

**IN THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
(3)	REVISED:
Date: Signature: <i>[Signature]</i> 6/10/21	

**CASE NO: 7021/21**

In the matter between:

**GAETAL (PTY) LTD**

Applicant

and

**THE UNIVERSITY OF JOHANNESBURG**

First Respondent

**THE COUNCIL: UNIVERSITY OF JOHANNESBURG**

Second Respondent

**THE MANAGEMENT EXECUTIVE COMMITTEE:  
UNIVERSITY OF JOHANNESBURG**

Third Respondent

**Coram:** Fourie AJ

**Heard on:** 6 August 2021

**Delivered:** 7 October 2021

**Summary:** Promotion of Administrative Justice Act 3 of 2000, applied. University, in administering public funding for student accommodation, acting contrary to its own policy on accreditation of private student accommodation providers. Decision not to consider applicant as a provider for the 2021 academic year set aside on review. University directed to consider the application.

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## JUDGMENT

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### Introduction

1. This is a review application, brought in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), in which the applicant, a property development company, seeks to challenge the decision of the first respondent ("the University"), to not consider new buildings for approval in terms of its relevant policies, for the 2021 academic year. The University opposes the application.
2. It is common cause between the parties that PAJA applies to the impugned decision. This being the default gateway to constitutional review, it is not necessary to consider whether the impugned decision falls foul of the broader constitutional principle of legality.

### Background

3. The University endeavours to provide access to accommodation to students who require it. Only a small fraction of these students can be accommodated at the on-campus residences, that are owned and run by the University. The remainder are referred to approved private landlords for off-campus accommodation. The aim of approving private providers of student accommodation is to ensure an adequate standard of accommodation, suitable for students, is maintained.

4. Students who qualify for State funding of their studies via the National Student Financial Aid Scheme (“NFSAS”), also qualify, where required, for a contribution of around R45,000 per annum to their accommodation costs. This creates a strong commercial incentive for private property developers and smaller landlords to obtain accreditation from a university, as it effectively guarantees the receipt of rental income.
5. NFSAS relies on the University to ensure that public funds are not misspent. The University (and any other learning institution receiving NFSAS-funded students) is obliged to take the necessary steps to ensure a sufficient supply of student accommodation that meets minimum standards set by Government, and to ensure that student accommodation monies are not misspent. In practice, these are onerous and wide-ranging responsibilities, which the University is not, by its nature, well-suited to carry out.
6. With the high demand for tertiary education, the University would generally be under pressure to ensure that there were adequate numbers of beds available in approved private accommodation, for the following financial year. The University developed a policy that regulates what it refers to as “POSA’s”, an acronym for “Providers of Student Accommodation”. This policy also regulates applications for new providers or new buildings by existing providers.
7. The applicant is part of a group of companies that develop student accommodation buildings. It’s owners acquired a building near the University’s City Campus in Doornfontein, Johannesburg, during 2019, and set about converting it to meet the required standards for student

accommodation, with the aim of applying for and obtaining approval by the University during 2020, thus enabling it to advertise to and attract students whose accommodation fees would be funded by NFSAS, starting with the 2021 academic year. The applicant invested approximately R90-million in converting the building to meet the required standards.

8. The spread of the Covid-19 pandemic and the lockdown in South Africa that commenced in March 2020, disrupted the academic program of the University, as most in-person teaching had to be suspended. Some 18 months later, things have still not returned to normal, with many courses and lectures proceeding via online channels, and it is not clear when or whether the amount of privately provided beds for students will recover to previous levels.
9. As at mid-2020, when the University would normally commence the process of inviting applications for new buildings and accommodation providers, it was apparent that the demand for student accommodation had plummeted with the onset of lockdown, and was unlikely to fully recover in the short term. A decision was made by the second respondent, the Management Executive Committee of the University ("the MEC"), at a meeting held on 28 July 2020, not to consider new applications for 2021, but to simply continue to use existing providers of student accommodation.
10. It is this decision which the applicant seeks to set aside on review. In addition, the applicant seeks an order directing the University (via the MEC) to consider its application for approval, in terms of the Policy, in respect of the 2021 academic year.

### Mootness

11. The 2021 academic year will be over in approximately two months. The University argues that the issue is therefore moot, as a judgment will have no practical effect either way. The applicant is hardly likely to attract new residents for the current academic year. The University is in the process of revising the Policy, as it has proven to be problematic in various respects, and claims that the new policy will apply in respect of the 2022 academic year, thus rendering a judgment on the current Policy almost immediately moot.
12. The applicant argues that the matter is not moot, the main reasons being that it has invested significant capital in renovating the building to the appropriate standards, and has provided accommodation to some 349 NFSAS-funded students during this year. If the applicant can obtain accreditation, even after the event, it can proceed to recover accommodation fees (in excess of R12 million for the 2021 academic year) from NFSAS. The commercial consequences of the dispute are therefore by no means trivial. The applicant expresses doubt that the University will issue a new policy in the near future.
13. In my view the matter is clearly not moot. The outcome of this application will still have real-world consequences between the parties. It may also impact on assessments for the 2022, as the policy in question is still in force (although I was informed that it is in the process of being reviewed and is likely to be amended).

### The applicable policies

14. The University's Policy<sup>1</sup> ("the Policy") regulates the appointment of providers of student accommodation for a particular calendar year. Providers apply per building and not on a blanket basis. Approvals only cover a particular year.
15. The Policy aims to *"offer an enriching student-friendly learning and living experience, by providing Students who enter into contracts with Service Providers ("SPs") for accommodation in Privately-owned Student Accommodation ("POSA") subject to the Policy with adequate, fit-for-purpose accommodation of reasonable quality, and enable them to enjoy learning and living environments that promote academic success."*
16. The Policy also seeks to give effect to the requirements set by the Minister of Higher Education in a policy<sup>2</sup>, duly promulgated in terms of section 3 of the Higher Education Act, on minimum norms and standards for student housing at public universities ("the Minimum Standards Policy"), which sets specific requirements for acceptable privately-owned student accommodation.
17. The Policy applies to all prospective and current accommodation service providers. It sets out the process for applications for accreditation. In brief:
  - 17.1. The University sets the opening and closing dates for applications, on an annual basis.
  - 17.2. Applicants are bound by the terms of the Policy.

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<sup>1</sup> Policy: Privately-Owned Student Accommodation, approved on 29 November 2016.

<sup>2</sup> Notice 897 in GG 39238 of 29 September 2015: Policy on the Minimum Norms and Standards for student Housing at Public Universities.

- 17.3. Applicants must complete the relevant application forms and provide information required by the University, and pay a non-refundable application fee.
- 17.4. Only applications that comply fully with the Policy will be considered for accreditation.
- 17.5. Applications are considered on the documents, and qualifying buildings will then be inspected to ensure compliance with minimum housing standards.
- 17.6. Four possible outcomes are envisaged:
  - 17.6.1. Approval of the service provider and the particular building/s applied for, subject to conclusion of a contract with the University;
  - 17.6.2. Limited approval with corrections to be carried out to obtain full approval;
  - 17.6.3. The application is declined;
  - 17.6.4. Declined and blacklisted (from future applications).
18. The Policy provides for an appeal process against a decision to decline an application, with the decision of the appeals panel being final.
19. An approved service provider is then entitled to market itself to the student community as being approved by the University.
20. Of critical importance is that approved service providers qualify for funding from NSFAS, the National Student Financial Aid Scheme, funded and operated by the National Department of Higher Education and Training, and

aimed at providing study loans to deserving students for tertiary education. NSFAS support includes the funding of student accommodation.

21. In essence, the University is tasked with ensuring compliance with housing standards on behalf of NSFAS and the Minister/Department, by regulating the providers of student housing. Providers that qualify in terms of the Policy, will receive rental payments from NSFAS for qualifying students that take up accommodation with an approved service provider. This is obviously a critical commercial incentive for private accommodation providers to compete for accreditation.
22. Lastly, the Policy allows for deviations from its own terms, on approval from the MEC.

#### Timeline of key events

23. The key facts in this matter are largely common cause, and can be briefly recorded.
24. On 22 May 2020, the University addressed email correspondence to its various accommodation service providers, inviting applications for 2021. The application process entails registration on an online system, uploading all relevant documents, and paying an administration fee.
25. The applicant duly submitted its application and paid the application fee.
26. On 22 July 2020, the University communicated that applications would close at the end of September 2020.



27. On 28 July 2020, unbeknownst to the applicant and other prospective accommodation providers, the MEC apparently decided not to continue with assessment of applicants for 2021, but rather to continue to use current accommodation service providers in 2021. The recordal of the purported decision in this regard reads as follows:

## **5.2 REPORT OF THE MEC STRATEGIC BREAKAWAY OF 8 JUNE 2020**

### **Noted:**

1. That the following was highlighted regarding Privately-Owned Student Accommodation (POSA):
  - a) The Chairperson expressed concern about the POSA accreditation process, including the possibility of bribery being involved and also that there was no auditing mechanism to determine if the POSA establishments continuously complied with the accreditation rules. The investigation into POSA processes would also indicate ways in which to introduce improved controls and delegation of functions.
  - b) Dr Vukuza and the Student Affairs team had also discussed the accreditation of establishments for 2021 and had agreed that, due to the prevailing uncertain times created by COVID-19, no new properties would be accredited. The existing accredited POSA establishments would be used.
  - c) It was proposed that third-party monitoring of POSA establishments should be incorporated into a Policy for Accrediting POSAs.

### **Resolved:**

2. That the report and action list of the MEC Strategic Breakaway of 8 June 2020, as set out in MEC.418/2020(7), be approved.

28. It bears mentioning that the “report and action list of the MEC Strategic Breakaway of 8 June 2020” does not deal with the 2021 accreditation process at all. The only reference to the purported decision is in para 1 b).

29. On 28 July 2020, Dr Nolitha Vukuza (Senior Executive Director: Student Affairs & University Relations) addressed an email to several colleagues, in which the decision of the MEC of 27 July 2021 was communicated as follows:

*“Dear Colleagues*

*Please note the following from the MEC: No new POSA accreditations for 2021, the sentiment is to use the 2020 already accredited ones. It must be emphasized that students are not to be left stranded because of this directive. As and where there are those providers that will no longer participate but are accredited improvisation must be done. What it means therefore is that you should determine their availability for 2021. Things are poised to change as we foresee a dip in student enrolment because of online learning."*

30. On 17 August 2020, Godfrey Helani ("Helani"), Senior Director: Student Affairs submitted a recommendation to the MEC on student accommodation, in the following terms:

ITEM TITLE	ACCREDITATION PROCESS OF PRIVATELY-OWNED STUDENT ACCOMMODATION FOR 2021
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**1. RECOMMENDATION**

Student Affairs is recommending that the Management Executive Committee of the University approves the proposal of, instead of accrediting new properties of Privately-Owned Student Accommodation for 2021, extending the accreditation status of the 2020 accredited 539 properties, which yielded 27312 beds, to 2021. The extension should be subject to continuous and consistent compliance with the requirements and conditions as prescribed and provided for by the Policy on Privately-Owned Student Accommodation and the concluded Memorandum of Agreement.

Should the above recommendation be approved, Student Affairs would further recommend that the annual non-refundable administration fee paid by service providers when applying or renewing their respective accreditation to accommodate students should still be paid by the 2020 approved service providers who are available to continue in 2021. However, Student Affairs would propose that the fee be discounted with 30% as the process for 2021 will not be a complete application process as the compliance reports will inform a decision whether to continue or not with the service providers accredited for 2020.

31. On 19 August 2020, in response to a routine email inquiry on outstanding documents in the submission process, the applicant's representative (Mr Jennings) was informed by the University's Mr Molokwane, as follows:

*"I would like to acknowledge the receipt of your Nano New Development. The University has taken a decision not to increase the number of beds for 2021. I will provide you with more information tomorrow about the whole accreditation process for 2021."*

32. On 24 August 2020, Mr Jennings responded to Mr Molokwane's email:

*"I am following up on the additional information you advised would be forthcoming. As you can imagine, we are quite concerned, as we are deep in the process of a multi-million Rand development, so would really like to understand further regards your information on the 2021 applications."*

33. In response, Mr Molokwane informed Mr Jennings that he was following up with University management regarding "... MEC directives and guidelines for 2021 accreditation process."

34. On 24 August 2020, the associations addressed a collective letter to Mr Helani, containing responses to issues raised at a meeting held during July 2020. It is apparent from the content of this letter that the industry was not aware of the University's purported decision of 27 July 2020, not to engage any new service providers for 2021.

35. On 25 ~~August~~ August 2020, the MEC met, and resolved as follows:

## 8.7 ACCREDITATION PROCESS OF PRIVATELY-OWNED STUDENT ACCOMMODATION FOR 2021

Resolved:

1. That the following proposals regarding the accreditation process for POSA establishments, as set out on MEC.529/2020(8), be approved, on the understanding that the UJ reserved the right to terminate the service providers' contracts if any of them were found to have colluded with any UJ staff member/student:
  - a) To extend the accreditation status of 539 accredited properties (27312 beds) from 2020 to 2021, subject to them being subjected to a continuous compliance test, and to de-accredit them if they did not comply.
  - b) To charge a non-refundable admin fee to be paid for 2021, which would be the same as for 2020 with a discount of 30%. The fee would be used for use for monitoring, compliance, and evaluation purposes.
2. That the possibility of introducing an independent verification process for POSA accreditation, from 2022 and beyond, be discussed, after which a proposal be submitted to the meeting when finalised.

Dr Vukuza, Ms Mamorare and Prof Swart

36. During September and October 2020, Mr Jennings addressed several queries regarding the applicant's application for accreditation. He did not receive a response.

37. On 3 November 2020, Mr Helani addressed an email to accommodation service providers, their representatives and the associations, in which he recorded:

*"Dear colleagues,*

*The Management Executive Committee of the University has since made the decision on the reported recommendations of Student Affairs regarding the Accreditation Process for 2021.*

*The recommendations of Student Affairs on the Accreditation Process for 2021 are approved, on the understanding that UJ reserves the right to terminate contracts of service providers who are found to be non-compliant with and/or in violation of the Policy on Privately-Owned Student Accommodation and/or the Memorandum of Agreement, and/or found to have colluded with any UJ staff member and/or student. The approved recommendations are:*

- To extend the accreditation status of 539 accredited properties (27312 beds) from 2020 to 2021, subject to the properties being subjected to a continuous compliance test, and to de-accredit them if they did not comply.*
- To charge a non-refundable admin fee to be paid for 2021, which would be the same as for 2020 with a discount of 30%. The fee would be used for monitoring, compliance, and evaluation purposes.*

*The Office of the Privately-Owned Student Accommodation will communicate the decision to all the service providers. Just for clarity, at the time of making a recommendation to the University Management, 539 properties were accredited."*

38. On 17 November 2020, a meeting was held between industry and University representatives. There was still widespread confusion about the status of the 2021 accreditation applications. Apparently, during the course of this meeting, a University representative mentioned that the 2021 applications would not be considered.

39. This prompted Mr Jennings to address a direct query on email on 18 November 2020, in which he sought clarity on this statement. The response was to the effect that the issue would be taken to executive management for consideration, and thereafter providers would be updated.

40. In early December 2020, at a further industry meeting, the University finally informed industry representatives that it would not consider applications for

2021, but would continue using existing accommodation service providers. This prompted an outcry, and the University undertook to consider submissions prior to implementing this decision. Shortly thereafter, in a response to submissions, Mr Helani indicated that the University would consider new applications if the existing suppliers could not meet demand, or if suppliers had their accreditation withdrawn due to non-compliance with relevant rules and standards.

41. In December 2020, amidst the confusion, industry representatives called on the University to make a final decision about the 2021 applications. No response was forthcoming. In mid-January 2021, the applicant's attorneys addressed correspondence to the University, and demanded a formal response to the applicant's application for 2021.

42. By 19 January 2021, no response had been received, and the applicant indicated by way of attorney's correspondence that it sought to exercise its right of appeal in terms of the policy. On 30 January 2021, the University finally provided a substantive response, along the following lines:

42.1. The MEC decided on 28 July 2020, not to consider any applications for 2021 student accommodation providers;

42.2. The MEC was empowered, in terms of clause 27 of the Policy, to deviate from the Policy.

42.3. The decision had been communicated to the applicant's representative on 19 August 2020.

42.4. Given the MEC's decision, there was no scope for an appeal by the applicant.

43. In a later letter, the University's attorneys supplemented the reasons for the MEC decision of 28 July 2021, with two additional reasons:

43.1. Problems with sub-standard accommodation by existing service providers needed to be addressed before new service providers could be considered.

43.2. Due to covid-19, there was an oversupply of student accommodation based on supply and demand figures for 2020.

44. The applicant then instituted review proceedings, initially as a semi-urgent application, which later morphed into this application. The University provided a review record and opposed the application.

45. In supplementary papers, the applicant raised the fact that the University had acted inconsistently by approving certain new accommodation service providers for 2021. The University's explanation is that the official who appointed these service providers, acted without authority, and is facing disciplinary action.

The factual grounds for the PAJA challenge to the decision not to consider applications for 2021 service providers

46. Counsel for both parties confirmed that the impugned decision constitutes administrative action, and that the default review pathway under PAJA applies. The key issue for determination is therefore whether, on the facts, there are sufficient grounds established to review and set aside the impugned decision under PAJA.

47. I deal only with what I regard, for purposes of this judgment, as the critical grounds of review pleaded by the applicant. In essence, the key factual grounds on which the applicant seeks to review the impugned decision, are:

47.1. No decision was taken by the MEC on 28 July 2020, to not consider new applications. Alternatively:

47.2. In making the impugned decision, the University from its own Policy in key respects, outside of its powers to do so;

47.3. The failure to provide the applicant with the opportunity to make submissions prior to it taking the impugned decision, or to provide the applicant with reasons for the impugned decision within a reasonable time of taking it;

47.4. The initial invitation to submit applications, acceptance of application documents and fees, and failure to advise the applicant of the impugned decision until months after the fact, created a legitimate expectation that the applicant's application would be considered.



The factual basis of the University's defence

48. The University pleads that the impugned decision was in fact taken at the MEC meeting on 28 July 2020, that it was communicated to the applicant by email during August 2020, and that the decision was “confirmed” at the MEC meeting of 25 August 2020.

49. In its answering affidavit, the University advanced the following reasons for the impugned decision:

49.1. Traditionally there was an undersupply of student accommodation. This reversed in 2020, and the anticipated oversupply of beds provided by private accommodation providers was likely to continue.

49.2. The MEC is established in the Institutional Statute of the University. The MEC is tasked with assisting the Vice-Chancellor and Principal in the administration and management of the University. It is a senior decision-making body.

49.3. Various serious irregularities had emerged over the years in the provision of student accommodation by private service providers. For example, investigations had shown that certain providers were defrauding the NFSAS by overcharging students, sometimes in cahoots with students.

- 49.4. The University administration is not adequately staffed or geared to manage the process of appointing, vetting and monitoring the provision of private student accommodation on the scale required. It does the best it can, with limited expertise and resources available.
- 49.5. The Policy is no longer fully fit for purpose, and requires large-scale revision. This process is currently underway.
- 49.6. The Covid-19 pandemic has had a drastic impact on the University's operations. One impact has been that the need for student accommodation has drastically declined. This exposed other abuses of the NFSAS, such as students who did not vacate their NFSAS-funded accommodation, but did not pay over the rental (which they received from NFSAS as part of their grant) to the accommodation provider.
- 49.7. The University was concerned that the oversupply of accommodation might increase the levels of irregularities and abuses of the State-funded student accommodation scheme. At a strategic breakaway session in June 2020, the entire system of administration of private suppliers of student accommodation needed to be revised.
- 49.8. Management took the view that the move towards increased online learning and virtual classes, which was rapidly accelerated by the onset of the Covid-19 pandemic and related lockdowns, was likely to become permanent, thus permanently reducing the ongoing need for student accommodation near to campus.

49.9. These views informed the decision, recorded in the minute of the MEC meeting on 28 July 2020, that no new accommodation service providers would be considered for the 2021 academic year.

49.10. This decision was promptly communicated to management, accommodation service providers and their representative bodies. The applicant was informed of this decision on 19 August 2020, in the email quoted above. On 3 November 2020, the University again communicated its clear intention to use existing accredited accommodation service providers in the following year, and not to increase the number of beds for the following year. At the same time, the University reserved the right to monitor service providers, and to withdraw their accreditation in the event of non-compliance with applicable norms, standards and rules.

50. Affected service providers were subsequently given the opportunity to make representations on the 2021 accreditation issue, which were duly considered by the University.

#### Determination of key factual dispute

51. The only real dispute of fact that requires determination, is whether the impugned decision was in fact taken by the MEC at the meeting of 28 July 2020. The applicant disputes this, on the basis that the minute of this meeting does not reflect that the impugned decision was taken, as it was not recorded as a resolution (“resolved”).

52. Inasmuch as this constitutes a dispute of fact, the direct evidence of the University, which confirms that the decision was in fact taken by the MEC in this meeting, despite the error in how it was recorded in the minute, will prevail, on the application of the well-known *Plascon-Evans* test. In any event, this dispute is more apparent than real. The decision by the University not to consider applications for accreditation for 2021 underlies the review application before me. That the decision was taken, albeit that there is some confusion apparent from the papers as to when exactly it was taken, is common cause, and I find on the facts that the impugned decision was taken by the MEC at the meeting of 28 July 2020.

PAJA – relevant provisions on procedural fairness and application to the facts

53. Section 3 of PAJA regulates procedural fairness in administrative action that does not involve the broader public. It reads:

*“3. Procedurally fair administrative action affecting any person.—*

*(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.*

*(2) (a) A fair administrative procedure depends on the circumstances of each case.*

*(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)—*

*(i) adequate notice of the nature and purpose of the proposed administrative action;*

- (ii) a reasonable opportunity to make representations;*
- (iii) a clear statement of the administrative action;*
- (iv) adequate notice of any right of review or internal appeal, where applicable;*
- and*
- (v) adequate notice of the right to request reasons in terms of section 5.*

*(3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to—*

- (a) obtain assistance and, in serious or complex cases, legal representation;*
- (b) present and dispute information and arguments; and*
- (c) appear in person.*

*(4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).*

*(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including—*

- (i) the objects of the empowering provision;*
- (ii) the nature and purpose of, and the need to take, the administrative action;*
- (iii) the likely effect of the administrative action;*
- (iv) the urgency of taking the administrative action or the urgency of the matter;*
- and*
- (v) the need to promote an efficient administration and good governance.*

*(5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure."*

54. The "empowering provision" referred to in section 3 is defined in PAJA as "...a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken." In this matter, the empowering provision is clearly the Policy, being the instrument that regulates the entirety of the relations between the University and prospective and current private accommodation service providers.

55. It seems obvious (and was not seriously disputed) that the impugned decision adversely affected the rights or legitimate expectations of the applicant. The procedural fairness requirements in section 3 therefore apply.

56. In my view, the University failed entirely to comply with the bare minimum requirements of procedurally unfair administrative action, for the following primary reasons:

56.1. It had invited new applications for 2021, in terms of the Policy, in May 2020. In July 2020, it had communicated the closing date for applications to interested parties.

56.2. The University did not give any sign or notice that it was contemplating the suspension of the 2021 application process, prior to the impugned decision being taken. As a result, interested parties such as the

applicant were denied any opportunity (let alone a reasonable opportunity) to make representations prior to the impugned decision being taken.

56.3. The impugned decision was not clear, and neither was it properly or timeously communicated to affected parties, including the applicant:

56.3.1. Mr Molokwane's email of 19 August 2020 states that "*The University has taken a decision not to increase the number of beds for 2021.*" In my view, this statement does not clearly imply that no new service providers would be considered for 2021, particularly as, in terms of the Policy, the approved accommodation for 2020 was not simply automatically approved for 2021.

56.3.2. Mr Molokwane's subsequent undertakings to provide further details on the "*entire accreditation process*" after consultations with management does not convey the message that a final decision not to consider any applications for 2021, has been taken.

56.3.3. The timeline indicates that as late as December 2020, there was still no clarity on whether 2021 applications would be considered at all.

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56.4. The Policy provides for the right of internal appeal against the refusal of accreditation. PAJA requires that affected parties be advised of such rights. The applicant gave notice of its intention to exercise its right of appeal. This was disregarded, on the spurious reasoning that as the applicant's application had not been refused, the right to appeal had not been triggered. The University, having invited applications for 2021 accommodation in terms of the Policy; and having received an application and application fee from the applicant, before deciding not to consider any such applications, cannot now assert with any credibility that it did not refuse the application, but simply decided not to consider it and all other similar applications. In my view, refusal after consideration, and refusal to consider are essentially the same result, and the internal right of appeal lies against both.

PAJA – relevant provisions on substantive fairness, and application to the facts

57. Section 6 of PAJA reads, in relevant part:

*“6 Judicial review of administrative action.—*

*(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.*

*(2) 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;*

*(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.*

...”

58. I have already found that the impugned decision was procedurally unfair. On this basis alone, it may be set aside on review. I briefly deal with other material challenges that in my view require consideration.

59. As noted above, the “*empowering provision*” that applies is the Policy. The Policy does not grant the MEC the power to make the impugned decision. On the face of it, the impugned decision stands to be set aside because:

59.1. s6(a)(i) - “*the administrator who took it was not authorised to do so by the empowering provision*”;

59.2. s6(2)(f)(i) – “*the action itself ... is not authorised by the empowering provision*”. (This provision also puts paid to the University’s assertion that as the MEC simply decided not to consider any new application in respect of 2021, it did not ‘refuse’ the applicant’s application. The Policy does not give the University the power not to consider applications. In any event, the failure to take a decision (on an application for accreditation) would in itself be susceptible to review).

60. The University argues that this is not the case, as the Policy itself provides the MEC with the discretion to deviate from its terms. Clause 27 of the Policy provides that “*The MEC may approve deviations from the Policy on good cause shown.*”

61. On the facts, it does not appear that the MEC was faced with any kind of application to approve a deviation from the Policy when it took the impugned. It decided of its own accord to simply not consider any applications for new accommodation for 2021. It did so for reasons which, at least at the time (the reasons were significantly bolstered after the fact, a reviewable irregularity in itself), were clearly not relevant to the issue. After all, irregularities in the services provided by existing accommodation providers hardly justifies the decision to not consider new service providers.
62. It also did so shortly after having initiated the new process and having invited applications for 2021, thus creating the right, alternatively a legitimate expectation, on the part of prospective service providers (including the applicant) that, provided they jumped through the applicable hoops, their applications for accreditation would be considered on their merits, in terms of the Policy.
63. I have real doubts as to whether clause 27 of the Policy grants the MEC the discretion to disregard the entirety of the portions of the policy dealing with applications for accreditation. In any event, even if the discretion is that broad, it cannot lawfully be exercised on the basis irrelevant considerations, or arbitrarily, which in my view it was. The extent of arbitrariness is illustrated by the later decision to automatically extend the accreditation of 2020 service providers for 2021, in circumstances where the Policy does not contemplate any such blanket extension.
64. Much can be made of the changes over time to the reasons provided by the University for the impugned decision. It hardly bolsters the University's

argument that the decision was reasonable and procedurally fair. But given the findings already made, it is not necessary to deal with this issue in further detail, suffice to note that the failure to provide adequate reasons can in itself render the decision susceptible to review.

#### Appropriate relief

65. In my view, for the reasons set out above, the impugned decision should be declared invalid. The next consideration is what further relief, if any, should be granted. I see no reason why the default relief of setting the impugned decision aside should not follow.

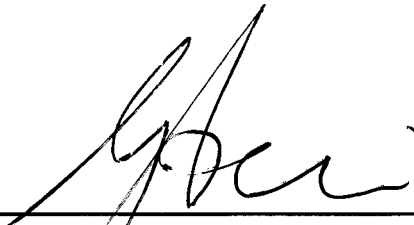
66. The applicant seeks an order directing the MEC to consider its application in terms of the Policy. In my view this is the most appropriate relief to grant in the circumstances. Although the reconsideration will only occur towards the end of (or after) the conclusion of the 2021 academic year, there are still real commercial consequences that will flow from the decision, namely whether the rental subsidies of NFSAS students who resided in the applicant's building during 2021, can be recovered from the NFSAS. This can only happen if the applicant is accredited by the University.

67. In my view the applicant is entitled to the costs of the application. I see no compelling reason as to why costs should not follow the result on these facts. The applicant was treated in a grossly unfair and high-handed manner by the University, and had no choice but to approach the Court for relief. Given the nature of the proceedings, it would have incurred considerable expenses in vindicating its rights.

Order

68. I make the following order:

- “1. The decision by the first respondent not to consider the applicant’s application for accreditation as a new provider of private student accommodation for the 2021 academic year, is reviewed and set aside.
2. The first respondent is directed to, within 10 days of granting this order, consider the applicant’s application, as contemplated in the applicable policy, for the accreditation of the building known as Nano Living Miller Street, in respect of the 2021 academic year, and to forthwith communicate its decision to the applicant.
3. The first respondent is ordered to pay the costs of this application.



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Greg Fourie  
*Acting Judge of the High Court of South Africa  
Gauteng Local Division, Johannesburg*

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HEARD ON:	6 August 2021
DATE OF JUDGMENT:	6 October 2021
FOR THE APPELLANT:	Adv CC Bester and Adv M Sethaba
INSTRUCTED BY:	Fluxmans Inc
FOR THE RESPONDENT:	Adv AE Bham SC
INSTRUCTED BY:	Lawtons Inc

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