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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Annexure A - Form of summons for respondent [Rule 4.1(c)]
Annexure B - Form of subpoena for witness [Rule 4.3]
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 –


2.2 “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" means 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 of ................................20...... 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 of ......................... 2............

......................................................

Signature and capacity

Served on .......................................................

......................................................

Sheriff

www.eca.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@eca.co.za

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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

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DOCUMENT LIST

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

1.
2.
3.
4.