

## **SUGGESTIONS, TIPS AND HINTS FOR DRAFTING AFFIDAVITS**

We understand that it is not always easy for a lay-person to formulate his or her complaint and that people are not always certain on how to go about the process. With this in mind we provide the following guidelines and suggestions that may assist to clarify the process.

(Note to legal representatives: This document is intended to provide a simplified explanation to assist lay-persons in dealing with the disciplinary process. The process is based on the motion procedure in the High Court and legal representatives are advised to draft and paginate as they would for an opposed application in the High Court.)

### **A. THE FOUNDING AFFIDAVIT:**

#### **1. INTRODUCTION:**

The complaint (Founding Affidavit) is where the complainant sets the stage for the basis of his/her complaint. This also serves as the main source of information on which the disciplinary structure of the Institute relies when having to evaluate and determine whether a member is guilty of any misconduct or not.

The complaint represents the first and only opportunity for the complainant to place his version of events on record and it is of critical importance that the complainant ensures that he deals with all the relevant facts and background relating to the matter. Although the complainant will have the opportunity to respond to later allegations by the member the complainant will not be allowed to then bring new facts or allegations to the table and he/she will be limited to the case that he/she made out in the initial complaint (Founding Affidavit).

In essence then, the formulation of the complaint provides the complainant with his/her first and only 'bite of the cherry' and the content and the formulation of the complaint will predominantly determine the ultimate success of the complaint, obviously having regards to the full record of the matter at the time.

In the following paragraphs, we will set out some of basic principles that a complainant can follow when drafting his/her complaint.

## **2. PROVIDE A PROPER AND COMPREHENSIVE FACTUAL BASIS FOR THE COMPLAINT:**

All too often the Institute is presented with a bare chronology of events together with a seemingly random concoction of email correspondence and extracts from sms's and whatsapp messages. This is usually accompanied by a covering letter where the complainant states his own conclusions such as:

- a. He wants the member to be found guilty of unprofessional conduct;
- b. He wants the member to be suspended or membership terminated;
- c. He wants to be reimbursed for his "damages"; and
- d. He demands all manner of formal statements from the Institute deploring the conduct of the member.

No background or context is provided to substantiate the complainant's conclusions. Similarly, the multitude of annexures is simply attached and the complainant expects the Institute to do his work for him by sifting through numerous documents in a search for any nuggets of 'evidence' supporting his allegations / conclusions.

It is highly unlikely that an applicant will attempt to approach the High Court in such a manner and expect any measure of success and the same applies to the investigative and disciplinary process of the Institute. The Institute cannot do a complainant's work for him and a complaint as referred to above will either be rejected out of hand as being without merit or referred back to the complainant.

**It is the duty of the complainant to provide the Institute with the full factual basis of the complaint and all supporting evidence on which the complainant relies so that the Institute can consider the complaint and make an initial evaluation as to the merits based on the complaint itself.** This will also assist the Institute at a later stage to determine whether the complaint should be referred to a disciplinary hearing or not.

We cannot place enough emphasis on the importance of preparing a proper and comprehensive founding affidavit setting out all the facts relevant to the matter. Remember, as we have stated above, the complainant will generally not be allowed to rectify any defects in his initial affidavit or to

place facts on record by way of further affidavits that he should have placed on record in his initial affidavit.

**In general, a complaint will stand or fall based on the strength of the initial (founding) affidavit.**

Another common mistake by complainants is to assume that their audience has the same knowledge of the matter as they do. They assume knowledge of facts when in reality, their audience has absolutely no knowledge of the matter whatsoever.

Consider the investigative and disciplinary committees to be your audience. It's very similar to writing a book. You want to peak the readers interest in the story and get them to read further. You want them to sympathise with the victim and rage against the villain. You don't want them to get frustrated or bored and put the book down. To do this you need to tell your story in a structured and logical manner. To take a page from 'Alice in Wonderland', you tell a story by starting at the beginning, then the middle and finally progressing to the end.

Still dealing with the analogy of a story or a book. If you were to start and conclude with "and they lived happily ever after" it will be highly unsatisfactory to your audience. By the same token, if you were to start in the middle of the murder scene, your audience will be left totally confused since they will have no idea as to who the main characters are, what the major plot line is and how the events came to pass.

The same principles apply when drafting your complaint. Start from the basic assumption that your audience has absolutely no knowledge whatsoever of the facts of your particular complaint – because in reality, they don't.

We are going to illustrate the point in the following paragraphs by continuing the analogy of a story book or novel:

- a) The first thing that you want to do is to sketch out the main characters. Tell the audience who you are and what it is that you do. Remember, they don't know you from Adam and you will probably not meet them in the initial phases of the process so you want them to be able to form an idea in their minds as to who you are.

- b) The same applies to framing the other characters in the story. You need to provide the necessary detail as to the other characters. For the complainant, it will be the member against who he is complaining. We need to know who he or she is and his/her practice details. This will save time, especially where we have members with similar names or practices. Help us by eliminating cases of confused or mistaken identity.
- c) Now that you have the main characters on record, briefly tell us what the story is about. Is it about unprofessional conduct? Is it about misappropriation of funds? Is it about retention of documents? A general summary will do, we just want to know what the story is about – you will set out the detail of the story later.
- d) However, a word of caution. It is not going to be sufficient to say that you feel the member is guilty of unprofessional conduct. You will have to specify what unprofessional conduct he is guilty of and give a brief summary of the reasons why you say that the member is guilty of unprofessional conduct and then expand on these reasons in the main body of your complaint.
- e) The next step is to give us the background to the story. You need to set the scene. So many complainants jump to the statement that "...he failed to do X,Y or Z." To which the appropriate response should be "so what?" They completely forget to tell the committee why the member was supposed to do X,Y or Z in the first place. It comes back to the mistake of assuming that the audience has the same knowledge as the complainant of the matter.
- f) A much better approach would be to tell the committee how and when you and the member became professionally engaged. You obviously had to come to some agreement as to the professional services that the member was to provide and when and how and how much he was to be paid for his services. You probably agreed on areas of responsibility and other items such as retention of documents, provision of information, guarantee as to the accuracy of information etc. If this was verbal, then you need to give us the details of this verbal agreement. If it was in writing, so much the better – attach a copy of the agreement to the complaint.
- g) The next step would then be to deal with the detail of the conduct that you are complaining about:

- i) You need to lay the basis as to why you say that the member acted wrongly or negligently.
- ii) Let's assume you only make the barest of submissions. If the member responds by saying that yes, he did not do X,Y or Z but that he couldn't do so because you failed to provide him with any of the documents and/or information that he required to do so, despite numerous requests to you – then the probabilities mitigate in favour of the member. It also creates a factual dispute that, if left unresolved, may lead to the complaint being dismissed.
- iii) You will then be left to attempt to salvage matters by adding new information in a further affidavit which may not necessarily be allowed. This places you at a disadvantage since the duty is on you to make out a proper case in your initial complaint.
- iv) However, let's assume that you provided proper context as we suggested above. You sketched the basis of the engagement with the member and that he assumed responsibility to do X,Y or Z. You then provided the details of your correspondence with the member and you confirm that you timeously provided him with all necessary documentation and information that he required and that basically, you have complied with all your obligations and duties viz the engagement.
- v) Unless the member can provide a plausible / probable contradictory version for his failure – the facts now mitigate in your favour.
- vi) Remember. As complainant, your initial affidavit is your first and best 'bite at the cherry'. Make certain that you make it count.
- h) Just to recap. The committee now knows who you are and who you are complaining against. You have provided the background of your engagement and the respective duties and obligations of the parties. You have specifically dealt with the duty of the member that he failed to exercise and that you are complaining about and you have provided the committee with the detail as to your compliance and all the steps that you have taken from your side in 'support' of this duty of the member. Lastly, you have dealt with the member's failure to do his duty or to exercise reasonable care.

- i) The next step would be to deal with the consequences of the failure or conduct of the member. Again, don't fall into the trap of assuming knowledge of the matter on the part of your audience. Give detail as to the consequences and try to separate the damages into categories eg. penalties incurred, wasted costs to have work redrafted, fees paid for no service etc.
- j) Please provide supporting documentation and also provide a detailed breakdown of how any amounts are calculated. Remember to separate penalties or amounts that you would in any event had to pay (if any) from the penalties and amounts that are attributable to the conduct of the member. The Institute will only concern itself with the latter and it is very frustrating to be faced with a jumble of irrelevant information.
- k) We suggest that you follow a structure similar to the following (although any logical breakdown will be acceptable):

*...Penalties in the amount of R###, made up and calculated as follows:*

- ### (See Annexure #)                      R###;
- ### (See Annexure #)                      R###

- l) The same breakdown as set out above can be used for fees paid for services (not) rendered, commissions etc. It helps the investigative and disciplinary committees to evaluate the complaint in a structured and logical manner.
- m) You then conclude with the relief that you prefer. It is not to say that it will be granted since the relief provided will depend on the merits of the specific matter. You may request that the member's membership be terminated while the committee may only impose a reprimand or a fine. You may request damages whereas (as stated above) the committee may refer you to pursue damages via a civil court of law. However, where possible, it assists the committees in evaluating the complaint and an appropriate sanction.

At this point in time it is perhaps necessary to say something about annexures and supporting documentation.

### **3. ANNEXURE'S AND SUPPORTING DOCUMENTATION:**

Keep in mind that the complaint (Founding Affidavit) essentially constitutes evidence in front of the disciplinary committees as if you are providing oral evidence. In order to lend credibility to your version of events it is important that you support your version with documentary evidence where available. A version supported by external written documents generated by the parties during the course of events is much more credible than a version without any supporting documents whatsoever.

When you refer to a document, clearly identify the documents for example, "... email dated 28 March 2015." Reference the documents in sequence for example as **Annexure A** or **Annexure B** and remember to also mark the specific document according to the reference. This assists the committee to identify the documents that you refer to.

If you are dealing with lengthy Annexure's such as a long letter or a contract then it is always helpful to indicate the specific paragraphs or page that contain the information that you are relying on for example, "... Annexure A, paragraphs 5 and 7 on page 2 thereof." It assists the committees in identifying the relevant portions of the Annexure's without having to read through lengthy and irrelevant documents.

It is always a beneficial if there are third parties who can confirm your version of events. Where certain discussions or conduct took place in front of such third parties and you refer to them, it is ideal to attach a confirmatory affidavit from such 3<sup>rd</sup> party where in the third party confirms that he has read the content of your complaint and that he confirms the content thereof as far as it relates to him or her.

### **4. FURTHER PROCESS AND CONSIDERATION OF THE COMPLAINT:**

Following completion of the internal process for considering the relative merits of a complaint, as have been set out above, the Founding Affidavit (complaint) will be forwarded to the member to afford the member the opportunity of answering to the allegations put forth by the complainant in the Founding Affidavit.

### **B. THE ANSWERING AFFIDAVIT:**

## **1. INTRODUCTION:**

The same principles, procedure and formalities that apply to the drafting of the Founding Affidavit also apply to the preparation and drafting of the Answering Affidavit.

Subject to the discretion of the committee, the Answering Affidavit represents the first and only opportunity for the member to place his version of events on record. It is therefore critical that the Answering Affidavit deals with all the relevant facts and background relating to the matter as well as the specific content of the Founding Affidavit.

In essence then, the formulation of the Answering Affidavit provides the member with his/her first and only 'bite of the cherry' and the content and the formulation of the Answering Affidavit will predominantly determine the ultimate success of the member in resisting the complaint against him or her, obviously having regards to the full record of the matter at the time.

In the following paragraphs, we will set out some basic principles that a member can follow when drafting his/her Answering Affidavit.

## **2. PROVIDE A PROPER AND COMPREHENSIVE FACTUAL BASIS:**

Please refer to what has been set out above with regard to the formulation and content of the complainant's Founding Affidavit. The same principles will apply to the drafting of the Answering Affidavit.

All too often the Institute is presented with a bare denial of events together with a mix of seemingly random email correspondence and extracts from sms's and whatsapp messages. No background or context is provided to substantiate the member's denials and the member expects the Institute to do his work for him by sifting through numerous documents in a search for any nuggets of 'evidence' supporting his denials.

As we mentioned earlier in this document, it is highly unlikely that a person will attempt to approach the High Court in such a manner and expect any measure of success and the same applies to the investigative and disciplinary process of the Institute. The Institute cannot do a member's work for him and an Answering Affidavit as referred to above will either be rejected out of hand as being without merit or referred back to the member.

When considering a complaint, regard is had to the probability of the complainant's and the member's versions. In considering this regard is had to, *inter alia*:

- a) The facts that are common cause between the parties and/or not in dispute.
- b) Taken together with the facts contained in the Answering Affidavit that are admitted and/or undisputed.

Having regard to the above we cannot place enough emphasis on the importance of preparing a proper and comprehensive Answering Affidavit setting out all the facts relevant to the matter. As per the analogy of the storybook as set out above:

- a) Don't make the mistake of immediately dealing with the content of the Founding Affidavit. The first thing that you want to do is to tell the reader who you are and what it is that you do. Remember, they don't know you from Adam and you will probably not meet them in the initial phases of the process so you want them to be able to form an idea in their minds as to who you are.
- b) Now that we know who you are, provide the background by setting out your version of events. The complainant has set out his or her version of events which may or may not correspond with your own version of events. Commit your version of events to record.
- c) Remember, don't fall into the trap of trying to be too cryptic. This is your one opportunity to take the committee into your confidence and to provide a detailed explanation as to your version of events and why you say that you are not guilty of unprofessional conduct and/or professional negligence as alleged by the complainant.
- d) Having set out your properly motivated and supported version of events, you then deal with the content of the complainant's Founding Affidavit. Remember that any allegation made by the complainant that is not denied by you in your Answering Affidavit will be deemed to have been admitted. The best way to prevent you accidentally omitting to deal with something is to deal with the allegations on a paragraph per paragraph basis. Remember to provide a heading so that the reader can ascertain which paragraphs you are dealing with. For example: "Regarding paragraph 1 thereof:" If convenient you can also deal with paragraphs as a group eg "Regarding paragraphs 1 to 6 thereof:"

- e) If you agree with the content of a paragraph or group of paragraphs, then you can simply state that it is admitted or that you agree with the content thereof. If you only partially agree with the content of a paragraph or group of paragraphs, then state what you agree with and then deal with the portion that you do not agree with. If you do not agree at all then state that you do not agree and why.
- f) **If you do not deal with the content of a paragraph, then the allegation stands uncontested and will be deemed to have been admitted.**
- g) Be careful of a bare denial unless you have clearly dealt with the facts in dispute when setting out your own version of events. Even then it is better to say that you do not agree and then briefly refer to the relevant paragraphs of your version if possible. You don't have to retype your whole version at every juncture – that is the reason you deal with it up front. It makes traversing the paragraphs of the Founding Affidavit much easier.

### **3. ANNEXURE'S AND SUPPORTING DOCUMENTATION:**

As with the Founding Affidavit, the Answering Affidavit essentially constitutes evidence in front of the disciplinary committees as if you are providing oral evidence. In order to lend credibility to your version of events it is important that you support your version with documentary evidence where available. A version supported by external written documents generated by the parties during the course of events is much more credible than a version without any supporting documents whatsoever.

When you refer to a document, clearly identify the documents for example, "... email dated 28 March 2015." Reference the documents in sequence for example as **Annexure A** or **Annexure B** and remember to also mark the specific document according to the reference. This assists the committee to identify the documents that you refer to.

If you are dealing with lengthy Annexure's such as a long letter or a contract then it is always helpful to indicate the specific paragraphs or page that contain the information that you are relying on for example, "... Annexure A, paragraphs 5 and 7 on page 2 thereof." It assists the committees in identifying the relevant portions of the Annexure's without having to read through lengthy and irrelevant documents.

It is always a beneficial if there are third parties who can confirm your version of events. Where certain discussions or conduct took place in front of such third parties and you refer to them, it is ideal to attach a confirmatory affidavit from such 3<sup>rd</sup> party where in the third party confirms that he has read the content of your affidavit and that he confirms the content thereof as far as it relates to him or her.

#### **4. FURTHER PROCESS AND CONSIDERATION OF THE COMPLAINT:**

The Answering Affidavit will be forwarded to the complainant to afford the complainant the opportunity of answering to the allegations put forth by the member in the Answering Affidavit.

The same procedural requirements as set out in the previous section apply to any Replying Affidavit prepared by or on behalf of a complainant.

#### **C. THE REPLYING AFFIDAVIT**

Following receipt of the member's Answering Affidavit the Answering Affidavit will then be forwarded to the complainant to allow the complainant to comment thereon and to respond to any new facts or disputes raised by the member in the Answering Affidavit.

This is not an opportunity for the complainant to bring new issues to the table but for the complainant to be able to respond to new facts and/or allegations that was not dealt with by the complainant in the initial complaint (Founding Affidavit).

The same principles as set out above when dealing with the content of the Answering Affidavit also apply to the content of the Replying Affidavit.

It is not necessary for a complainant to repeat the allegations that it set forth his or her Founding Affidavit to the extent that the member denies the content thereof. However, where the member brings new facts or allegations to the table that have not been addressed in the Founding Affidavit, it is necessary for the complainant to respond thereto, even if it is just to note that the new fact or allegation is denied to the extent that it is in conflict with the complainant's initial version.

Should a complainant fail to deal in Reply with any new fact or allegation raised in the Answering Affidavit then such fact or allegation shall be deemed to have been admitted in the same manner as if the member should fail to deal with any allegation made in the Founding Affidavit.

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