

BOARD NOTICE 42 OF 2017

ENGINEERING COUNCIL OF SOUTH AFRICA



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

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SCHEDULE

1. Introduction

- 1.1 It is acknowledged that the *Council* is mandated to take any steps it considers necessary for the protection of the public and the environment in their dealings with *registered persons* for the maintenance of the integrity and the enhancement of the status of the engineering profession.
- 1.2 In pursuance of the *Council's* right and obligation mentioned in 1.1 above, the *Council* must investigate an act of alleged *improper conduct* by a *registered person* and/or investigate a complaint, charge or allegation of *improper conduct* against a *registered person* brought by any person.
- 1.3 An investigation mentioned in 1.2 above is directed towards the professional conduct of a *registered person*, and does not intend to recover damages on behalf of any person, or enforce specific performance against any person and as such, is not meant to replace civil and/or criminal litigation.
- 1.4 It is furthermore acknowledged that the *Council* may take any steps which it considers necessary where, as a result of engineering related undertakings, public health and safety is prejudiced.
- 1.5 Where a *registered person* or persons registered with different Built Environment Professions are involved in the same subject of investigation, the *Council* will share relevant information with such other Councils and Stakeholders.
- 1.6 These *rules* are to be read with the Act.

2. Definitions

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

- 2.1 “**Act**” means the Engineering Profession Act, 46 of 2000.
- 2.2 “**Advisory letter**” means correspondence with a *respondent* advising of concerns raised by the *investigating committee* regarding the *respondent's* professional behaviour.
- 2.3 “**CEO**” means the person appointed as *Chief Executive Officer* under section 8(1)(a) of the *Act*.
- 2.4 “**Complainant**” means an aggrieved person whose interests and rights have been affected by the professional conduct of a registered person.
- 2.5 “**Council**” means the Engineering Council of South Africa established in terms of section 2 of the *Act*.
- 2.6 “**Days**” means calendar days, first day included, last day excluded

- 2.7 **“Disciplinary tribunal”** means the tribunal appointed by the *Council* in terms of section 30 of the *Act*.
- 2.8 **“Improper conduct”** means a transgression of the Code of Conduct published in terms of 27(1) of the *Act*.
- 2.9 **“Inquiry”** means the process of investigation in terms of these *rules*.
- 2.10 **“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.
- 2.11 **“Investigator” means** a registered person appointed by ECSA to investigate a case of alleged improper conduct by a registered person.
- 2.12 **“Legal personnel” mean administrators** in the Legal Services Unit.
- 2.14 **“Meru Motu case”** a case where ECSA in terms of section 14(j) of the *Act*, out of its own accord institutes an investigation,
- 2.15 **“Parties”** means the Complainant and Registered Person/Respondent
- 2.16 **“Preferring Charges”** means where there is prima facie evidence of improper conduct by the registered person and the investigating committee resolved to charge him/her with transgressing the code of conduct.
- 2.17 **“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.
- 2.18 **“Pre-Hearing Meeting” means** informal meeting between the pro forma complainant and the Respondent before the disciplinary hearing commence for purposes of narrowing down issues in dispute, expedite disposition of the case, help the tribunal establish managerial control over the case, discourage wasteful costs, improve the quality of the hearing with thorough preparation and to facilitate a settlement of the case.
- 2.19 **“Registered person”** means a person registered in terms of section 18 of the *Act*.
- 2.20 **“Representative”** means a person representing a registered person, during a disciplinary hearing be it a legal representative or colleague member of the public, this does not include a Trade Union representative.
- 2.21 **“Respondent”** means a *registered person* who has been charged with transgressing the code of conduct.
- 2.22 **“Rules”** means these *rules*.

3. PROCEDURE PRIOR TO INQUIRY

3.1 Information and complaints of improper conduct

- 3.1.1 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, which must detail the specific act or acts relating to the alleged *improper conduct*, and must submit evidence in support of it.
- 3.1.2 The *CEO*, upon receipt of a complaint referred to in paragraph (a) with information of conduct which *prima facie* points to *improper conduct* by a *registered person* must refer the complaint to the *investigating committee* to determine whether the *registered person* should be charged.

3.2 Investigation

- 3.2.1 The *CEO* must within 3 (three) days furnish any *registered person* whose conduct is the subject of a complaint received 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.
- 3.2.2 The *CEO* must inform the *registered person* –
- 3.2.2.1 of the right to be represented by a representative; and
- 3.2.2.2 that he/she is not obliged to make any statement and any statement so made may be used in evidence against him/her.
- 3.2.3 The *investigating committee* (IC) must afford the *registered person* the opportunity to respond to the complaint and all other evidence considered against him/her.
- 3.2.4 The *Manager: Legal Services* may appoint an investigator.
- 3.2.5 The *investigator* must investigate the matter and obtain evidence to determine whether or not, in its opinion, the *registered person* concerned should be charged and if so, make a recommendation to the IC.
- 3.2.6 The *Council*, must when it becomes aware of engineering related undertakings that may prejudice public health and safety, appoint an investigator to investigate such undertakings and report to the *IC* on his/her findings and recommendations.
- 3.2.7 The *IC* must consider whether the matter ought to be reported to any of the other Councils in the Built Environment or to any other stakeholder.
- 3.2.8 In terms of section 20(3) and (4) of the Act, the Council must at the written request of any registered person cancel his or her registration, *but where an investigation into alleged improper conduct by that person is in progress or is to be held, the registration may not be cancelled until the investigation has been concluded and the registered person has made good of any fee, arrears or penalty imposed by the council for the period that he or she was registered.*

3.3 Resolutions by IC after conclusion of an investigation

- 3.3.1 In the event that the IC resolves that there is insufficient evidence of improper conduct, the matter will be dismissed.
- 3.3.2 In the event that the IC resolves that there is evidence of improper conduct, however the conduct warrants a written warning, the legal personnel would issue the Respondent with an Advisory letter and close the case.
- 3.3.3 In the event that the Complainant withdraws the complaint prior to the commencement of an investigation, the case will be closed, however if an investigation has commenced, the matter will proceed.
- 3.3.4 In the event that the Complainant is not the person whose rights and interests have been affected by the professional conduct on the Respondent, the complaint will be dismissed.
- 3.3.5 Before the IC resolves to prefer charges, the IC may explore with the Complaint and the Respondent the possibility of the complaint being referred to conciliation, mediation, arbitration or another dispute resolution process. If the matter is referred to a dispute resolution process and the parties fail to resolve the matter within 30 days, the IC will prefer charges and refer the matter to a disciplinary hearing.
- 3.3.6 Alternative dispute resolution or issuing of an Advisory letter does not amount to disciplinary action in terms of section 32(3)(a) of the Engineering Profession Act
- 3.3.7 In the event that the IC resolves that there is evidence of improper conduct, charges will be preferred against the Respondent and the matter referred to a disciplinary hearing.

4. PREPARATION FOR DISCIPLINARY HEARING

4.1 In the event where the IC resolves to prefer charges -

- 4.1.1 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;
- 4.1.2 the *CEO* may appoint one or more persons to assist the *Pro Forma Complainant*; and
- 4.1.3 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 -
 - 4.1.3.1 informing the *Respondent* of the charge;
 - 4.1.3.2 informing the *Respondent* of the right to representation
 - 4.1.3.3 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
 - 4.1.3.4 inviting the *respondent* to file a plea to the charge sheet by no later than 14 days after receipt of the charge sheet.

4.1.4 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.

4.2 The summons for the *Respondent* referred to in *sub rule* 4.1.3 must be substantially in the form of Annexure A, and must be served on the *respondent* in the manner described in *rule* 5 below.

4.3 The subpoena 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

5.1 The *Pro Forma Complainant* must serve documents referred to in item 4 above, to the *Respondent* in the following manner:

5.1.1 by hand delivery to the Respondent;

5.1.2 by registered mail to the address that ECSA has on record or an address chosen by the Respondent.

5.1.3 through the Sheriff of the High Court.

5.2 The *Pro Forma Complainant* may serve documents referred to in item 4 above, to the Respondent upon his/her consent, in the following manner;

5.2.1 by hand delivery to a representative of the Respondent, who appears to be at least 16 years old at the Respondent's place of residence, place of employment or an address chosen by the Respondent

5.2.2 by email

5.2.3 by fax

6. PROOF OF SERVICE

6.1 A party must prove to the *disciplinary tribunal* that a document was served in terms of these *rules* by, providing the *tribunal*:

6.1.1 with a copy of proof of mailing the document by registered post to the other party; or

6.1.2 with a telegram or fax communicating the document to the other party; or

6.1.3 with a copy of the fax transmission report indicating the successful transmission to the other party of the whole document; or

6.1.4 if a document was served by hand-

6.1.4.1 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

6.1.4.2 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

6.1.5 if a document was sent by electronic mail, electronic acknowledgement of receipt by the *Respondent* or other party.

6.2 If proof of service in accordance with *rule* 6.1 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.

6.3 The *disciplinary tribunal* may accept proof of service in a manner other than prescribed in this *rule* as sufficient.

7. PRE-HEARING MEETING

7.1 Before the commencement of the disciplinary hearing either party may initiate pre-conference by advising the party in writing to avail him or herself for matters for consideration at the disciplinary inquiry.

7.2 A Pro Forma Complainant may initiate the process by making stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference including but not limited to the following;

7.2.1 formulating and simplifying the issues, and eliminating frivolous defenses.

7.2.2 amending the pleadings if necessary or desirable.

7.2.3 obtaining admissions and stipulations about facts and documents to avoid unnecessary proof.

7.2.4 the admissibility of evidence and identifying witnesses.

7.2.5 avoiding unnecessary proof and cumulative evidence.

7.2.6 facilitating in other ways the just, speedy, and inexpensive disposition of the matter.

8. PLEA AGREEMENTS

8.1 A *Respondent* desirous to plead guilty may enter into a plea agreement with the *Pro Forma Complainant* with due consideration to the following factors:

8.1.1 the nature and circumstances of the transgression;

8.1.2 personal circumstances of the *Respondent*;

8.1.3 whether the *Respondent* was found guilty of related transgressions in the past;

8.1.4 the interest of the community;

8.1.5 remedial work done and/or required to rectify the condition caused by the *Respondent's* conduct; and/or any other relevant considerations.

8.2 Plea agreements must be in writing and signed by the *Pro Forma Complainant* and the *Respondent* or his/her legal representative.

- 8.3 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.

9. DISCIPLINARY TRIBUNAL

- 9.1 The function to appoint a *disciplinary tribunal* in terms of section 30 of the Act is delegated to the CEO.
- 9.2 The CEO shall appoint a *disciplinary tribunal* at the request of the *Pro Forma Complainant*.

10. PROCEDURE AT DISCIPLINARY HEARING

- 10.1 The Pro Forma Complainant shall furnish the tribunal members with the bundle of all documents to be referred to during the disciplinary hearing.
- 10.2 The *Pro Forma Complainant* shall present the case on behalf of the *Council*.
- 10.2.1 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.
- 10.2.2 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.
- 10.2.3 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.
- 10.2.4 After a finding of guilty and before sanction, any previous convictions of the *Respondent* may be presented to the *disciplinary tribunal*.
- 10.2.5 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*.

11. LODGING OF APPEAL

- 11.1 A registered person found guilty of improper conduct may appeal in accordance with the provision of section 33 of the Act, against such finding, or against the sentence imposed or both.
- 11.2 The Appeal must be lodged within 30 days of the decision coming to the knowledge of the registered person.
- 11.3 The parties must be notified of the outcome of the appeal.

12. GENERAL PROVISIONS

12.1 Repeal of rules

12.1.1 The *rules* on the Method of Inquiry into alleged Improper Conduct published in Board Notice 171 of 2011 are hereby repealed.

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

ENGINEERING COUNCIL OF SOUTH AFRICA**Annexure A****NOTICE OF SET DOWN**

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

www.ecsa.co.za

ENGINEERING COUNCIL OF SOUTH AFRICA
1st Floor Waterview Corner 2 Ernst Oppenheimer Ave Bruma
Private Bag X691 Bruma Johannesburg South Africa 2026
Tel: +27 11 607 9500 | Fax: +27 11 622 9295 | E-mail: engineer@ecsa.co.za

ENGINEERING COUNCIL OF SOUTH AFRICA**Annexure B****SUBPOENA**

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 2..... 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.

.....
Signature and capacity

Served on

.....
Sheriff

www.ecsa.co.za

ENGINEERING COUNCIL OF SOUTH AFRICA
1st Floor Waterview Corner 2 Ernst Oppenheimer Ave Bruma
Private Bag X691 Bruma Johannesburg South Africa 2026
Tel: +27 11 607 9500 | Fax: +27 11 622 9295 | E-mail: engineer@ecsa.co.za

DOCUMENT LIST

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

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