

SACPCMP

The South African Council for the Project and Construction Management Professions

— CONSTRUCTING NEW PERSPECTIVES —

SACPCMP POLICY ON APPEALS AND TRIBUNALS

Revision No.				
Last Revision Date				
Effective Date				
Valid Until				
	NAME	POSITION	SIGNATURE	DATE
Approved by				
Approved by				

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Acronyms and Abbreviations

CBE	The Council for the Built Environment
PAJA	Promotion of Administrative Justice Act, Act 3 of 2000
SACPCMP	The South African Council for the Project and Construction Management Professions

Definitions

Act, the	In this policy 'the Act' refers to the founding legislation of the Council which is the Project and Construction Management Professions Act 48 Of 2000.
Administrator	An organ of state or any natural or juristic person taking administrative action.
Administrative action	Any decision taken, or any failure to take a decision by the SACPCMP when exercising a power in terms of its Act which adversely affects the rights of any person and which has a direct, external legal effect.
Appeal	is concerned with the merits of a case and seeks to understand whether the original decision or outcome was correct or not.
Appellant	Means the person who is appealing an administrative action as outlined in sub-section 3.4.5 of this policy
Consistency	The quality of always behaving in the same way or of having the same standard. The quality of being consistent usually implies a positive sense of dependability.
Council	The South African Council for the Project and Construction Management Professions
Credibility	the quality of being trusted and inspiring belief.
Decision	Any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision.
Empowering provision	A law, a rule, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken.
Lawful	A decision allowed by law, taken by an authorised administrator acting within the scope of his/her/its authorisation

Reasonable	The decision taken must be justifiable or there must be a good reason for the decision.
Objectivity	Being independent from bias, prejudice and judgement.
Registered Person	Is defined in the Act as a person registered under the categories referred to in section 18 of the Act.
Review	is concerned with the manner that the decisions were arrived at thus focussing on the legality and not the process followed.
Transparency	The quality of being clear, open and honest.

1. Introduction

The South African Council for the Project and Construction Management Professions (SACPCMP) was established by section 2 of the Project and Construction Management Professions Act (No. 48 of 2000) hereafter referred to as 'the Act' to regulate Project and Construction Management professions to protect the public. In doing so it is required to take administrative action as empowered by the Act. The SACPCMP strives to do so in line with the Constitution of the Republic of South Africa and as such must adhere to the principles ascribed therein.

It is also required by the SACPCMP to ensure that high professional and ethical standards are upheld by professionals through adherence to the Code of Conduct for Registered Persons. This may result in cases of improper conduct against registered persons. Therefore, cases of improper conduct and the grievance procedure in relation to registration must be fairly adjudicated and there must be adherence to the relevant legislation in the implementation of appeals and tribunals.

The aim of this policy is to set out the principles that govern the appeals and tribunals implemented by the SACPCMP.

2. Legislative and Policy Framework

People have the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa. These rights are prescribed in the Promotion of Administrative Justice Act, Act 3 of 2000.

The criteria that the SACPCMP must meet in order to be subjected to the requirements of PAJA are as follows:

- a) It must be a Juristic person established by an Act of Parliament.
- b) It must exercise a public function.

According to the SACPCMP founding legislation, the Council does perform a public function of regulating built environment professions through various powers conferred it through the Act. Due to the Council having instruments to perform a public function, it is therefore subject to PAJA requirements.

This policy outlines the criteria for the implementation of the SACPCMP's powers with regards to appeals as outlined in sections 24 and 33 of the Act, and tribunals as outlined in sections 30 to 32 of the Act.

This Policy on Appeals and Tribunals utilises the guidelines of the CBE *Policy Framework on Appeals and Tribunals*.

3. Policy Prescripts

3.1. Defining an administrative action

Administrative action consists of the following six elements:

3.1.1. A decision or failure to make a decision.

3.1.2. It must be of administrative nature made in terms of empowering provision.

(1) Decisions made by the SACPCMP are empowered by the Act.

3.1.3. Should not be excluded by PAJA.

(1) Excluded decisions include:

- i. Policy decisions of the executive
- ii. The making of legislation by Parliament, a provincial legislature or a municipal council; and
- iii. The exercise of judicial functions by officers of courts and some bodies

3.1.4. That is made by an organ of state.

(1) All decisions of an administrative nature taken by the SACPCMP are based on applicable prescripts of the Act will be affected.

3.1.5. That adversely affects rights.

(1) A decision will adversely affect the rights of someone or a group when it has a negative effect – this will include decisions that:

- i. Require someone to do something or not to do something.
- ii. Limit or remove someone's rights.
- iii. Lead to a conclusion that someone does not have a right to something.

(2) A beneficial decision would therefore not constitute administrative action.

3.1.6. That has direct external legal effect which comprises of three components:

(1) Legal effect: The decision must be legally binding.

(2) Direct effect: The decision must be the final one.

(3) External effect: The decision must affect someone who is not part of the SACPCMP.

3.2. Requirements for Lawful administrative decisions

3.2.5. A decision made must be:

- (1) Reasonable - The decision made must be justifiable by providing good reasons and the process of decision-making should be thorough.
- (2) Lawful - The SACPCMP must make a decision in terms of an empowering provision and must be authorised by law.
- (3) Fair - The decisions that have a negative effect on a person should not be taken without consulting them first.
- (4) Rational- The decision should not be arbitrary and all relevant factors should be taken into account and the decision should thus be based findings of fact and the application of legal principles to those facts.

3.2.6. Procedurally fair Administrative Action

- (1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.
- (2) A fair administrative procedure depends on the circumstances of each case.
- (3) In order to give effect to the right to procedurally fair administrative action, the SACPCMP, must:
 - i. give a person adequate notice of the nature and purpose of the proposed administrative action.
 - ii. Provide a reasonable opportunity to make representations.
 - iii. Provide a clear statement of the administrative action.
 - iv. Provide adequate notice of any right of review or internal appeal, where applicable; and
 - vi. Provide adequate notice of the right to request reasons for the administrative action to give effect to the right to procedurally fair administrative action.
 - vii. give a person the opportunity to obtain assistance and, in serious or complex cases, legal representation.
 - viii. give a person the opportunity to present and dispute information and arguments; and
 - ix. give a person the opportunity to appear in person.

- (4) If it is reasonable and justifiable in the circumstances, the SACPCMP may depart from any of the requirements referred to above. In determining whether a departure is reasonable and justifiable, the SACPCMP must consider all relevant factors, including:
 - i. the objects of the empowering provision.
 - ii. the nature and purpose of, and the need to take, the administrative action.
 - iii. the likely effect of the administrative action.
 - iv. the urgency of taking the administrative action or the urgency of the matter; and
 - v. the need to promote an efficient administration and good governance.
- (5) Where the SACPCMP is empowered by any empowering provision to follow a procedure which is fair, the SACPCMP may act in accordance with that different procedure.

3.3. Principles for appeals and tribunals

3.3.5. Appeals and tribunals are governed by the following principles:

- (1) Transparency – the process and its requirements must be communicated and understood by all the parties.
- (2) Fairness – appeals and tribunals must be conducted in conformity with the applicable laws and must be free from favouritism, self-interest, bias or deception.
- (3) Objectivity – it must follow objective rational norms standards and processes.
- (4) Consistency – The process must follow the prescripts of this policy.
- (5) Credibility – it must be trustworthy, and the outcome must be reasonable.
- (6) Confidentiality – information about the proceedings should be known and accessible only to participants.
- (7) Precedent setting – in the same or similar situations, past decisions must be followed.

3.4. Appeals

3.4.5. Grounds for Appeal

- (1) Registration

- i. According to section 24 (1) of the Act, if an applicant is of the opinion that a committee, in its refusal to register him or her, or to cancel his or her registration, other than a cancellation in terms of section 20(1)(a)(iii) or 32(3)(a)(iv) of the Act, did not comply with section 33 of the Constitution, that applicant may, on payment of the prescribed fees and within 30 days from the date on which the refusal or cancellation came to his or her knowledge, appeal to the council against that decision.
- ii. If an appeal is lodged against a refusal of a committee to renew the registration of a registered person, the registration of that person may not be cancelled until the appeal has been decided.

(2) Decision of Disciplinary Tribunal

- iii. According to section 33 (10) 1 of the Act a registered person found guilty of improper conduct may appeal to the Council against a finding of the disciplinary tribunal or against the sentence, or both.
- iv. If a registered person found guilty of improper conduct lodges an appeal in terms of subsection 33 (1) the decision of the disciplinary tribunal under section 32(3); or the publication by the council in terms of section 32(5), may not be put into effect before the Council or the CBE, or both, has decided the appeal.

(3) Decision of the Council

- i. According to section 35 (1) of the Act any member of the public whose interests and rights are affected by a decision made by the council may within 30 days from that person becoming aware of the decision request the Council in writing to furnish him or her in writing with its reasons for that decision.
- ii. A person, within 90 days from the date on which the Council furnished him or her with its reasons for that decision and after giving notice to the Council, may appeal to the CBE against that decision.
- iii. The decisions described in paragraphs (i) and (ii) above do not include decisions with regards to registration and disciplinary tribunals which require a person to first lodge an appeal with the Council as stipulated in the Act.

3.4.6. Option for internal review

- (1) The assessment and registration processes of the SACPCMP are independently reviewed on a regular basis through its moderation and internal audit processes.
- (2) Moderation and internal audit is done on a sample of applications for a particular period.
- (3) An applicant who has reasonable grounds to believe that their application was unfairly assessed may through a formal written correspondence request an internal review of their application by the moderator.
- (4) Upon review of the application the moderator will assess whether the assessment criteria and standards were applied correctly and fairly and will decide:
 - i. If it is determined that the assessment criteria and standards were breached, to overturn the decision of the assessor(s).
 - ii. If it is determined that the assessment criteria and standards were adhered to, to uphold the decision of the assessor(s).
- (5) The decision of the moderator will be considered final.
- (6) If the applicant, following the internal review remains aggrieved with the outcome they may appeal the decision as prescribed in this policy.
- (7) In the case of the internal review outcome being that to refuse registration, the date of this outcome will be considered the official date of refusal.

3.4.7. Notice of Appeal and Notice to Oppose

- (1) An appeal must be lodged within 30 days from the date on which the refusal or cancellation came to the notice of the appellant by delivering a Notice of Appeal in the prescribed format.
- (2) The appellant must pay the prescribed fee before the notice of appeal is accepted.
- (3) The respondent being the SACPCMP may respond to the Notice of Appeal by delivering a Notice to Oppose in the prescribed format and this must be within ten (10) days of receiving the Notice of Appeal.

- (4) The Notice to Oppose must address the information as contained in the Notice of Appeal and must include documents relevant to the Appeal which were not submitted by the appellant.

3.4.9. Condonation Applications

- (1) Fairness dictates that the Appellant ought to be given the opportunity to seek condonation for late lodging or late payment of the appeal fee and that the Council ought to grant such condonation under appropriate circumstances.
- (2) When weighing an application for condonation, the Council should weigh the following factors:
 - i. Degree of lateness of the appeal and/or payment:
Council should consider the number of days that the lodging and/or payment was late.
 - ii. Reasons for the lateness:
Appellant needs to demonstrate that the delay was caused by reasonable or excusable behaviours. If the delay was wilful, the condonation application would probably not be granted.
 - iii. Prospect of success on the merits:
Council needs to consider all the facts and surrounding circumstances submitted in the condonation application before it, whether it seems that the appellant may have a reasonable chance of success on the merits. The assessment does not require the full assessment of the appeal but rather a prima facie assessment as to whether the appeal has merit.
 - iv. Prejudice to both parties:
 - v. Prejudice argued by the appellant outside the ordinary prejudice that may be suffered should an appeal be dismissed as well as the interests of the Council are to be weighed.
- (3) Council should balance the different factors to come to a decision and if condonation is granted then Council can proceed to hear the appeal.

3.4.10. Legal Representation

- (1) Legal representation is not automatically granted. The Appellant should therefore make a written application requesting the approval of the Council for legal representation 10 days before the date of the hearing.
- (2) The Council must within five (5) days after receipt of the application respond to the Appellant stating the approval or disapproval of the application for legal representation.
- (3) Council reserves the right to grant approval for legal representation and will be guided by the nature and extent of the complexity of matter(s) before the hearing, appearing hereunder.
- (4) Fairness requires that the Council should consider the impact of the refusal of legal representation of the appellant. It must weight amongst others:
 - i. Complexity of the factual circumstances;
 - ii. Complexity of the legal issues to be decided upon; and,
 - iii. Whether the procedure would be unfair if legal representation is not allowed.

3.4.11. Hearing Date

- (1) The Council will set down the appeal for hearing within the required 60 days period and notify the parties accordingly.
- (2) The Council will endeavour to accommodate the parties in determining the hearing date, provided that it allows for the appeal to be decided within the statutory time limit.
- (3) The appellant should be allowed the opportunity to lead his/her case in person at the Council meeting that considers the appeal.
- (4) Council should invite the appellant in writing to come and present his/her appeal in person before the Council by written notice sent out at least fourteen (14) days before the Council meeting.
- (5) The appellant shall submit his/her written document(s) he/she wishes to rely upon to the Council at least seven (7) days before the Council meeting.
- (6) Where the appellant elects in writing not to appear before Council and argue the appeal, the Council may consider the appeal on the documentation submitted.
- (7) Should the appellant make no decision or make an election to appear but does not present himself/herself at the Council

meeting, the Council cannot merely proceed in his/her absence. The Council should satisfy itself that the appellant did receive the notice of the appeal hearing and that he/she was not prevented to attend by some or other circumstances beyond his/her control.

- (8) Where Council needs to decide as to whether to proceed with the appeal hearing, the following factors should be weighed, whether:
 - i. The Council has proof that the Notice of Appeal hearing was served on the appellant;
 - ii. An attempt was made to contact the appellant and if he/she was contacted, what were the reason forwarded for his/her absence;
 - iii. The Council is aware of any factors indicating that the appellant wanted to attend the hearing but was not able due to circumstances outside of his/her control; and,
 - iv. There is sufficient time left out of the 60 days period within which the appeal must be decided, to allow the Council to provide the appellant with a further opportunity to present himself/herself before the Council in the appeal hearing.

3.4.12. Hearing and Decision

- (1) The Council shall decide on the appeal after considering the Portfolios of Evidence and hearing arguments from both parties. The parties have the duty to present their cases before Council as completely as possible and to advance their submission at the appeal hearing.
- (2) The Council must decide on the appeal and provide the appellant with reasons for its decision.
- (3) Within 90 days from the date on which the Council furnished him or her with its reasons for its decision and after giving notice to the Council, a person may appeal to the CBE against that decision in terms of section 21 of the Council for the Built Environment Act, 2000.
- (4) A person referred to in paragraph (3) above may, after giving notice to the Council or the CBE, as the case may be, lodge a notice of appeal with the registrar of the appropriate High Court within one month from the date of the decision of the Council or the CBE.
- (5) With regards to an appeal against a decision of the disciplinary tribunal the Council may:

- i. dismiss the appeal against the decision of the disciplinary tribunal and confirm the finding or sentence or both; or
 - ii. uphold the appeal against the decision of the disciplinary tribunal wholly or in part and set aside or vary the finding or sentence or both.
- (6) If an appeal is dismissed in terms of section 33 (2)(a) of the Act the appellant may, within 30 days, from the date of the dismissal of the appeal, appeal to the CBE.
- (7) The appellant whose appeal was dismissed by the CBE may appeal to the appropriate High Court.
 - i. must, after giving notice to the CBE, lodge a notice of appeal with the registrar of the appropriate High Court within one month from the date of the decision of the CBE.
- (8) The Council may appeal to the appropriate High Court against any decision of the CBE with regard to disciplinary matters.
 - i. The Council must, after giving notice to the CBE, lodge a notice of appeal with the registrar of the appropriate High Court within one month from the date of the decision of the CBE.

3.5. Disciplinary Tribunals

3.5.1. Appointment of disciplinary tribunal

- (1) The Council must appoint a disciplinary tribunal to hear a charge of improper conduct if a person charged denies the charge; or fails to submit a written plea in response to the charge.
- (2) The disciplinary tribunal must consist of at least:
 - i. a person who specialises in the professional field concerning the charge;
 - ii. a professional who has appropriate experience; and
 - iii. a person qualified in law and who has appropriate experience.

3.5.2. Disciplinary Hearing

- (1) The disciplinary hearing must be conducted by the disciplinary tribunal.
- (2) The disciplinary tribunal may appoint a person to assist it in the performance of its functions. This person may:

- i. lead evidence and advance arguments in support of the charge and cross-examine witnesses;
- ii. question any person who was subpoenaed in terms of subsection (3) below; or
- iii. call anyone to give evidence or to produce any book, document or object in his or her possession or custody or under his or her control which the person suspects or believes to have a bearing on the subject of the hearing.

(3) Witnesses:

- i. The disciplinary tribunal may, for the purposes of a hearing, subpoena any person to appear before the disciplinary tribunal at the time and place specified in the subpoena, to be questioned or to produce a book, document or object, who in its opinion:
 - a. may be able to give material information concerning the subject of the hearing; or
 - b. who it suspects or believes has in his or her possession or custody or under his or her control any book, document or object which has any bearing on the subject of the hearing,
- ii. A witness who has been subpoenaed may not:
 - a. without sufficient cause, fail to attend the hearing at the time and place specified in the subpoena;
 - b. refuse to be sworn in or to be affirmed as a witness;
 - c. without sufficient cause, fail to answer fully and satisfactorily to the best of his or her knowledge to all questions lawfully put to him or her; or
 - d. fail to produce any book, document or object in his or her possession or custody or under his or her control which he or she has been required to produce.
- iii. A witness who has been subpoenaed must remain in attendance until excused by the chairperson of the disciplinary tribunal from further attendance.

- iv. A witness who has been subpoenaed may request that the names of the members of the disciplinary tribunal be made available to him or her.
- v. The law relating to privilege, as applicable to a witness subpoenaed to give evidence or to produce a book, document or object in a civil trial before a court of law may, with the necessary changes, apply in relation to the examination of, or the production of any book, document or object to the disciplinary tribunal by, any person called in terms of this section as a witness.
- vi. A witness may not, after having been sworn in or having been affirmed as a witness, give a false statement on any matter, knowing that answer or statement to be false.

(4) Subpoena:

- i. Must be in the prescribed form;
- ii. Must be signed by the chairperson of the disciplinary tribunal or, in his or her absence, any member of the disciplinary tribunal; and
- iii. Must be served on the registered person concerned personally or by sending it by registered mail.
- iv. A person may not prevent another person from complying with a subpoena or from giving evidence or producing a book, document or object which he or she is in terms of this section required to give or produce.

(5) Record of evidence:

- i. The disciplinary tribunal may retain a book, document or object produced in terms of subsection (3) above for the duration of the hearing.
- ii. The record of evidence which has a bearing on the charge before the disciplinary tribunal, and which was presented before any commission which investigated an event or conduct is admissible without further evidence being led if:
 - a. the record is accompanied by a certificate from the chairperson; and
 - b. the certificate certifies that the investigation was lawful, reasonable and procedurally fair.

- i. If the improper conduct with which the registered person is charged amounts to an offence of which he or she has been convicted by a court of law, a certified copy of the record of his or her trial and conviction by that court is, on the identification of the registered person as the person referred to in the record, sufficient proof of the commission by him or her of that offence, unless the conviction has been set aside by a superior court.
- (6) Proceedings:
- i. The chairperson of the disciplinary tribunal may call upon and administer an oath to, or take an affirmation from, any witness at the hearing who was subpoenaed in terms of subsection (3) above.
 - ii. At a hearing the registered person charged:
 - a. may personally be present at the hearing of the proceedings;
 - b. may be assisted or represented by another person in conducting the proceedings;
 - c. has the right to be heard;
 - d. may call witnesses;
 - e. may cross-examine any person called as a witness in support of the charge; and
 - f. may have access to documents produced in evidence;

3.5.3. Proceedings after hearing

- (1) After the conclusion of the hearing the disciplinary tribunal must, within 30 days:
- i. decide whether or not the registered person charged is guilty of improper conduct;
 - ii. if the disciplinary tribunal finds that the registered person charged is guilty of improper conduct, take cognisance of any aggravating or mitigating circumstances;
 - iii. inform the registered person charged and the council of the finding; and
 - iv. inform the registered person of his or her right of appeal in terms of section 33.

- (2) A registered person found guilty of improper conduct in terms of this section may:
 - i. address the disciplinary tribunal in mitigation of sentence; and
 - ii. call witnesses to give evidence on his or her behalf in mitigation of the sentence.
- (3) If the registered person charged is found guilty of improper conduct, or if he or she admits that he or she is guilty of the charge, the disciplinary tribunal must either:
 - i. caution or reprimand the registered person;
 - ii. impose on him or her a fine not exceeding the amount calculated according to the ratio for one year imprisonment determined in terms of the Adjustment of Fines Act, 1991 (Act No. 101 of 1991);
 - iii. suspend the registration of the registered person concerned for a period not exceeding one year;
 - iv. or cancel the registration of the registered person concerned and remove his or her name from the register referred to in section 11(c).
- (7) The disciplinary tribunal may take decisions under more than one of the subparagraphs of paragraph (3) above.
- (8) At the conclusion of the hearing the disciplinary tribunal must notify the council of its finding.
- (9) The council must publish the finding and the sanction imposed in terms of subsection (3) in the Gazette.
- (10) The council must give effect to the decision of the disciplinary tribunal.

3.6. Database

- 3.6.1. The Council should keep an updated database with the data and information regarding all appeals and tribunals and their final outcomes.

4. Version Control

4.5. Maintenance of the policy

The current policy will be reviewed every five (5) years and will be scheduled. Unscheduled reviews will be triggered by the following:

- i. Legislation changes
- ii. Benchmarking (changes in benchmarks or new benchmarks)
- iii. Changes in technology

4.6. Dissemination

The policy will be made available to SACPCMP stakeholders and the general public on the SACPCMP website after publishing in the Government Gazette. It will be disseminated externally on request.