

BOARD NOTICE 106 OF 1997

Engineering Council of South Africa

METHOD OF INQUIRY INTO ALLEGED IMPROPER CONDUCT: ENGINEERING PROFESSION OF SOUTH AFRICA ACT, 1990 (ACT NO. 114 OF 1990)

In terms of section 21(2) of the Engineering Profession of South Africa Act, 1990 (Act No. 114 of 1990), the Engineering Council of South Africa hereby makes known that it has, under section 21(1)(i) and (m) of the said Act, made the rules in the Schedule.

SCHEDULE

METHOD OF INQUIRY INTO ALLEGED IMPROPER CONDUCT

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CHAPTER 1

PROCEDURE PRIOR TO INQUIRY

Information and complaints of improper conduct

1. (1) The registrar must refer any information which *prima facie* points to improper conduct on the part of a *registered person*, to a *committee of preliminary investigation*⁽¹⁾ to determine whether or not *prima facie* evidence of such conduct exists.
- (2) (a) Any person lodging a complaint of improper conduct with the council against a *registered person*, 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 complainant contemplated in paragraph (a) must also indicate the preparedness to produce the additional evidence which the *committee of preliminary investigation* may request, and to identify any witness who may be able to provide evidence in support of the complaint.

(1) An italicised word or expression is defined in rule 15.

- (c) The registrar must, upon receipt of a complaint referred to in paragraph (a) which ***prima facie*** points to the improper conduct by a *registered person*, refer the complaint to the *committee of preliminary investigation* to determine whether or not ***prima facie*** evidence of such conduct exists.

Preliminary investigation

- 2. (1) The *committee of preliminary investigation* must in writing notify any *registered person* whose conduct is the subject of an investigation in terms of rule 1 -
 - (a) of the nature of the alleged improper conduct; and
 - (b) that such person may, within 30 days from the date of the notice, give a written explanation of the matter, which may be used in evidence.
- (2) If the *committee of preliminary investigation* is of the opinion that ***prima facie*** evidence exists of improper conduct referred to in section 17(1) of *the Act* or the rules promulgated under section 21(1)(h) of *the Act*, it may recommend to the council that an inquiry be held in terms of section 19 of *the Act*.

Preparation for inquiry

- 3. (1) In the event of an inquiry being decided upon by the council -
 - (a) the *committee of preliminary investigation* must appoint a *pro forma complainant*, who must formulate the charge in writing and, at the inquiry, adduce all evidence in support of the charge;
 - (b) the *committee of preliminary investigation* 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 *defendant*, as well as a summons -
 - (i) informing the *defendant* of the charge;
 - (ii) requiring the *defendant* to attend the inquiry 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 *defendant* to file an answering affidavit, which may be used in evidence at the inquiry.
- (2) The summons for the *defendant* referred to in subrule (1)(c) must be substantially in the form of Annexure A, and must be served on the *defendant* by the sheriff concerned.
- (3) Where the *pro forma complainant* or the *defendant* intends to call any person as a witness at the inquiry, a written notice of intention to call the person must be given to the other party prior to commencement of proceedings, and the said notice must disclose the name of the witness intended to be called and, in the case of an expert witness, the evidence the witness will give.
- (4) The summons for a witness to attend an inquiry contemplated in section 19(2) of *the Act* must be substantially in the form of Annexure B.

CHAPTER 2

PROCEDURE AT INQUIRY

Defendant present at inquiry

4. Where the *defendant* is present at an inquiry the procedure is as follows:
- (a) The chairperson of the *committee of inquiry* reads the charge to the *defendant*.
 - (b) The chairperson then asks the *defendant* to plead by admitting or denying the charge.
 - (c) If the *defendant* or the representative of the *defendant* informs the *committee of inquiry* that the *defendant* admits to a charge, the *committee of inquiry* may find the *defendant* guilty on the charge without hearing evidence, or after hearing the evidence it may deem necessary.
 - (d) If the *defendant* denies the charge, the *committee of inquiry* must hear evidence pertaining to the charge.
 - (e) If the *defendant* refuses or fails to plead to a charge, the *committee of inquiry* makes a note of the refusal or failure and enters a plea of denial on behalf of the *defendant*, and a plea so entered has the same effect as if it had in fact been so pleaded.
 - (f) The *pro forma complainant* then states the case against the *defendant* and adduces evidence in support of it.
 - (g) Subject to paragraph (h), no person may be examined as a witness unless that person is put under oath.
 - (h) Any person who objects to taking the oath or who does not consider the oath to be binding on the conscience, or who for any other reason objects to taking the oath, must make an affirmation.
 - (i) The *defendant* or the representative of the *defendant* must be given the opportunity to cross-examine any witness called by the *pro forma complainant*, as contemplated in section 19(6) of *the Act*, and then the *pro forma complainant* may re-examine the witness on points raised in cross-examination.
 - (j) At the conclusion of the case presented by the *pro forma complainant*, the *defendant* must be afforded the opportunity of stating the defence, and of adducing evidence in support of it.
 - (k) If the *defendant's* defence is contained in a written statement the statement must be read at the inquiry.
 - (l) The *pro forma complainant* may cross-examine a *defendant* who has elected to give evidence, and each witness for the defence and then the *defendant* or the representative of the *defendant* may re-examine the witness on points raised in cross-examination.
 - (m) If any person whose evidence may be material is not called as a witness by the *pro forma complainant* or the *defendant* during the inquiry, the *committee of inquiry* may at any time summon and call that person as a witness, after it has informed both parties of the name of the witness and the expected evidence, and subject to their rights to cross-examine the witness.

- (n) Members of the *committee of inquiry* may, with the permission of the chairperson, question the *pro forma complainant*, a *defendant* who has elected to give evidence or any witness.
- (o) At the conclusion of the case for the *defendant*, the *committee of inquiry* must, irrespective of whether the *defendant* has adduced evidence or not, hear the address of the *pro forma complainant* on the case generally, but may hear no further evidence unless, in a special case, it deems it just to receive further evidence.
- (p) At the conclusion of the address of the *pro forma complainant*, the *defendant* or the representative of the *defendant* may address the *committee of inquiry* in defence.
- (q) The *pro forma complainant* may not reply to such address unless -
 - (i) the *defendant* or the representative of the *defendant* has adduced further evidence after the address of the *pro forma complainant*, in which event the reply must be confined to matters arising from that evidence; or
 - (ii) the *defendant* or the representative of the *defendant* has in the address raised any question of law, in which event the reply must be confined to the question of law so raised.
- (r) The *pro forma complainant* may, with the consent of the *committee of inquiry*, at any time withdraw any charge before a finding has been made on it, but once the *defendant* has pleaded to a charge, the defendant is entitled to a finding on it, and may not be charged again on the same facts at a later stage.
- (s) The *committee of inquiry* may **in camera** decide on any point arising in connection with, or in the course of, an inquiry.
- (t) At the conclusion of an inquiry, the *committee of inquiry* may deliberate **in camera**.

Defendant not present at inquiry

5. If a *defendant* fails to attend the inquiry or to be present at any resumption of it after an adjournment, the *committee of inquiry* may continue to deal with the matter in the absence of the *defendant* as follows:
- (a) The *pro forma complainant* must produce proof to the *committee of inquiry* that the summons and the charge was served on the *defendant* personally.
 - (b) The *pro forma complainant* must then state the case and adduce evidence in support of it.
 - (c) For the purposes of paragraph (b), formal evidence must be given on oath of affirmation, and the *committee of inquiry* must consider and take cognisance of all written statements and other evidence produced by the *pro forma complainant*.

Finding on merits by committee of inquiry

6. (1) The *committee of inquiry* must, in regard to each charge, determine whether sufficient facts have been proved on a balance of probabilities to support the charge, and the chairperson must at the inquiry announce the finding on the merits.
- (2) The chairperson must within 30 days after the inquiry inform the *defendant* in writing of the finding on the merits, and of the *defendant's* right to appeal under section 10(5) of *the Act*.

Previous convictions

7. (1) After the announcement of a finding in terms of in rule 6(1), the *pro forma complainant* may adduce evidence of previous convictions, if any, of improper conduct on the part of the *defendant*.
- (2) Evidence of previous convictions of improper conduct must be adduced by means of a certificate under the hand of the registrar, and the certificate must contain the charge preferred at the time, the finding of the relevant *committee of inquiry* and the punishment imposed.
- (3) If the *defendant* challenges the correctness of the certificate, the record of the inquiry at which the *defendant* was previously convicted, must be produced in evidence.

Evidence in mitigation

8. (1) The *defendant* or the representative of the *defendant* may adduce evidence in mitigation and concerning the character of the *defendant*.
- (2) (a) The *pro forma complainant* may cross-examine a *defendant* who has elected to give evidence, and each of the defence witnesses, and then the defence may re-examine the witness on points raised in cross-examination.
- (b) The *pro forma complainant* may also adduce evidence in rebuttal of the evidence contemplated in subrule (1).
- (3) The *defendant* or the representative of the *defendant* must be given the opportunity to cross-examine any witness called by the *pro forma complainant*, as contemplated in section 19(6) of *the Act*, and then the *pro forma complainant* may re-examine the witness on points raised in cross-examination.

Addresses on punishment

9. (1) At the conclusion of the evidence in mitigation, if any, the *pro forma complainant* may address the *committee of inquiry* on the punishment to be imposed on the *defendant*.
- (2) Then the *defendant* or the representative of the *defendant* may address the *committee of inquiry* on the question of punishment.
- (3) The *pro forma complainant* may not reply unless the *defendant* or the representative of the *defendant* has in the address raised a question of law, in which event the reply must be confined to the question of law so raised.

Finding on punishment

10. (1) The *committee of inquiry* may deliberate **in camera** upon the punishment to be imposed, and the chairperson must at the inquiry announce the finding on punishment.
- (2) The chairperson must within 30 days after the inquiry inform the *defendant* in writing of the finding on punishment, and of the *defendant's* right to appeal under section 10(5) of *the Act*.

CHAPTER 3

PUNISHMENTS WHICH MAY BE IMPOSED

Punishments

11. (1) Any one or more of the following punishments may be imposed on a *registered person* who has been found guilty of improper conduct:
- (a) A caution.
 - (b) A fine not exceeding R100 000-00.
 - (c) A temporary disqualification from registration in terms of *the Act*, for a period not exceeding three years.
 - (d) Subject to subrule (2), permanent disqualification from registration in terms of *the Act*.
- (2) A punishment of permanent disqualification from registration referred to in subrule (1)(d) may only be implemented with the approval of the council after it has considered all the relevant facts.

Payment of fine

12. (1) If a fine is imposed by a *committee of inquiry* under of rule 11(1)(b) and the *registered person* is unable to pay the fine in full within 30 days, the *registered person* may, subject to section 18(3) of *the Act* -
- (a) if the *committee of inquiry* is still in sitting, make representations to the *committee of inquiry*, which may allow payment of the fine by instalments and may determine the period within which the fine must be paid; or
 - (b) within 14 days after conclusion of the proceedings, make representations to the chairperson of the *committee of inquiry*, who may allow payment of the fine by instalments and may determine the period within which the fine must be paid.
- (2) If a *registered person*, having been fined under rule 11(1)(b), fails to pay the fine within the period prescribed in section 18(3) of *the Act* or determined under subrule (1), the council may recover the fine by due process of law in a competent court.

Publication of finding

13. (1) If a *registered person* is found guilty in terms of these rules, the *committee of inquiry* may authorise the publication in the **Gazette** of the name and registration number of the person concerned, the finding and the punishment imposed.
- (2) If a *registered person* who has been acquitted so requests, the *committee of inquiry* must cause the name and registration number of that person and the fact of the acquittal, to be published in the **Gazette**, at no cost to that person.
- (3) In the event of a punishment under rule 11(1)(d) having been imposed by the *committee of inquiry*, the publication contemplated in subrule (1) may only be effected after the implementation of the punishment has been approved by the council as contemplated in rule 11(2).

CHAPTER 4

GENERAL PROVISIONS

Repeal of rules, and transitional provision

14. (1) The rules on the Method of Inquiry into alleged Improper Conduct published in Board Notice 121 of 22 October 1993 are hereby repealed.
- (2) Any inquiry started in terms of the repealed rules may be finalised in terms of these rules, except that insofar as the rules have been changed to the detriment of a *registered person*, the repealed rules still apply in respect of improper conduct committed before the commencement of these rules.

Definitions

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

“**committee of inquiry**” means a committee appointed by the council under section 9(2) of *the Act* and to which the power to inquire into the conduct of a *registered person* under section 18(2) or 19 of *the Act* has been delegated under section 10(1) of *the Act*;

“**committee of preliminary investigation**” means a committee appointed by the council under section 9(2) of *the Act* and to which the power to conduct a preliminary investigation under section 18(1) of *the Act*, has been delegated under section 10(1) of *the Act*;

“**defendant**” means a *registered person* whose conduct is the subject of an inquiry in terms of these rules;

“**pro forma complainant**” means a pro forma complainant appointed in terms of rule 3(1)(a);

“**registered person**” means a person registered in terms of *the Act*; and

“**the Act**” means the Engineering Profession of South Africa Act, 1990 (Act No. 114 of 1990).

16. These rules are called the Rules on Inquiries into Improper Conduct in the Engineering Profession, 1997.

ANNEXURE A

FORM OF SUMMONS FOR DEFENDANT

[(Rule 3 (2))]

To

You are hereby notified that an inquiry in terms of section 19 of the Engineering Profession of South Africa Act, 1990 (Act No. 114 of 1990), will be held at..... on the day of200 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 inquiry 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 advised that you may request further particulars to the charge, and must file an answering affidavit, which may be used as evidence at the inquiry.

Should you fail to be present at the inquiry, or at the resumption of it after an adjournment, the committee of inquiry 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 of200.....

.....
Signature and capacity

Served on

.....
Sheriff

ANNEXURE B
(SUBPOENA FOR WITNESS)
[Rule 3 (4)]

To

You are hereby notified that an inquiry in terms of Section 19 of the Engineering Profession of South Africa Act, 1990 (Act 114 of 1990) (the Act), will be held at on the day of 200 at when a charge of alleged improper conduct against will be considered.

Whereas the Engineering Council of South Africa (ECSA) is of the opinion that you may be able to give material information concerning this inquiry and you may have in your possession the following documents:-

1. All documents relating in any way to, or recording 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 matter were discussed.
3. Plans, specifications, designs and/or one or more of the documents as set out in the document checklist annexed hereto.

Therefore, in terms of section 19(1) of the said Act, you are hereby summoned to appear before the committee of inquiry at the time and place specified above, to be interrogated or to produce the items specified in the attached Annexure.

Your attention is respectfully directed to the provisions of section 19, and particularly subsections 19(3), (4), (5) and (7) of the said Act, a copy of which is enclosed.

.....
Signature and capacity

Served on

.....
Sheriff

CHECKLIST

This checklist for witnesses is a guideline setting out the nature of documents required which may be directly or indirectly related to the inquiry and must be produced:

1. Minute books and all minutes of meetings of Directors, Members, Project Managers, site office meetings.
2. All books of account and all notes in whatever form the following specific documents:-
 - 2.1
 - 2.2
 - 2.3
 - 2.4
 - 2.5