

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case no: 17883/2021

(1) OF INTEREST TO OTHER JUDGES: NO

(2) REVISED:

SIGNATURE:

DATE: 21 August 2023

In the matter between:

ISWELETHU CEMFORCE CC

Applicant

and

**THE TRUSTEES FOR THE TIME BEING OF
THE NATIONAL EDUCATION COLLABORATION
TRUST**

First Respondent

**THE MINISTER: GOVERNMENT OF THE
REPUBLIC OF SOUTH AFRICA: DEPT OF BASIC
EDUCATION**

Second Respondent

JUDGMENT

COWEN J

Introduction

1. The applicant, Izwelethu Cemforce CC (Cemforce) applies to review a procurement process concerning the provision of sanitation services to rural schools in KwaZulu-Natal, the Eastern Cape and Limpopo. The review is under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The procurement process entails soliciting bids for the appointment to a panel of professional service providers to provide, for a three-year period, planning, design, construction supervision and related services to build toilet structures at identified schools.
2. Cemforce is in the business of providing sanitation solutions, specializing in constructing and providing toilet structures. It has been in the business since 2002. Cemforce's 'VIP toilet product' is approved by a statutory body known as Agrément South Africa. The product has been tested by the CSIR and accepted by government as in conformity with national standards.¹ Cemforce has completed over 213 sanitation projects providing its VIP toilet product.
3. The first respondent, the National Education Collaboration Trust (NECT) has been appointed by the Department of Basic Education (the Department) as the implementing agent to assist to roll out a project known as the Sanitation Appropriate for Education Project (the SAFE project). The SAFE Project is an initiative led by the Department to eradicate pit latrines and provide dignified

¹ Government Gazette 25492, GN 2512.

sanitary and latrines facilities in public schools. Its primary objective is to replace pit toilets with appropriate sanitation. The Department falls under the second respondent, the Minister of Basic Education (the Minister).

4. The impugned tender process is restricted to tenders from providers who can provide what is known as a dry sanitation system. This is a system which separates urine from excrement, enables the evaporation of urine and the drying of excrement in a substructure followed by its periodic removal. It is common cause that a dry sanitation system involves technology that qualifies as an alternative or innovative building technology. The procurement process has two phases. The first phase entailed inviting expressions of interest from potential bidders for inclusion on a panel. In the second phase, only pre-qualified registered bidders are eligible to submit tenders. They do so by submitting quotes to construct new ablution facilities for various schools in KwaZulu-Natal, the Eastern Cape or Limpopo Province.
5. The case pleaded and advanced by the applicant has evolved as the litigation has unfolded, and in the result, this is a case where caution must be exercised so that only the issues that are duly and fairly canvassed on the affidavits are decided. During argument, the applicant's counsel advanced the case on two main bases. First, it was contended that the specification or requirement that the system be a dry sanitation system (the dry sanitation specification) is irrational and unlawful. Secondly, a formal qualifying criterion is impugned as irrational and unlawful: specifically a specification or requirement that the technology offered must be certified either by Agrément South Africa or under the South African National Standards (SANS) system (the standards specification). The applicant

submits that that Regulation 18(15) of the Regulations relating to Minimum Norms and Standards for Public School Infrastructure specifically requires Agrément certification.² Regulation 18(15) provides:

‘Where the use of alternative or innovative building technologies are to be considered for the implementation of the norms and standards contained in these Regulations, certification is required from Agrément South Africa.’

6. SANS certification is obtained from the South African Bureau of Standards, being the national standards body responsible for developing, maintaining and promoting South African National Standards under the Standards Act 8 of 2008. Agrément South Africa is a body recognized and regulated under the Agrément South Africa Act 11 of 2015 (the Agrément Act).³ Its objects are multifold but essentially concern the use and certification of fit-for-purpose ‘non-standardised construction related products or systems.’⁴
7. Viewed simply, the applicant’s grievance is that although its product is certified by Agrément South Africa, it is not a dry sanitation system and the applicant is thereby excluded from consideration. The applicant is further aggrieved as it takes the view that because one is dealing with alternative or innovative technologies, only products that are certified by Agrément South Africa, as its product is, can lawfully be considered.

² Published under GN R920 in GG 37081 of 29 November 2014 and made under section 5A(1)(a) of the South African Schools Act 1996 (the Minimum Norms and Standards Regulations).

³ The President assented to the Act on 13 December 2015 and it commenced on 1 April 2017. Section 3 provides that the body, which was established by the Minister of Public Works and which exists when the Act took effect continues to exist and is a juristic person.

⁴ Its objects are set out in section 4 of the Agrément Act.

8. It should be noted upfront that NECT has already concluded contracts with service providers in respect of multiple schools. That emerged from the Rule 53 record and is dealt with in the supplementary founding affidavit and the NECT's answering affidavit. Their appointment was pursuant to an invitation to bid dated 21 January 2021.⁵ As foreshadowed, only pre-qualified tenderers registered for the NECT Infrastructure Framework Database were eligible. On 25 February 2021, the Bid Adjudication Committee appointed contractors.⁶ Works have commenced. The applicant does not seek to set aside any of these tender awards or appointments. The relief it seeks will only affect future appointments. In this regard, it was confirmed during the proceedings that there are still many other schools for which bids will be solicited in the roll-out of the project.
9. The application was argued before me as a special motion on 16 May 2023. Mr Grobler SC appeared for the applicant. Mr Bham (with him Ms Tabata) appeared for the NECT and Ms Hemraj SC (with her Advocates Bokaba and Sonke) appeared for the Minister.

The issues in dispute

10. It is necessary to delineate the issues in dispute with reference to the case pleaded in the founding affidavit and the supplementary founding affidavit delivered after the Rule 53 Record was supplied. I do so with reference to the two main bases on which the applicant impugns the process referred to above.

⁵ Tenders No N[...]1(Batch One); N[...]1(Batch Two); N[...]3 (Batch Three).

⁶ 25 contractors were appointed for Batch One (from 152 bids); 24 contractors were appointed for Batch Two (from 83 bids) and 36 for Batch Three (from 122 bids).

11. The subject of the first main attack is the dry sanitation system specification. This requirement appears initially in the expression of interest (phase one) and is carried through to the requests for quotations (phase two). In the founding affidavit, the applicant's complaint was premised on the contention that the toilet structure NECT required from bidders is one manufactured only by Bertram (Pty) Ltd known as 'Amalooloo' to the exclusion of any other product. However, this premise falls in view of the facts NECT put up in their answering affidavit, which makes it clear that the process was not limited to the 'Amalooloo' product, but included any dry sanitation system of which there are others. In fact, contractors proposed six different technologies: Amalooloo, Cobro Concrete, Conloo/Conrite, Eldo Fox, Shocrete and Cemforce. Without its premise, the case made out in the founding affidavit in respect of the dry sanitation system specification may be said to be answered.

12. However, on a more generous reading of the founding affidavit the case may fairly be understood to include a broader one that takes issue with restricting the tender process to any dry sanitation system to the exclusion of other systems, even if water-wise. Thus understood, the complaint is that a dry sanitation system, such as the Amalooloo, is unsafe and it is irrational to insist on only that system. In this regard it is said to pose a significant safety threat to younger children and infants as children can fall into the substructure pit, where excrement is retained, contrary to the intentions of the SAFE initiative. Other difficulties with the system referred to that they are said to smell bad and their lifespan can be affected by solid waste disposal. The system entails the dehydration of solid waste, which may then be disposed of or used as fertilizer. However, the subsequent use of the solid waste is said to be unsafe and cause

illness (in part because it may contain Ascaris (roundworm which is not eliminated through the dehydration process). The system is, moreover, dependent on rain water for handwashing which is unsafe because, it is said, it is cross-contaminated with impurities such as bird- and insect waste. It is then submitted that it is irrational to then exclude other alternatives such as low flush systems which only require 1-2 liters of water and which are more hygienic.

13. The NECT responds to these complaints by stating that it is not for the applicant to determine which systems are better in context: that is for the state functionaries to decide. The NECT provides a factual response to the complaints about a dry sanitation system and the suitability or relative benefits of other systems, such as low-flush systems. In short, the NECT explains that the toilet systems installed are designed to ensure that no-one can fall into them, their depth is one metre and waste is regularly removed. The NECT accepts that the waste is used as an organic fertilizer but contends it is safe to remove it. The NECT disputes that rainwater cannot be used to wash hands. The NECT explains that low flush systems were not considered to be viable because of the scarcity of water in the affected rural areas and, it is said, they cannot be regarded as a serious solution for communities without running water or a bulk water supply. The communities served by the SAFE project are those in deep rural areas where the main water source is underground and tends to run dry within 10 years of installing a borehole.

14. During argument, the applicant submitted that restricting bidders to a dry sanitation system is in breach of Regulation 12(2) of the Minimum Norms and

Standards Regulations.⁷ This case was not, however, advanced in the founding affidavits and was raised in reply.

15. The second main basis upon which the tender process is impugned relates to the standards specification, in other words the specification that the alternative technology offered by bidders must be SANS Certified or Agrément certified.⁸ This is said to be in breach of Regulation 18(15) of the Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure, which provides:

‘Where the use of alternative or innovative building technologies are to be considered for the implement of the norms and standards contained in these regulations, certification is required from Agrément South Africa.’

16. The effect of this contention, if correct, would be to restrict any tender process to solicit alternative or innovative building technologies to those that are Agrément certified. As mentioned, although the applicant’s product is not a dry sanitation system, it does carry Agrément certification.

⁷ Regulation 12(2) is titled Sanitation and provides:

- (1) All schools must have a sufficient number of sanitation facilities, as contained in Annexure G, that are easily accessible to all learners and educators, provide privacy and security, promote health and hygiene standards, comply with all relevant laws and are maintained in good working order.
- (2) The choice of an appropriate sanitation technology must be based on an assessment conducted on the most suitable sanitation technology for each particular school.
- (3) Sanitation facilities could include one or more of the following:
 - (a) Water borne sanitation;
 - (b) Small bore sewer reticulation;
 - (c) Septic or conservancy tank systems;
 - (d) Ventilated improved pit latrines; or
 - (e) Composting toilets.
- (4) Plain pit and bucket latrines are not allowed at schools.

Annexure G sets out the number of toilets, basins and urinals required in primary and secondary schools based on enrolment ranges and gender.

⁸ In the founding affidavit it is incorrectly alleged at a point that the tender process required neither SANS certification nor Agrément certification.

17. The Minister defends the application by raising three technical or preliminary points. First, the Minister contends that the applicant ought to have joined the appointed contractors. Second, the applicant is said to lack standing to institute the application. Third, the Minister contends that the applicant has failed to make out a *prima facie* case in terms of PAJA's essential requirements. More specifically, it is contended that the grounds of review are not adequately pleaded and the definitional requirement that a decision must 'adversely affect the rights' of a person to constitute administrative action is not met.

18. During the hearing, counsel for the NECT argued the case squarely on the merits of the review. However, counsel had no instructions to abandon two technical or preliminary points advanced on its papers, being the non-joinder and standing points also raised by the Minister. On the merits, the NECT defends the decision to restrict bidding to dry sanitation systems centrally on a factual basis, and by contending that it is the appropriate sanitation solution for schools in deep rural areas that are water scarce and that have no bulk water supply or running water, these being the affected schools. The NECT defends the impugned specification that allows either SANS or Agrément certification on two grounds. The first, emphasized in the answering affidavit and heads of argument, amounts to a contention that there is substantial compliance with the applicable regulations, which, it is submitted, permit of deviation based on reasonable practicability. The second, emphasized in oral argument is a legal argument to the effect that the impugned specification is authorized by the Minimum Norms and Standards Regulations, properly construed in light of the Agrément Act.

19. In light of the above, the following issues arise for decision:

19.1. Does the applicant have standing?

19.2. Was the applicant obliged to join the successful bidders who have commenced works?

19.3. Has the applicant made out a *prima facie* case under PAJA?

19.4. Is the dry sanitation systems specification lawful and rational?

19.5. Is the standards specification lawful and rational?

Standing

20. The applicant approaches the Court in its own interests, and, though only obliquely asserted, the interests of other potential contractors who may also wish to tender on broader eligibility criteria. Only the Minister articulated the challenge to the applicant's standing with any clarity. The Minister contends that the applicant lacks standing because its rights are not affected by the process to date, it has not submitted any expression of interest or bid and it only has some future possible interest, insufficient to ground standing. As against this, the applicant pleaded and Mr Grobler submitted that the applicant has standing because it is wholly excluded from the tender process due to its alleged illegality.

If the illegality is cured – specifically, the restriction that only dry sanitation systems may be supplied, it would be able to participate in the tender process going forward.

21. The effect of the impugned specification, specifically the dry sanitation systems specification, is to exclude the applicant from being appointed to the panel, and therefore to be considered for any of the works. In *Giant Concerts*, the Constitutional Court held that “(t)he own interest litigant must ... demonstrate that his or her interests or potential interests are directly affected by the unlawfulness sought to be impugned”.⁹ In my view, the applicant has established own interest standing as articulated in *Giant Concerts*. The exclusionary criteria impact directly and sufficiently on its interests and potential interests.

Non-joinder

22. The Minister and the NECT pleaded that the applicant ought to have joined the successful contractors who were appointed pursuant to the three requests for quotations submitted in January 2021.¹⁰ The Minister advanced the point in argument too. The test for joinder is whether a party has a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the Court in the proceedings concerned.¹¹ In my view, the argument

⁹ *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and others* 2013(3) BCLR 251 (CC) (*Giant Concerts*) para 41a. Compare: *Areva NP Incorporated in France v Eskom Holdings Soc Limited and others* [2016] ZACC 51; 2017(6) BCLR 675 (CC) 2017(6) SA 621 (CC) in which the Constitutional Court held that a party who did not submit a bid in its own right did not have standing to institute a review. In that case, the applicant was part of the same group of companies of the company that submitted the bid.

¹⁰ See para 8 above.

¹¹ See *Bowring NO v Vrededorp Properties CC* [2007] ZASCA 80; 2007(5) SA 391 (SCA) at para 21 and *South African History Archive Trust v South African Reserve Bank* 2020(6) SA 127 (SCA) at para 30.

would have traction had the applicant applied to review and set aside the awarded bids. But, the applicant made it clear in its supplementary founding affidavit that it is not doing so and seeks no relief that will interfere in their rights as successful bidders. The stance adopted in the supplementary founding affidavit limits the relief sought. It means that what is impugned is restricted to an exclusionary criterion and can have only prospective effect, without interfering with the rights of the affected contractors. In these somewhat unusual circumstances, I conclude that it was not necessary for the successful contractors to be joined.

A *prima facie* case under PAJA

23. The Minister submits that the applicant has not made out a *prima facie* case both because the grounds of review relied upon under PAJA are not apparent and because the applicant has not made out a case that its rights are adversely affected, this being a definitional requirement for a decision to constitute administrative action.

24. In *Bato Star*,¹² the Constitutional Court dealt with a submission that the cause of action – there also a PAJA review – was not sufficiently clearly or precisely disclosed to enable a response. The Constitutional Court was willing in that case to assume in favour of the applicant that the manner in which the case had been pleaded was not fatal to its case. It did so in circumstances where the specific

¹² *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (4) SA 490 (CC) at para 27.

provisions of PAJA relied upon were referred to only in written argument.

However, the Court held (footnotes omitted):

‘ ... Where a litigant relies upon a statutory provision, it is not necessary to specify it, but it must be clear from the facts alleged by the litigant that the section is relevant and operative. [i]t must be emphasised that it is desirable for litigants who seek to review administrative action to identify clearly both the facts upon which they base their cause of action, and the legal basis of their cause of action...’

25. There is no question in this matter that this is an application for judicial review in terms of PAJA. The applicant refers expressly to PAJA in the founding affidavit alleging that the procurement decision is subject to the Act and constitutes administrative action susceptible to judicial review in terms of section 6. The applicant does not refer in its founding affidavits to the specific grounds of review in section 6 upon which it relies.¹³ The process is, rather, impugned as ‘unlawful’

¹³ Section 6(2) provides:

‘A court or tribunal has the power to judicially review an administrative action if-

- (a) the administrator who took it-
 - (i) was not authorised to do so by the empowering provision;
 - (ii) acted under a delegation of power which was not authorised by the empowering provision; or
 - (iii) was biased or reasonably suspected of bias;
- (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
- (c) the action was procedurally unfair;
- (d) the action was materially influenced by an error of law;
- (e) the action was taken-
 - (i) for a reason not authorised by the empowering provision;
 - (ii) for an ulterior purpose or motive;
 - (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
 - (iv) because of the unauthorised or unwarranted dictates of another person or body;
 - (v) in bad faith; or
 - (vi) arbitrarily or capriciously;
- (f) the action itself-
 - (i) contravenes a law or is not authorised by the empowering provision; or
 - (ii) is not rationally connected to-
 - (aa) the purpose for which it was taken;
 - (bb) the purpose of the empowering provision;

and 'irrational' and the reasons for saying so are then spelt out, centrally in paragraphs 16 and 17 of the founding affidavit. While there is and was no duty on the applicant to specify the statutory provision relied upon, the question remains whether it is clear from the facts alleged what sections are relevant and operative. The applicant's heads of argument do assist in this regard at least in respect of the attack on the standards specification in that reliance is squarely placed on Regulation 18(15) of the Minimum Norms and Standards Regulations and reference made to the Agrément Act.

26. In my view, the way in which the applicant has set out its case in respect of the standards specification satisfactorily discloses a cause of action under PAJA. The case, put simply, is that the standards specification is unlawful because it breaches Regulation 18(5) of the Minimum Norms and Standards Act. It is unfortunate that Mr Grobler does not specify which part of section 6 of PAJA is thereby triggered. However, in my view, this failure is not fatal in this case because the argument is both clearly advanced and this is a classic legality argument embraced by section 6(2)(a)(i), section 6(2)(b) or section 6(2)(f)(i) of PAJA.¹⁴

27. The operative provisions relevant to the attack on the dry sanitation system specification are less clear and one is left to speculate. There are various

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- (cc) the information before the administrator; or
 - (dd) the reasons given for it by the administrator;
 - (g) the action concerned consists of a failure to take a decision;
 - (h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
 - (i) the action is otherwise unconstitutional or unlawful.

¹⁴ See fn 13 above.

possibly relevant and operative grounds of review. In my view it was incumbent upon the applicant to specify the grounds relied upon as the Minister submitted. Nevertheless, I will assume in the applicant's favour that this is not destructive of this part of the case and in doing so I will approach the issue in terms of section 6(2)(e)(vi) and 6(2)(f) of PAJA, these being the primary provisions dealing with arbitrariness and rationality.¹⁵

28. The Minister also submitted that a case is not made out that the impugned procurement process constitutes administrative action because of a failure to establish the definitional requirement that the impugned conduct adversely affects the rights of the applicant.

29. The SCA dealt with this requirement in *Greys Marine*¹⁶ in the following terms:

'While PAJA's definition purports to restrict administrative action to decisions that, as a fact, 'adversely affect the rights of any person', I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsonant with s 3(1), which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the

¹⁵ Id.

¹⁶ *Grey's Marine Hout Bay (Pty) Ltd and others v Minister of Public Works and others* 2005(6) SA 313 (SCA) (*Grey's Marine*) at para 23.

capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals.'

30. There is no dispute that a decision to award or refuse a tender constitutes administrative action because the decision 'materially and directly affects the legal interests or rights of tenderers concerned.'¹⁷ However, in this case the applicant is not a tenderer, successful or unsuccessful as it was excluded from submitting a bid due to an exclusionary criterion which it contends is unlawful. In this regard, I accept that there must be a limit to when a person can contend that their rights are adversely affected due to their inability to provide the works or goods sought in a tender process. However, a similar issue arose in *Earth Life Africa*,¹⁸ in which a full bench of the Western Cape High Court held that a ministerial determination that a quantity of new power generation capacity would be sourced from nuclear energy adversely affected the rights of non-nuclear power producers.

31. In my view this is a case where the rights of the applicant are adversely affected in the sense articulated in *Greys Marine* at least because of the manner in which the case has been pleaded. Although the applicant ultimately could not persist with the argument on the facts established in answer, the case was advanced partly on the basis that the tender was limited to procuring one product, the Amalooloo. The rights of suppliers of substantially similar products can legitimately contend that their rights are adversely affected thereby, not least the

¹⁷ *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007(3) SA 121 (CC); 2007(3) BCLR 300 (CC).

¹⁸ *Earthlife Africa and another v Minister of Energy and others* 2017(5) SA 227 (WCC) at para 37.

rights that flow from section 217 of the Constitution which imposes a duty on organs of State, when they contract for goods or services to do so in accordance with a system which is 'fair, equitable, transparent, competitive and cost-effective', which rights are given effect to in, *inter alia*, the Preferential Procurement Policy Framework Act 5 of 2000 and the particular tender system in place.

The dry sanitation system specification

32. In my view, the NECT has factually answered the complaint about the dry sanitation system specification. I accept that there is scope under PAJA to review as irrational the use of an unsafe system where the very purpose is to secure safety. But on the evidence I cannot conclude that the systems are unsafe. In this regard, the applicant contends – in general terms – that the system is unsafe as a child can fall into the substructure. The NECT has responded – also in general terms – to say that the systems that will be used are designed to ensure this cannot happen. I must accept the NECT's version, not least on the limited information the applicant supplies on the issue.¹⁹ In my view, the further complaints about the drawbacks of a dry sanitation system are insufficiently substantiated to ground a rationality review.

33. The further argument was advanced that it is irrational to exclude from consideration other water-wise systems, such as low-flush systems. In my view, that case is also answered factually. As Mr Bham submitted, on the evidence

¹⁹ *Plascon-Evans Paints v Van Riebeeck Paints* 1984(3) 623 (A) at 634H-635C; *Wightman t/a JW Construction v Headfour (Pty) Ltd and ano* 2008(3) SA 371 (SCA), para 13.

before me, the affected schools are all in water scarce, deep rural areas where there is no bulk-water supply or running water. The use of low-flush systems was accordingly regarded as unsuitable. Moreover, the NECT explains that the tender requirement must be understood against the settling of water scarcity in South Africa. Africa is categorised as a water-stressed continent. The 2014 Intergovernmental Panel on Climate Change projected that between 75 and 250 million people will be adversely affected by this climate change by 2020. The selection of dry sanitation systems is informed by this context in that it is understood that in the long term, increased water scarcity will negatively affect the use of modern technology including modern waterborne flush toilets that require large amounts of water.

34. As indicated above, during argument, a legality argument was advanced in respect of the dry sanitation system to the effect that it breaches Regulation 12(2) of the Minimum Norms and Standards Regulations. The point was only raised in the replying affidavit and in my view it would be unfair to entertain it because had it been duly raised in the founding affidavits, the NECT would have been able to explain the precise extent to which the needs of individual schools were assessed before a determination was made that the dry sanitation system would be a suitable one for the relevant schools.²⁰ The NECT was not pertinently afforded that opportunity. And in any event, to the extent that the case is foreshadowed, it is answered in that the NECT explains that the schools earmarked for the dry sanitation system are all in deep rural areas which are water scarce and without any bulk water system or running water.

²⁰ *Administrator of Transvaal and Others v Theletsane and Another* [1990] ZASCA 156; 1991 (2) SA 192 (AD); [1991] 4 All SA 132 (AD).

35. Accordingly, on the affidavits before me, I am of the view that the applicant cannot succeed in its review of the procurement system based on the attack on the dry sanitation system specification.

The standards specification

36. In order to assess the lawfulness of the standards specification, it is necessary to interpret the requirements of the Minimum Norms and Standards Regulations and the Agrément Act.²¹ Specifically, to consider whether they do impose a requirement that a dry sanitation system used in schools can *only* be Agrément certified or whether it is lawful to specify that the technology be either SANS certified or Agrément certified as occurred in this case. This requires a fuller consideration of the language, purpose and legislative context within which Regulation 18(15), which imposes the Agrément certification requirement, is found. Also relevant is that Regulation 18(15) is intended to protect constitutional rights of learners, usually children, by ensuring that children are educated in dignified, safe and suitable conditions.²²

37. Regulation 4 of the Minimum Norms and Standards Regulations is titled 'Implementation of regulations'. Regulation 4(1)(a), upon which the NECT relies, provides (with emphasis supplied):

²¹ *Cool Ideas 1186 CC v Hubbard and another* 2014(4) SA 474 (CC) (Cool Ideas) at para 28.

²² Section 10, section 28(2) and section 29(1) of the Bill of Rights. See too *Komape and Others v Minister of Basic Education* [2018] ZALMPPHC 18; *Komape v Minister of Basic Education* [2019] ZASCA 192.

‘(1) Notwithstanding the provisions of these Regulations, the norms and standards contained in the regulations –

(a) Must, subject to subregulation (5) and **as far as reasonably practicable**, be applied to all new schools and additions, alterations and improvements to schools, with the exception of schools contemplated in subregulation (2);’

38. Regulation 12 of the Minimum Norms and Standards Regulations deal with Sanitation specifically.²³ Regulation 12(1) imposes a requirement, *inter alia*, that sanitation facilities ‘comply with all relevant laws’.

39. Regulation 18 is titled ‘Design considerations for all education areas’. It contains 15 sub-regulations most of which apply generally to all education areas covering a range of issues such as ventilation and background noise. Both Regulation 18(14) and (15) are relevant, and read:

‘(14) In the planning and design of all schools contemplated in regulation 4(1)(a), school design must comply with all relevant laws, including the National Building Regulations, SANS 10-400 and the Occupational Health and Safety Act 85 of 1993.

(15) Where the use of alternative or innovative building technologies are to be considered for the implementation of the norms and standards contained in these Regulations, certification is required from Agrément South Africa.’

40. Mr Bham submitted that these requirements must be understood in context of the provisions of the Agrément Act itself. Notably, the Agrément Act does not use the language of alternative or innovative building technologies’. It uses the

²³ See above n 7 for its detailed requirements.

language of a 'non-standardised construction related product' which is defined in section 1 to mean 'a construction related product or system, which may not necessarily be regarded as innovative and for which no SABS standard specification exists or which falls outside the scope and requirements of an existing SABS standard specification.' In turn, a 'construction related product or system' is defined to mean 'a product, material, component, element, system, method, assembly, process or procedure intended for use in the construction of a building or infrastructures within the built environment.' Under section 5(1) of the Agrément Act, Agrément South Africa is empowered to certify the fitness-for-purpose of a 'non-standardised construction related product or system.'

41. In this context, Mr Bham submitted that the standards specification serves a legitimate purpose and complies with the Minimum Norms and Standards Regulations read with the Agrément Act. While it is common cause that a dry sanitation system is an alternative or innovative building technology as contemplated by Regulation 18(15) of the Minimum Norms and Standards Regulations, the standards specification anticipates that there may be features of such a system for which a SABS standards specification exists and which must then be in place. The standards specification thus serves to ensure that nothing falls between the cracks and that all necessary certifications are in place. As against this, Mr Grobler contended that Regulation 18(15) is quite clear in its requirements and must be strictly applied to the products in question.

42. The Regulation must, in my view, be interpreted consistently with the Agrément Act. Notably, Regulation 18(15) predates the enactment of the Agrément Act but it invokes the Agrément South Africa regime, which – according to its transitional

provisions – entailed certification through a Board appointed by the Minister of Public Works. The Regulations are subordinate legislation and expressly contemplate that school planning and design generally and sanitation facilities in particular comply with all relevant laws. Thus the reference to certification by Agrément South Africa in Regulation 18(15) must be interpreted to mean certification in accordance with any governing laws. Once this is accepted, Mr Bham's submissions have traction as it would be wholly undesirable let alone impracticable if any part of the technology used somehow fall between the cracks of SANS or Agrément certification. This approach also comports with a purposive interpretation of Regulation 18(15) – its purpose being to ensure that alternative and innovative technologies are assessed as fit for purpose – and it serves to advance its constitutional goals.

43. Viewed in this way, the standards specification cannot be said to be unlawful or in breach of section 6(2)(a)(i), section 6(2)(b) or section 6(2)(f)(i) of PAJA. Nor can it be said to be irrational.

44. This means, however, that in the application of the standards specification, it is incumbent upon NECT only to award bids to tenderers whose technology is in fact so compliant. It is more difficult to discern on the papers before me what this means practically for the parties and the legality of the application of the specification is not before me, only the specification itself. Suffice to note that I am unable to discount that, in practice, the applicant may be correct in saying that Agrément certification may in fact be required for this tender, even if it is not the only necessary certification in context of a particular bid. This in circumstances where counsel confirmed that there is no dispute that dry

sanitation systems invariably entail alternative and innovative technology, and no applicable SANS standards have been drawn to the Court's attention that apply to dry sanitation systems.

45. The NECT also defended the standards specification on the basis that it entails substantial compliance with the Minimum Standards Regulations. In this regard, it was pleaded that the NECT's empirical understanding is that not many entities have the relevant Agrément certification and limiting the certification sought to Agrément certification would have had the effect of limiting the number of responses to the requests for quotations and in turn impacted the efficiency with which the SAFE Project is rolled out. The NECT pleaded that there are other safeguards in the process such as the requirement for a sign off from a qualified and duly registered structural engineer.

46. Mr Grobler submitted that the test for substantial compliance is not met. He relied on test the Constitutional Court articulated for compliance with a statutory provision in *ACDP* being 'whether [the conduct] constituted compliance with the statutory provisions viewed in light of their purpose.'²⁴ He submitted further that substantial compliance cannot be achieved on peremptory requirements such as what is contained in Regulation 18(15).

47. The latter submission is difficult to reconcile with *All Pay* in which the Constitutional Court held:²⁵

²⁴ *African Christian Democratic party v Electoral Commission and others* 2006(83) SA 305 (CC) at para 25. See too, *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* [2013] ACC 42; 2014 (1) SA 604 (CC) (2014 (1) BCLR 1 at para 30.

²⁵ At para 30.

‘Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between ‘mandatory’ or ‘peremptory’ provisions on the one hand and ‘directory’ ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this court O'Regan J succinctly put the question in *ACDP v Electoral Commission* as being ‘whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose’. This is not the same as asking whether compliance with the provisions will lead to a different result.

48. The question is then whether the standards specification complies with Regulation 18(15) viewed in light of its purpose (see above). Regulation 18 encourages the use of innovative and alternative technologies in its detail. Viewed contextually, the purpose of Regulation 18(15) must include to ensure that such technologies have been suitably assessed as fit for purpose in accordance with the Agrément South Africa dispensation, whose objectives include minimizing the risk associated with non-standardised products or systems.²⁶

²⁶ The objects of Agrément South Africa are set out in section 4 and are to –

- (a) Provide assurance to specifiers and users of the fitness-for-purpose of non standardised construction related products or systems;
- (b) Support and promote the process of integrated socio-economic development in the Republic as it relates to the construction industry;
- (c) Support and promote the introduction and use of certified non-standardised construction related products or systems in the local or international market;
- (d) Support policy makers to minimize the risk associated with the use of a non-standardised construction related product or system; and
- (e) Be an impartial and internationally acknowledged South African centre for the assessment and confirmation of fitness-for-purpose of non-standardised construction related products or systems.’

49. The explanation for deviation proffered by NECT is difficult to understand in the absence of evidence that there are SANS compliant dry sanitation systems. Furthermore, as postulated above, on the limited information to hand but on the face of it, it may be that, practically, some level of Agrément certification cannot be avoided if dry sanitation systems are required. However, I have insufficient evidence before me to draw any firm conclusions in this regard. Nevertheless, provided the specifications standard is understood to require certification under one or both systems – each of which serve to set what the legislature regards as suitable standards – it is difficult to see how it is either unlawful or irrational. The real question seems to be how it is applied in practice.

50. In the result, I am of the view that the applicant's attack on the standards specification itself must also fail.

Costs and order

51. The NECT has succeeded in defending the application on its merits. The Minister was materially unsuccessful in defending the application on the three technical points raised. In my view, the NECT is entitled to its costs including the costs of two counsel. In all the circumstances, the second respondent should, in my view, carry its own costs.

52. I make the following order:

52.1. The application is dismissed.

52.2. The applicant is directed to pay the costs of the first respondent including the costs of two counsel.

52.3. The second respondent is to pay its own costs.

SJ Cowen

Judge, High Court Pretoria

Date of hearing: 16 May 2023

Date of decision: 21 August 2023

Appearances:

Applicant: S Grobler SC instructed by Honey Attorneys

First Respondent: A Bham SC and C Tabata instructed by Mkhabela Huntley Attorneys

Second Respondent: P Hemraj SC, K Bokaba and L Sonke instructed by the State Attorney, Pretoria