering profession.
2. In pursuance of the *Council's* right and obligation mentioned in 1 above, the *Council* must investigate an act of alleged improper conduct by a *registered person* and/or investigate a complaint, charge or allegation of improper conduct against a *registered person* brought by any person.
3. An investigation mentioned in 2 above is directed towards the professional conduct of a *registered person*, and does not intend to recover damages on behalf of any person, or enforce specific performance against any person and as such, is not meant to replace civil and/or criminal litigation.
4. It is furthermore acknowledged that the *Council* may take any steps which it considers necessary where, as a result of engineering related undertakings, public health and safety is prejudiced.
5. Where a *registered person* or persons registered with different Built Environment Professions are involved in the same subject of investigation, the *Council* will share relevant information with such other Councils and Stakeholders.

Definitions

In these rules, any expression or word which has been defined in *the Act* has that meaning and, unless the context otherwise, indicates –

“**Act**” means the Engineering Profession Act, 46 of 2000.

"Advisory letter" means correspondence with a *respondent* advising of concerns raised by the *investigating committee* regarding the *respondent's* professional behaviour.

"CEO" means the Chief Executive Officer appointed in terms of Section 8 of the *Act* or any person authorised by the *CEO* to perform any function in terms of these *rules*.

"Complainant" means a person or body lodging a complaint in terms of *rule 1(1)* hereof.

"Council" means the *Council* established in terms of Section 2 of the *Act*.

"Disciplinary tribunal" means the tribunal appointed by the *Council* in terms of Section 30 of the *Act*.

"Inquiry" means the process of investigation in terms of these *rules*.

"Investigating committee" means a committee appointed by the *Council* under section 17 of the *Act* and to which the power to inquire into the conduct of a *registered person* under Section 28 of the *Act* is delegated.

"Peer counselling" means a meeting held between a *respondent* and appropriate members of the *investigating committee* or their nominees to counsel the *respondent* on aspects of his/her conduct that are construed as unprofessional but do not warrant a *disciplinary tribunal* hearing.

"Pro forma complainant" means a person appointed in terms of *rule 4(1)(a)* of the *rules* to perform the duties required in terms of the *Act* and *rules*, and duties that are reasonably required to conduct disciplinary hearings and investigations.

"Registered person" means a person registered in terms of Section 18 of the *Act*.

"Respondent" means a *registered person* whose conduct is the subject of an *inquiry* in terms of these *rules*.

"Rules" means these *rules*.

PROCEDURE PRIOR TO INQUIRY

1. Information and complaints of improper conduct

- (1) (a) Any person lodging a complaint of improper conduct against a *registered person* with the *Council* must lodge the complaint in the form of an affidavit or an affirmation, must detail the specific act or acts relating to the alleged improper conduct, and must submit evidence in support of it.

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

2. Investigation

- (1) The *CEO* must within 3 (three) working days furnish any *registered person* whose conduct is the subject of a complaint received in terms of *rule 1* or who has committed an act which may render him or her guilty of improper conduct, a written copy of the complaint and/or information related to the conduct.
- (2) The *CEO* must inform the *registered person* –
 - (a) of the right to be represented or assisted by another person; and
 - (b) that he/she is not obliged to make any statement and any statement so made may be used in evidence against the *registered person*.
- (3) The *investigating committee* must afford the *registered person* the opportunity to respond to the complaint and all other evidence considered against him/her.
- (4) The *investigating committee* or persons assigned by the *investigating committee* including people appointed to investigate the complaint may, with due consideration of the provision Section 28(3) of the *Act*, question the *registered person* concerned.
- (5) The *investigating committee* must investigate the matter and obtain evidence to determine whether or not, in its opinion, the *registered person* concerned should be charged and if so, recommend to the *Council* the charge or charges that should be preferred against that *registered person*.
- (6) The *investigating committee*, may when it becomes aware of engineering related undertakings that may prejudice public health and safety, investigate such undertakings and report to the *CEO* on its findings and recommendations.
- (7) The *investigating committee* must consider whether the matter ought to be reported to any of the other *Councils* in the Built Environment or to any other stakeholder.

3. Peer counselling and Advisory letters

- (1) The *investigating committee*, if it is of the opinion that charges should not be preferred against a *registered person*, may resolve to conduct a *peer counselling* meeting with the *registered person* or address an *advisory letter* to the *registered person*.
- (2) *Peer counselling* or the issuing of an *advisory letter* does not amount to disciplinary action in terms of Section 32(3)(a) of the Engineering Profession Act.

4. Preparation for disciplinary hearing

- (1) In the event of a disciplinary hearing being decided upon by the *Council* –
 - (a) the *CEO* must appoint a *pro forma complainant* who must formulate the charge in writing, arrange a disciplinary hearing and, at the disciplinary hearing, adduce all evidence in support of the charge;

- (b) the *CEO* may appoint one or more persons to assist the *pro forma complainant*; and
 - (c) the *pro forma complainant* must cause a copy of these *rules* to be served on the *respondent*, as well as a charge sheet and notice of set down -
 - (i) informing the *respondent* of the charge;
 - (ii) requiring the *respondent* to attend the hearing at a stated place, date and time, which may not be earlier than 30 days after the date of service of the notice; and
 - (iii) requiring the *respondent* to file a plea to the charge sheet by no later than 14 days after receipt of the charge sheet.
 - (d) The parties shall give each other notice of the intention to call expert witnesses and by not later than 7 (seven) days before the hearing, provide a summary of such expert evidence to the other party.
- (2) The summons for the *respondent* referred to in *sub rule* (1)(c) must be substantially in the form of Annexure A, and must be served on the *respondent* by the sheriff concerned or in any of the manners described in *rule* 5 below.
- (3) The summons for a witness to attend a disciplinary hearing contemplated in Section 31(3) of *the Act* must be substantially in the form of Annexure B.

5. Service of documents

- (1) A party must serve a document on the other party:
- (a) by handing a copy of the document to-
 - (i) the person concerned;
 - (ii) a representative authorised in writing to accept service on behalf of the person;
 - (iii) a person who appears to be at least 16 years old and in charge of the person's place of residence, business premises or place of employment at the time;
 - (b) by leaving a copy of the document at an address chosen by the person to receive service;
 - (c) by faxing or emailing a copy of the document to the person's fax number or email address or a number chosen by that person to receive service;
 - (d) by sending a copy of the document by registered post or telegram to the last-known address of the party or an address chosen by the party to receive service.

6. Proof of service

- (1) A party must prove to the *disciplinary tribunal* that a document was served in terms of these *rules* by, providing the *tribunal*:
- (a) with a copy of proof of mailing the document by registered post to the other party; or
 - (b) with a telegram or fax communicating the document to the other party; or
 - (c) with a copy of the fax transmission report indicating the successful transmission to the other party of the whole document; or

- (d) if a document was served by hand-
 - (i) with a copy of a receipt signed by, or on behalf of, the other party clearly indicating the name and designation of the recipient and the place, time and date of service; or
 - (ii) with a statement confirming service signed by the person who delivered a copy of the document to the other party or left it at any premises; or
 - (e) if a document was sent by electronic mail, electronic acknowledgement of receipt by the *respondent* or other party.
- (2) If proof of service in accordance with *sub rule* (1) is provided, it is presumed, until the contrary is proved, that the party on whom it was served has knowledge of the contents of the document.
- (3) The *disciplinary tribunal* may accept proof of service in a manner other than prescribed in this *rule* as sufficient.

PLEA AGREEMENTS

- 7 (1) A *respondent* desirous to plead guilty, may enter into a plea agreement with the *pro forma complainant* with due consideration to the following factors:
- (a) the nature and circumstances of the transgression;
 - (b) personal circumstances of the *respondent*;
 - (c) whether the *respondent* was found guilty of related transgressions in the past;
 - (d) the interest of the community;
 - (e) remedial work done and/or required to rectify the condition caused by the *respondent's* conduct; and/or
 - (f) any other relevant considerations
- (2) Plea agreements:
- (a) must be in writing and signed by the *pro forma complainant* and the *respondent* or his/her legal representative.
 - (b) are subject to approval by the *disciplinary tribunal*.
- (3) The *disciplinary tribunal* must consider and approve or reject a plea agreement entered into in terms of 7.2 above. If the plea agreement is approved, a sanction is imposed in accordance with the plea agreement. If the agreement is rejected, the matter shall be referred to a disciplinary hearing as if the *respondent* had pleaded not guilty.

DISCIPLINARY TRIBUNALS

- 8 (1) The function to appoint a *disciplinary tribunal* in terms of Section 30 of the *Act* is delegated to the *CEO*.
- (2) The *CEO* shall appoint a *disciplinary tribunal* at the request of the *pro forma complainant*.

PROCEDURE AT DISCIPLINARY HEARING

- 9 (1) The *pro forma complainant* shall present the case on behalf of the *Council*.
- (2) The presiding officer of a *disciplinary tribunal* shall, subject to Sections 31 and 32 of the *Act*, and having regard to the seriousness, complexity and urgency of the charges, determine the procedure to be followed at the hearing before it, after hearing both sides.
- (3) At the start of the hearing, the presiding officer shall put the charge or charges to the *respondent* and request him or her to plead to such charge or charges.
- (4) If the *respondent* pleads guilty to the charge or charges, the *disciplinary tribunal* may find the *respondent* guilty without hearing evidence, or if it deems it necessary, after hearing evidence and argument.
- (5) After a finding of guilty and before sanction, any previous convictions of the *respondent* may be presented to the *disciplinary tribunal*.
- (6) Should the *respondent* fail to attend the hearing without good cause, the *disciplinary tribunal* may proceed to hear evidence and argument, and may find the *respondent* guilty, provided that the *disciplinary tribunal* is convinced that the charge sheet has been served on the *respondent*.

GENERAL PROVISIONS

10. Repeal of rules

- (1) The *rules* on the Method of Inquiry into alleged Improper Conduct published in Board Notice.106 of 1997 are hereby repealed.

11. These *rules* are called the Rules for Inquiry into Alleged Improper Conduct: Engineering Profession Act, 2000 (Act No. 46 of 2000).

ANNEXURE A**FORM OF NOTICE OF SET DOWN FOR *RESPONDENT***
[(Rule 4)]

To

You are hereby notified that a disciplinary hearing in terms of section 31 of the Engineering Profession Act, 2000 (Act No. 46 of 2000), will be held at..... on the day of20..... at, when the charge against you, as set out in the charge sheet attached hereto, will be considered.

You are hereby summoned to appear at the hearing in person, and informed that you are entitled to be represented by some other person and that you may adduce evidence, call and examine witnesses on your behalf and cross-examine other witnesses.

You are to file a written plea to the charge(s) by no later than 14 (fourteen) days of receipt of this notice.

Should you fail to be present at the disciplinary hearing, or at the resumption of it after an adjournment, the *disciplinary tribunal* may consider and deal with the charge in your absence in accordance with the relevant *rules*.

A copy of the relevant *rules* is enclosed.

Given under the hand of the, on this day of2.....

.....
Signature and capacity

Served on

.....
Sheriff

ANNEXURE B
(SUBPOENA FOR WITNESS)
[Section 31(3)]

To

You are hereby notified that a disciplinary hearing in terms of Section 31 of the Engineering Profession Act, 2000 (Act 46 of 2000) (the Act), will be held at on the day of 20..... at, when a charge of alleged improper conduct against will be considered.

The Engineering Council of South Africa (ECSA) is of the opinion that you may be able to give material information concerning this *inquiry*. You are requested to provide the hearing with the following documents that you may have in your possession:-

1. All documents including electronic documents relating in any way to, or recording of any of the matters related to this *inquiry*.
2. Minutes and notes (including agendas and pre-meeting literature) et cetera relating to all and any meetings where any of the aforesaid matters were discussed:
3. Plans, specifications, designs and/or one or more of the documents as set out in the document list annexed hereto.

Therefore, in terms of section 31(3) of the said Act, you are hereby summoned to appear before the *disciplinary tribunal* at the time and place specified above, to be interrogated and to produce the items specified in the attached Annexure.

Your attention is respectfully directed to the provisions of section 19, and particularly subsections 31(3), (4), (5) and (8) of the said Act, a copy of which is enclosed.

Served on

.....
Signature and capacity

.....
 Sheriff

DOCUMENT LIST

The following specific documents which may be directly or indirectly related to the *inquiry* should be produced:

- 1.
- 2.
- 3.
- 4.