

# REVIEW BOARD

in terms of section 9, National Building Regulations and Building Standards Act, no.103 of 1977

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In the matter between:

**MEDICLINIC SOUTHERN AFRICA (PTY) LTD**

**Appellant**

and

**EKURHULENI METROPOLITAN MUNICIPALITY**

**Respondent**

**REVIEW BOARD:**

M. BESTER (Chairman), S. CUNHA-LEITHGÖB, K. HOWIE

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## DECISION

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### INTRODUCTION

#### 1. Parties

- 1.1 Appellant is Mediclinic Southern Africa (Pty) Ltd, the owner of *erf* 3629 Midstream Estates Extension 49 (“the Property”), and also the owner and operator of fifty-one (51) other private hospitals in South Africa.
- 1.2 Respondent is Ekurhuleni Metropolitan Municipality, a local authority with jurisdiction to approve the erection of buildings on the Property in terms of s.4 of the National Building Regulations and Building Standards Act (Act 103 of 1977) (“the Act”).

#### 2. Background

- 2.1 The facts in this matter are mostly common cause, alternatively not disputed by either one of the parties, except where specifically noted below.
- 2.2 The Property was formerly developed by Appellant as a hospital in accordance with a rezoning application and Site Development Plan (“SDP”) approved by Respondent in the course of 2012.<sup>1</sup> Certain conditions were applied by Respondent to its approval of the rezoning, *inter alia* that the number of hospital beds be limited to 179 and that, in regard

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<sup>1</sup> pp.1-6 of the Appellant’s bundle of documents marked “Exhibit A”

to parking provisions, that Appellant must provide “one bay per hospital bed [and] six bays per 100m<sup>2</sup> medical consulting rooms”. The effect of this stipulation was that Appellant was required to provide only 379 parking bays although, of its own volition, it in fact provided 568 bays.

- 2.3 In 2013, Appellant submitted further building plans to Respondent for a second phase of development of the Property, wherein it sought approval of revised layouts for its operating-theatre complex, intensive-care and high-care facilities and consulting rooms.
- 2.4 No amendments to the quantity of parking stipulated in the rezoning approvals were necessitated by the second-phase of development. However, Respondent required that the SDP should be amended to indicate provision of dedicated parking bays for persons with disabilities (“dedicated bays”) in accordance with para.4.3.2 of the South African National Standard, Part S: “Facilities for persons with disabilities”,<sup>2</sup> the relevant sections of which read as follows:

“4.3.2 In addition to the requirement of 4.3.1, where provision has been made within a building, or on the site on which such building has been erected, for the parking of more than 50 motor vehicles,

- a) at least one parking space per 25 parking spaces (or part thereof) and at least 20% of the parking spaces at rehabilitation and medical facilities shall be provided for parking of vehicles used by persons with disabilities;
- b) the parking spaces provided for vehicles used by persons with disabilities shall be of a suitable length, shall be at least of the dimensions shown ...;
- c) ...
- d) any parking space provided for vehicles used by persons with disabilities shall be clearly demarcated as being intended for the use of persons with disabilities only; ...”

- 2.5 Appellant, considering that this requirement would impact negatively on the management and functionality of its hospital, thereafter commissioned Mr A.P. van der Merwe of Graceland Architects to prepare a Rational Design for the relaxation of this stipulation. The Rational Design was duly submitted on 14<sup>th</sup> February 2014.<sup>3</sup>

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<sup>2</sup> SANS 10400-S:2011 (Edition 3) published in April 2011

<sup>3</sup> pp.7-20 of bundle

2.6 It is common cause both that Mr Van der Merwe is an Approved Competent Person,<sup>4</sup> duly appointed in terms of reg.A19,<sup>5</sup> and that the Rational Design submitted by him is in accordance with the requirements of the National Building Regulations.<sup>6</sup>

2.6 In a letter dated 18<sup>th</sup> June 2014 (“the Refusal”),<sup>7</sup> Respondent however refused to approve the Rational Design for the following reasons:

“... Your proposal as well as request for relaxation of parking required is here by acknowledge. However, the request cannot be acceded to as the parking requirement is legislated and hospital is mostly frequented by sickly people of whom the majority need to use wheel chair for their mobility. People with disability is not limited to those depended on wheel chairs.” [sic]

2.7 On 22<sup>nd</sup> August 2015, Ian Alexander Architects Network accordingly submitted an appeal to the Review Board on behalf of Appellant, receipt of which was acknowledged by the Review Board secretariat at the National Regulator for Compulsory Specifications (“NRCS”) on 8<sup>th</sup> September 2014. However, no response to the Appeal was received by the NRCS.

### 3. Process followed by Review Board

3.1 Delays arose in the Review Board’s attendance to the Appeals as a consequence of the suspension of the Review Board’s operations until mid-November 2014 for organisational reasons internal to the NRCS.

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<sup>4</sup> defined in the National Building Regulations, Part AZ2, as a

“person who is qualified by virtue of his education, training, experience and contextual knowledge to make a determination regarding the performance of a building or part thereof in relation to a functional regulation or to undertake such duties as may be assigned to him in terms of these regulations”;

this should be read with SANS 10400-S:2011, 3.10, which further defines a “Competent Person (environmental access)” as a

“person who is a) registered in terms of the Architectural Profession Act, 2000 (Act No.44 of 2000), as either a Professional Architect or ..., and has suitable contextual knowledge and experience to undertake a rational design or rational assessment in terms of the requirements of part S of the Regulations; ...”.

It is evident from Mr Van der Merwe’s abbreviated *curriculum vitae*, attached to the Rational Design (p.18) that he more-than-satisfactorily meets these requirements.

<sup>5</sup> A19(1) reads,

“Where in terms of these Regulations and in respect of the erection of any building –

(a) a rational design or rational assessment is required in terms of:

(i) ...; or

(ii) a part of SANS 10400; ...

the owner of the building shall ... appoint and retain one or more approved competent persons to undertake responsibility for the work associated with such Regulations including any inspections and certifications that may be required.”

<sup>6</sup> confirmed by both parties in response to the Review Board’s questions at the hearing on 13<sup>th</sup> August 2015

<sup>7</sup> p.21

- 3.2 Thereafter, the chairman of the Review Board, Mr Michael Bester, appointed Ms Sónia Cunha-Leithgöb (an architect) and Mr Kenneth Howie (an architect and arbitrator) as members of the Review Board in terms of s.9(2)(b) of the Act.
- 3.3 In the absence of either a response from Respondent or adequate evidence of service of the Appeal by Appellant, the Review Board wrote to Respondent on 3<sup>rd</sup> February 2015, eventually receiving a Response dated 18<sup>th</sup> March 2015.<sup>8</sup> Appellant replied by letter dated 30<sup>th</sup> March 2015<sup>9</sup> and further post-*litis contestatio* correspondence was received from both parties in the course of July 2015.<sup>10</sup>
- 3.4 The Review Board decided that a hearing was necessary for its determination of the Appeal and issued due notice thereof on 19<sup>th</sup> May 2015.<sup>11</sup> The hearing duly convened in Kempton Park on 13<sup>th</sup> August 2015.

## ISSUES IN DISPUTE

### 4. Regulatory and Legislative Background

- 4.1. Section 17 of the Act authorises the responsible Minister to promulgate national building regulations but further allows that,

“18(1) A local authority may, at the request in writing of the owner of any building or any person having an interest therein, in respect of the erection of such building or the land on which it is being or is to be erected, in writing permit a deviation or grant an exemption from any applicable national building regulation except a national building regulation regarding the strength and stability of buildings.

(2) The Board<sup>12</sup> may, at the request in writing of the owner of any building or any person having an interest therein and after consultation with the local authority in question, in respect of the erection of such building or the land on

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<sup>8</sup> pp.22-29

<sup>9</sup> pp.30-33

<sup>10</sup> pp.36-39 (Appellant, undated but received by the chairman of the Review Board on 28/6/2015); pp.42-46 (Respondent 14/7/2015); and p.47 (Appellant 22/7/2015) respectively.

<sup>11</sup> pp.34-35; see Government Notice 2074 of 13 September 1985: Review Board Regulation 11(1)(b)

<sup>12</sup> Given that this appears to have led to confusion in this matter, including *in limine* argument as to the extent of the Review Board's jurisdiction, it is to be noted that the original “Council” was substituted with “Board” by the Standards Act (8 of 2008). A definition of this word was also inserted by s.36 (the Schedule), whereby it is “*the Board as defined in section 1 of the National Regulator for Compulsory Specifications Act 2008*”. That Act (5 of 2008) in turn defines the Board as “*the Board of the National Regulator for Compulsory Specifications appointed in terms of section 6*”. The Trade Metrology Act (4 of 2014), s.42(4), has however now abolished the Board and, notwithstanding that the Act has not been amended to reflect this, it seems that the function contemplated by s.18(2) must now be fulfilled by the Chief Executive Officer of the NRCS. Harmonising of the legislation is clearly well overdue but it is nonetheless certain that the Review Board is not the body given jurisdiction in terms of s.18(2).

which it is being or is to be erected, in writing permit a deviation or grant an exemption from any applicable national building regulation relating to the strength and stability of buildings.<sup>13</sup>

4.2 The National Building Regulations, Part S, stipulate the standard for the design of buildings in regard to facilities for persons with disabilities, stating in reg.S2(2) that,

“Where parking for more than 50 motor vehicles is provided in or in connection with any building having a means of access contemplated in subregulation (1), adequate<sup>14</sup> parking space shall be provided for the parking of motor vehicles used by persons with disabilities and a suitable means of access shall be provided from the parking area, ...”

Sub-regulation S2(3) stipulates further that,

“The requirements of regulation S2 shall be deemed to be satisfied where –  
(a) the facilities provided are in accordance with SANS 10400-S;  
(b) the egress from the building in the event of fire is in accordance with SANS 10400-T.”

4.3 Part AZ4 of the National Building Regulations further stipulates that

“(1) The requirements of the National Building Regulations shall be complied with by –  
(a) adhering to the requirements of all the prescriptive regulations;<sup>15</sup> and  
(b) satisfying all functional regulations<sup>16</sup> by –  
(i) adopting building solutions that comply with the requirements of SANS 10400; or  
(ii) reliably demonstrating, or predicting with certainty, to the satisfaction of the appropriate local authority, that an adopted building solution has an equivalent or superior performance to a solution that complies with the requirements of the relevant part of SANS 10400.  
(2) A competent person ... shall prepare and submit to the local authority a rational design or rational assessment where compliance with the requirements of subregulation (1) is to be satisfied in terms of subregulation (1)(b)(ii). ...”

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<sup>13</sup> emphases added

<sup>14</sup> “adequate” is defined in reg.AZ2 as “... in the opinion of the of any local authority ...”

<sup>15</sup> defined in AZ2 as a “regulation which describes in some detail an operation to be performed, or the dimensions of a building, building element or building component and the materials and method of construction to be used in such building, building element or building component”

<sup>16</sup> similarly defined as a “regulation that sets out in qualitative terms what is required of a building element or building component in respect of a particular characteristic, without specifying the method of construction, dimensions or materials to be used” (emphasis added).

(emphases added). Finally, the term “rational design” is defined in reg.AZ2 as,

“any design by a competent person involving a process of reasoning and calculation which may include a design based on a standard or other suitable document.”

Accordingly, the stipulations of the functional regulations can be met either by the deemed-to-satisfy requirements set out in SANS 10400 or by a rational design.<sup>17</sup>

4.4 As is already plain from the above, the South African National Standards, SANS 10400, are not building regulations<sup>18</sup> but merely “deemed-to-satisfy requirements” promulgated in terms of the regulations. With the sole exception of Part AZ, all national building regulations have deemed-to-satisfy requirements which provide one of three alternative methods by which the regulations can usually be satisfied. SANS 10400-S:2011, para.3.11, defines a deemed-to-satisfy requirement as a

“non-mandatory requirement, the compliance with which ensures compliance with a functional regulation”.<sup>19</sup>

## 5. Respondent’s Refusal to Approve the Rational Design

The Refusal is predicated on two principles, namely (in essence) that Respondent lacks legal authority to permit deviations from the National Building Regulations and that, in any case, Respondent is not satisfied that the Rational Design achieves the necessary standard which would justify approval thereof. Both grounds are disputed by Appellant.

## ASSESSMENT

### 6. South African National Standard

6.1 As the above survey of the relevant legislation makes plain, Respondent is incorrect in asserting that para.4.3.2.a) of SANS 10400-S:2011 is peremptory and that it lacks discretion to grant relief from those provisions. Notwithstanding the language of the deemed-to-satisfy requirement itself, it is merely one, alternative, non-mandatory means of achieving compliance with Part S of the National Building Regulations. It is entirely

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<sup>17</sup> or by means of a system or methodology carrying an Agrément Certificate – not applicable *in casu*

<sup>18</sup> both parties’ representatives have repeatedly and mistakenly referred to SANS 10400-S as a “regulation”, both in papers and argument.

<sup>19</sup> emphases added

the choice of Appellant as to whether it wishes to achieve compliance by means of the deemed-to-satisfy requirements or by submitting a rational design.<sup>20</sup>

- 6.2 Even if this were not the case, the subject of Appellant's application does not pertain to the "strength and stability of buildings" and Respondent self-evidently has legal authority to grant Appellant relief from Part S of the regulations in terms of s.18(1) of the Act.

## 7. Assessment of Rational Design by Respondent

- 7.1 The assessment of both a rational design submitted in terms of reg.A19 and an application for relief in terms of s.18(1) involves some measure of discretion by a local authority. Proper, lawful administrative discretion of this kind is not absolute but must be exercised rationally and reasonably against the available evidence, in the context of a particular application. It is not lawful to adopt an overarching policy approach that requires a mechanical application of principles that interfere with the proper exercise of discretion granted by legislation.<sup>21</sup>
- 7.2 A local authority's reasonable discretion in determining its satisfaction with the rational design must therefore be made with reference to relevant considerations, including the qualifications and experience of the competent person, his obligation to take responsibility for his rational design,<sup>22</sup> the nature of the owner of the building, and a proper technical and factual assessment as to whether or not the solution proposed achieves the stipulated objectives: *Paola v Jeeva NO*,<sup>23</sup> *Walele v City of Cape Town*,<sup>24</sup> *True Motives 84 (Pty) Ltd v Madhi*.<sup>25</sup>
- 7.3 *In casu*, the Rational Design makes both qualitative and empirical assessments as to the necessity for dedicated bays on the Property and, notwithstanding the reduction in the number thereof in relation to the deemed-to-satisfy requirements, asserts that its results are to an equal or better standard of actual performance than that in SANS 10400-S.

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<sup>20</sup> there is no legal basis for Respondent's assertion that it was entitled to be consulted in this regard

<sup>21</sup> for example, the Respondent *in casu* cannot lawfully decline to exercise its discretion merely because "there is no regulation requiring it to accept a rational design", as it at one stage seemed to suggest.

<sup>22</sup> Regulation AZ4(3), Annex C of Part T

<sup>23</sup> *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA) [17-26]

<sup>24</sup> *Walele v City of Cape Town and Others* CCT 64/07 [2008] ZACC 11 (13 June 2008) [60]

<sup>25</sup> *True Motives 84 (Pty) Ltd v Madhi and Another* 2009 (4) SA 153 [25]ff

- 7.3 Respondent confirmed that it considered that the methodology adopted in the Rational Design was sufficient in itself<sup>26</sup> and did not challenge Appellant's claims as to the technical sufficiency of the Rational Design's conclusions, either by expert testimony or by any other evidence. The bald factual assertions in the Refusal (which were notably not persisted with either in the Response or at the hearing) are therefore unsubstantiated. They are also quite obviously incorrect:
- 7.2.1 it is plainly not true either that "most" people who go to a hospital are sick, or that most of those who are sick need to use wheelchairs; and,
- 7.2.2 while it is certainly true that not all persons with disabilities<sup>27</sup> are dependent on wheelchairs, it is plain that the relevant parking provisions of SANS 10400-S, para.4.3, are actually designed not for the benefit of the generality of such persons but for those who do use wheelchairs.
- 7.3 At the hearing, Respondent in effect merely argued that the number of dedicated bays in the Rational Design was less than that stipulated in the deemed-to-satisfy requirements, and therefore that it did not comply with reg.AZ4(1)(b)(ii).
- 7.4 This is not the correct way to assess a rational design. The National Building Regulations themselves are qualitative. Why would they make provision for rational design as an alternative to the quantitative deemed-to-satisfy rules, if the only basis for acceptability of the former was that it exceeded the quantifications of the latter? The criterion for assessing a rational design does not lie in a mechanical comparison of quantifications but in a reasonable assessment of the overall performance of the design in its particular context.
- 7.5 It is clear from the above that Respondent has failed to properly apply its mind in the required manner and it therefore falls to the Review Board to assess the sufficiency of the Rational Design.<sup>28</sup>

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<sup>26</sup> in response to the Review Board's question at the hearing on 13<sup>th</sup> August 2015

<sup>27</sup> this phrase is defined in SANS 10400-S, para.3.32 as a "person who has long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, might hinder his full and effective participation in society on an equal basis with others"

<sup>28</sup> see HOEXTER, C.: *Administrative Law in South Africa*, Juta & Co., 2012: pp.121-125, 151-155.



## **8. Sufficiency of the Rational Design**

- 8.1 As noted *supra*, Appellant is a major owner and operator of private hospitals in this country. It has, itself, enormous expertise in the management of hospitals and is highly motivated to provide its clients with satisfactory facilities, even if for no other reason (and no disrespect is intended) than the commercial viability of its operations. Its success in the field is its own proof of its expertise and sensitivity to the needs of its patients.
- 8.2 The statistical basis of the Rational Design is a comparative survey of Appellant's nine other hospital facilities in the northern regions of the country (approximately congruent with the old Transvaal province). The comparison assesses the actual provision for dedicated bays and the adequacy thereof, objectively concluding that the existing provision is in fact inadequate in four out of nine cases. Where the provision is inadequate, the survey enabled the hospitals' administration to recommend the additional number of bays required.<sup>29</sup> The recommended and existing provision of dedicated bays (as the case may be) suggests that 1.5% of the total number of parking bays is an appropriate number in general. The current total number of bays on the Property is well in excess of that required by the Respondent (189 in addition, *i.e.*: 33% more than stipulated) and the Rational Design proposes that 2.0% of the total number be dedicated to parking for persons with disabilities in accordance with Part S of the Regulations.
- 8.3 Appellant insists that the provisions of SANS 10400-S, para.4.3.2.a), are excessive and would have a deleterious effect on the operation and commercial viability of its Midstream facility. It convincingly argues that the actual operation of hospital facilities (in relation to dropping-off of patients, the employment of porters, and the needs of family, visitors, *etc.*) counter-intuitively demonstrates that fewer dedicated bays are required at a hospital than may elsewhere be the case. Appellant undertakes, in the Rational Design, to manage its parking facilities to ensure that persons with disabilities suffer no prejudice as a consequence of the reduced number of dedicated bays.
- 8.4 The evidence presented in the Rational Design suggests that the performance of the design will be superior to the standard given in SANS 10400-S:2011, notwithstanding that the number of dedicated bays is reduced. The Review Board is therefore satisfied

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<sup>29</sup> as pointed out by Appellant's counsel this is a "market indication", not an assessment of sufficiency in regard to SANS 10400-S:2011. Whether or not the hospitals were constructed before 2011 is therefore not relevant to the results of the survey and the argument presented therein.

that the evidence demonstrates that the requisite standard of performance is duly achieved in the Rational Design and that its conclusions do satisfy the requirements of reg.AZ4(1)(b)(ii).

## CONCLUSION

### 9. Summary of findings

The Review Board therefore finds the following:

- 9.1 Respondent does have the discretion, which must be reasonably exercised, to grant relief from the provisions of SANS 10400 and is obliged to do so when a satisfactory rational design is submitted by an Approved Competent Person;
- 9.2 Respondent also has the discretion to permit deviations and exemptions from the National Building Regulations in terms of s.18(1) of the Act;
- 9.3 the Rational Design submitted by Appellant achieves a satisfactory level of performance in relation to the requirements of SANS 10400-A and -S.

## DECISION

### 9. The decision of the Review Board is therefore that:

- 9.1 the Appeal is upheld; and
- 9.2 the Rational Design is approved.<sup>30</sup>

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Signed on behalf of the Review Board this 24<sup>th</sup> day of August in the year 2015:



**Michael Bester**  
Chairman: Review Board

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<sup>30</sup> National Building Regulation AZ2; also see *Pellencin v City of Tshwane Metropolitan Municipality* (47233/11) [2012] NGHC 133 (28 June 2012) at [4]