

(1 December 1999 – to date)

HOUSING CONSUMERS PROTECTION MEASURES ACT 95 OF 1998

(Government Gazette 19418, dated 2 November 1998. Commencement date: 4 June 1999, unless otherwise indicated [Proc. No. R70. Gazette No. 20122])

REGULATIONS REGARDING NHBRC DISCIPLINARY PROCEEDINGS

*Government Notice R1409 in Government Gazette 20658 dated 1 December 1999. Commencement date:
1 December 1999.*

The Minister of Housing has, after consultation with the National Home Builders Registration Council, under sections 1 and 7(2) of the Housing Consumers Protection Measures Act, 1998 (Act No. 95 of 1998), made the regulations in the Schedule.

SCHEDULE

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1. Definitions

In these Rules any word or expression to which a meaning has been assigned in the Act shall bear that meaning and unless the context otherwise indicates –

"**chair**" means the chair of the disciplinary committee contemplated in section 5(2)(a) of the Act;

"**committee**" means a disciplinary committee contemplated in section 5(1)(b) of the Act;

"**day**" excludes any day falling within the building industry recess period;

"prosecutor" means a person appointed or contracted by the Council for purposes of presenting a matter before the committee;

"the Act" means the Housing Consumers Protection Measures Act, 1998 (Act No. 95 of 1998).

2. Disciplinary committee

- (1) The Council shall appoint at least three persons to the disciplinary committee for the period determined by the Council, but not exceeding three years at any one time.
- (2) The Council may for bona fide reasons or at the request of a member of the committee for his or her removal, remove or substitute members of the committee.
- (3) Subject to subregulation (4), the constitution of the committee must remain unaltered for purposes of any proceedings in respect of any particular home builder in terms of section 11 (1) of the Act.
- (4) Should a vacancy occur on the committee after the committee has commenced with proceedings, the proceedings may continue before the remaining members of the committee: Provided that the committee shall not proceed with less than two members.
- (5) If only two members of the committee are present at a meeting, the decision must be unanimous in order to bring out a decision adversely affecting the home builder.
- (6) No decision taken by the committee or act performed by it hereunder is invalid merely by reason of a vacancy on the committee.
- (7) The committee must meet from time to time and at such places as may be necessary to fulfil its duties.
- (8) The quorum of the committee is two members, which must include the chair.
- (9) The proceedings before the committee must be recorded.
- (10) Any decision of the committee is a decision of the Council and is, subject to section 22(1) and 22(2) of the Act, final.
- (11) Subject to subregulation (5), the decision of the majority of the members of the committee constitutes the decision of the committee.
- (12) Subject to subregulation (5), the chair has a casting vote in addition to his or her deliberative vote in the event of an equality[sic] of votes.

3. Preliminary proceedings

Prepared by:

- (1) In the event that the Council has received information that a home builder may be guilty of anything contemplated in section 11(1) of the Act, the Council must investigate the matter.
- (2) The Council must investigate the charges contemplated in subregulation (1) in terms of its complaints procedures prescribed in terms of section 7(1)(vi) and (vii) of the Act.
- (3) Following the investigations contemplated in subregulation (2), should the Council be of the view that there has been a contravention contemplated in section 11(1) of the Act that requires disciplinary action, the Council must notify the home builder in terms of section 24 of the Act –
 - (a) that the matter has been referred to the committee;
 - (b) of the charge against the home builder, with reference to the relevant provision allegedly contravened as contemplated in section 11 (1) of the Act;
 - (c) of the implications for the home builder should the home builder be found guilty;
 - (d) of the home builder's right, within 30 days as from notification, to make representations to the committee in the form of a sworn affidavit setting forth its position, or any comments on the charges, but that the home builder is not obliged to do so and that any such affidavit or comments may be used as evidence at the enquiry;
 - (e) of the home builder's right to be represented by or accompanied by an adviser; and
 - (f) that should the home builder wish to plead guilty to the charge, the home builder may –
 - (i) furnish the committee within 30 days with an affidavit setting forth any mitigating circumstances; or
 - (ii) request an opportunity to lead evidence in mitigation;

and must provide the home builder with a copy of these rules and any affidavits contemplated in subregulation (4).

- (4) The Council must have affidavits prepared setting out the facts pertaining to the charge and details of the nature and results of any investigation undertaken by the Council and forward a copy of the notice in terms of subregulation (3) and those affidavits to the committee, who, subject to any comments contemplated in the affidavit submitted in terms of subregulation (3)(d) may determine that –
 - (a) the charge does not disclose a contravention contemplated in section 11(1) of the Act;

- (b) based on the facts set out in the affidavit, there is no reasonable prospect of proving the charge against the home builder;
 - (c) the matter is of a petty nature and does not require disciplinary sanction; or
 - (d) that the charge is competent and that an inquiry should be held.
- (5) The Council may at any time before a decision contemplated in subregulation (4) has been taken, withdraw a charge and notify the home builder and the affected housing consumer accordingly, and may re-open the matter thereafter should new evidence become available which may justify such an action.
- (6) In the event of the committee concluding as contemplated in subregulation (4)(a), (b) or (c), the committee must acquit the home builder and the Council must notify the home builder and any affected consumer accordingly.
- (7) Should the home builder in its comments, contemplated in subregulation (3)(d), admit that the home builder performed or failed to perform any act as charged and the committee is satisfied that such act or omission constitutes a contravention contemplated in section 11(1) of the Act, the committee must after considering the contents of the affidavits contemplated in subregulations (3) and (4), determine the penalty to be imposed and must notify the home builder and any affected housing consumer –
- (a) that it finds the home builder guilty of the charge; and
 - (b) of the penalty it has imposed on the home builder.
- (8) In the event of a home builder pleading not guilty and the charge not being disposed of in terms of subregulation (4), the Council must summon the home builder to appear before the committee at a time and place specified in the summons for the purpose of an inquiry.
- (9) The committee must make its findings based on the balance of probabilities.
- (10) In the pleading of a charge, the home builder may in addition to any other plea, plead that it has previously been found guilty or not guilty on the charge.
- (11) In the event of criminal proceedings being instituted against the home builder in terms of section 21 of the Act, the committee must, in determining the penalty for contravention, have regard to any sentence imposed by a competent court and bear in mind the cumulative effect of any penalty and any such sentence to avoid double jeopardy.
- (12) A court in imposing any sentence in terms of section 21 of the Act shall similarly have regard to any penalty imposed by the committee.

4. Summons

- (1) A summons referred to in subregulation 3(8), must be –
 - (a) as nearly as possible in the form specified in Annexure 1;
 - (b) signed by the chief executive officer;
 - (c) served on the home builder in terms of section 24 of the Act.
- (2) If the home builder, after the summons referred to in subregulation 3(8) has been served on it, but before the commencement of the inquiry, notifies the committee in writing that the home builder wishes to plead guilty to the charge as set out in such summons and the committee is satisfied that the charge against the home builder should be disposed of without the holding of an inquiry, the committee must, time permitting, notify the home builder, and the affected housing consumer and any person on whom a summons has been served in terms of regulation 7, that the inquiry will no longer be held, and thereupon regulation 3(7) applies with the necessary changes required by the context in respect of such charge.

5. Hearing

- (1) At the commencement of an inquiry the prosecutor must read the charge to the home builder and must ask the home builder to plead guilty or not guilty thereto.
- (2) If the home builder refuses or fails to plead to the charge at the inquiry, it must be recorded that the home builder pleaded not guilty, and thereupon the inquiry must be proceeded with as if the home builder had in fact pleaded not guilty to the charge.
- (3) A home builder may be assisted by an adviser, including a legal adviser, at an inquiry at the home builder's cost.
- (4) Subject to the provisions of these rules, evidence at an inquiry must be given orally or be tendered by way of sworn affidavits: Provided that no affidavit must be admitted in evidence if the committee is satisfied that there are sufficient grounds why it should not be admitted.
- (5) Unless an affidavit has been made available to a party before the hearing to consider such affidavit, the affected party may object to the acceptance thereof without having an opportunity to consider the affidavit.
- (6) The chair of the committee must administer an oath to or accept an affirmation from any person giving evidence.

- (7) Whenever the home builder has pleaded guilty to a charge –
 - (a) if the committee is satisfied that the home builder is guilty of a contravention contemplated in section 11(1) of the Act, and the committee is satisfied that the charge can be disposed of without hearing evidence, then the committee may find the home builder guilty of the charge without hearing evidence;
 - (b) the committee may, and at the instance of the home builder must, hear or accept further evidence in connection with the charge, irrespective of whether or not the committee is satisfied that the home builder is guilty of the charge.
- (8) If the home builder has pleaded not guilty to the charge or the committee has decided to hear or accept further evidence in connection with the charge in terms of subregulation (7), the committee must give the prosecutor the opportunity of adducing evidence in support of the charge.
- (9) After the prosecutor has adduced evidence in support of the charge in terms of subregulation (7) or (8), the committee must give the home builder the opportunity to adduce evidence in its defence against the charge.
- (10) Witnesses may be cross-examined by the parties and may also be examined by the committee.
- (11) After all the evidence in connection with a charge has been adduced or if the committee has decided in terms of subregulation (7), not to hear any further evidence in connection with the charge, the prosecutor and the home builder may address the committee and the committee may allow the parties to reply to issues raised.
- (12) After the proceedings contemplated in subregulation (11) have been concluded the committee must consider the evidence submitted at the inquiry, in order to come to a decision whether the home builder should be convicted on the charge.
- (13) The committee must inform the home builder and the affected housing consumer of its decision.
- (14) A committee may at any time, for sufficient cause, adjourn the inquiry to a date determined by it.

6. Penalties

- (1) If the committee has in terms of regulation 5(12) convicted the home builder of a charge, it must give –
 - (a) the prosecutor the opportunity of proving whether the home builder has previously been convicted by the committee; and

- (b) the home builder the opportunity of adducing evidence in mitigation and the home builder and the prosecutor the opportunity of addressing it in connection with the penalty which the committee should impose upon the home builder.
- (2) A certificate signed by the chief executive officer and purporting to be an extract from the minutes of the proceedings of the committee stating the particulars of the charge brought against the home builder, the conviction of the home builder, and the penalty imposed upon the home builder by the committee is, upon its production by the prosecutor to the committee, in the absence of evidence to the contrary sufficient proof that the home builder had previously been convicted.
 - (3) After the provisions of subregulation (2) have been complied with, the committee must, subject to subregulation 5 (14), impose a penalty and inform the home builder and an affected housing consumer accordingly.
 - (4) The penalties that may be imposed are –
 - (a) a warning;
 - (b) a fine not exceeding R25 000; or
 - (c) withdrawal of registration.
 - (5) Where a home builder wishes to appeal against or take under review, in terms of section 22(1) or (2) of the Act, a decision taken or a penalty imposed by the committee, the home builder must notify the Council of its intentions within 30 days of the issuing of the decision or penalty.
 - (6) Where the committee withdraws the registration of a home builder in terms of section 11(1) of the Act, the Council must publish in the *Government Gazette* –
 - (i) the names of such companies, close corporations, trusts, partnerships or sole traders;
 - (ii) the names, and identity numbers of the directors, members, trustees or partners; and
 - (iii) the reasons for such withdrawal of registration.
 - (7) Where a fine has been imposed, the committee may order that a portion of the fine, but not exceeding 80 percent of such fine, be applied, subject to finalisation as contemplated in subregulation (5), towards payment of compensation to any affected housing consumer who suffered pecuniary loss as a result of the home builder's contravention of the Act.
 - (8) Any fine imposed by the committee must be paid within 30 days of notification to the home builder, failing which the registration of the home builder is automatically suspended.

- (9) Should the fine not be paid within 60 days, the Council may act in terms of section 11(1)(c) of the Act.
- (10) Any person directly affected by the decision of the committee may within 30 days of notification of the decision request the committee in writing to furnish him or her with written reasons for a decision of the committee.
- (11) Any person affected by the decision of the committee may request a copy of the record of proceedings of the committee.

7. Witnesses and attendances

- (1) A committee may of its own accord or at the instance of the home builder or the prosecutor summon any person to be present at an inquiry in order to give evidence and to produce at such inquiry any book or other document which such person has in his or her possession or custody or under his or her control or which is suspected or believed to be in his or her possession or custody or under his or her control and which has a bearing on the charge which is a subject matter of such inquiry.
- (2) The committee may require security for the cost of attendance of any particular witness.
- (3) Subject to a decision of the committee, the Council may pay a witness for the Council summoned and present at an inquiry, the reasonable fees that the Council may from time to time determine generally, or in any particular case.
- (4) No person –
 - (a) having been duly summoned to be present at an inquiry, may without lawful excuse fail so to appear;
 - (b) having been called as a witness at an inquiry, may without lawful excuse refuse to be sworn or to make an affirmation or to produce any book or other document or to answer any question which he or she may be required to produce or answer.
- (5) Where a person fails to comply with subregulation (4), he or she is guilty of an offence in terms of section 27(1) of the Act and liable on conviction to a fine not exceeding R25 000 or to imprisonment for a period not exceeding one year.

8. Representation

A home builder must be represented in disciplinary proceedings by the chair, managing director, chief executive officer, managing member of the home builder or such other person as may be specified by

the Council in any particular case in the notice contemplated in regulation 3(3) or the summons in regulation 3(8).

Annexure 1

Housing Consumer Protection Measures Act, 1998
(Act 95 of 1998)

Form of summons referred to in regulations 3(8) and 4(1) and prescribed in terms of Section 27(1) of the Act.

To

You are hereby summoned to appear on19..... at.....h.....

at before a disciplinary committee of the National Home Builders Registration Council for the purposes of an inquiry into improper conduct by you and to produce the following books and documents at the said time and place

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The charge against you which will be inquired into at the said time and place and of which you have already been notified in writing by the board on is the following

If you fail, without lawful excuse, to be present at the time and place stated above, you will be guilty of an offence in terms of regulation 7(5) of Regulation No of 1999 and liable on conviction to a fine not exceeding R25 000 or up to one year's imprisonment.

Signed aton 19

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Managing Director
National Home Builders Registration Council