



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

CASE NUMBER: 511/2023

In the matter between:

LUBABALO OSCAR MABUYANE

Applicant

And

THE UNIVERSITY OF FORT HARE

1st Respondent

**MINISTER OF HIGHER EDUCATION, SCIENCE AND
INNOVATION**

2nd Respondent

JUDGMENT

RUSI J

[1] One of the greatest treasures of a democratic state is the respect that those who are endowed with the powers to govern in all its various facets accord to the rule of law.

[2] This matter concerns the review of the decision of the first respondent (the University) dated 12 March 2021 to deregister and exclude the applicant, from the postgraduate qualification of the Master's in Administration. The qualification (hereinafter conveniently referred to as the MA degree or the qualification) is offered by the University's Faculty of Management and Commerce, in particular the Department of Public Administration (the department).

[3] The grounds posited by the University for the applicant's deregistration are that he did not meet the minimum requirements for admission to the qualification. The qualification has two variants, namely, the course work and research component. The applicant was registered for the research component of the qualification in 2017.

[4] The minimum requirements for admission to the various post graduate qualifications offered by the University are set out in its General Rules enshrined in its prospectus. For ease of comprehension, it is instructive to outline the minimum requirements for admission to all Master's degrees offered by the University as set out in General Rule 15.2 of its 2017 Prospectus (the prospectus), and they are:

- (a) A four-year Bachelor's degree at the University; or
- (b) Honour's degree at the University; or
- (c) Similar higher education qualification at the appropriate NQF level, and which in the opinion of Senate, is equivalent to or higher than the examinations prescribed for an Honours degree at the University; or
- (d) An Honours mini-dissertation for the examination with the consent of the supervisor and within the deadline stipulated by the University.

[5] The prospectus also makes provision for the Recognition of Prior Learning (the RPL) as the alternative avenue for admission to all its postgraduate qualifications. In this regard, General Rule 15.4 provides as follows:

‘The above requirements should be read in conjunction with the University’s policy on the recognition of prior learning, which sets out access criteria as well as advanced standing granted to students based on learning acquired through formal, informal and non-formal means.’

[6] At the time the applicant made his application for admission to study towards the MA degree, he possessed the Senior Certificate (matric); and the Bachelor of Commerce degree (B.Com), a three-year qualification, which he obtained at the University on 19 April 2002. His curriculum vitae (CV) outlining his academic achievements and work experience accompanied his application for admission to the qualification. He submitted his application to the University’s Bhisho Campus. The application was subsequently endorsed as ‘accepted’ by Professor Ijeoma, then the Head of the department.

[7] In tandem with the review relief, the applicant seeks an order declaring that his admission to the qualification was lawful. For convenience I will hereafter refer to this relief as “the first declaratory relief.” The applicant seeks other ancillary relief.

[8] The applicant challenges the University’s decision to deregister him on the grounds that:

- (a) He was not afforded reasonable opportunity to make representations before the decision was made.
- (b) When the decision was made, the University did not have all the information before it.
- (c) The decision maker failed to take into account relevant considerations; thus, the decision is irrational.

(d) The decision is inherently unreasonable, irrational and arbitrary.

[9] In raising these grounds of review, the applicant relies on sections 3 and 6(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[10] Section 3 of PAJA provides, *inter alia*, that an administrative action must be procedurally fair, and, in order to give effect to the required procedural fairness, the person whose rights it materially and adversely affects must be afforded a hearing before the action is taken.

[11] Further grounds relied upon by the applicant for the review sought are that the decision to deregister him is unreasonable and irrational. As the basis of this contention, he states that when the University reviewed his admission, it failed to take into consideration as a relevant factor his prior experience in accordance with its RPL policy. In this regard, the applicant relies on section 6(2) of PAJA. In terms of section 6(2) of PAJA, a court or tribunal has the power to judicially review an administrative action on several grounds. Those grounds include the fact that:

- (i) Irrelevant considerations were taken into account, or relevant considerations were not considered;
- (ii) The action was taken arbitrarily or capriciously;
- (iii) The action itself is irrational;
- (iv) 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.

[12] The applicant further states that in reviewing his admission, the University applied unequal and discriminatory treatment to him as compared to two other students who, like him, possessed three-year Bachelor's degree when they were

admitted to the Master's qualification. The students concerned were registered in 2011 and 2017, respectively, for the course work variant of Master's in Public Administration (the MPA degree). According to the applicant, the University considered the RPL in respect of those students, whereas it did not do so in his case.

[13] Only the University opposes the application. I must indicate at this earliest stage that among the declaratory relief that the applicant sought was an order declaring unlawful the investigation by an independent entity named the Horison Forensics and the resultant report compiled at the instance of the University. The basis of the challenge was that he was not consulted during the investigation nor was he afforded an opportunity to make representations before the report was compiled.

[14] The forensic investigation was instituted following allegations of fraud and corruption relating to the admission of students to academic qualifications in the University's Department of Public Administration. The forensic investigation report was implicated in previous litigation in 2023, not connected to the present case, between the applicant, the President of the Republic of South Africa, the Special Investigation Unit (the SIU), and the University.

[15] In the papers filed of record in the present application, the University stated, *inter alia*, that the Horison Forensics Report made no adverse culpability findings against the applicant. A copy of the redacted forensic report is annexed to the papers filed in this application. Simply put, the University says that the applicant was not implicated in the impropriety that had formed the subject of the investigation by Horison Forensics.

[16] Further according to the University, the said forensic report was not part of the information that was placed before Senate at the time it made the decision to

exclude the applicant from the Master's qualification. On these grounds, the University contended that the challenge against the forensic investigation and the resultant report was ill-conceived.

[17] It is as well for the sake of completeness on this aspect, to reproduce the relevant excerpt of the University's answering affidavit filed in this application and deposed to by Professor Buhlungu in his capacity as its Vice-Chancellor, in which it traversed the applicant's challenge against the investigation and report. The relevant portions of the answering affidavit read as follows:

- '144. As the redacted Horizon Preliminary Forensic Report states, the subject of the investigation was Professor Ijeoma's irregular steering of admission and registration of students that had not met the minimum requirements. The applicant was not at this stage the subject of the investigation.*
- 145. There was an investigation into whether the Applicant was complicit in an unethical process whereby Professor Ijeoma, his staff and his post-doctoral students identified and prepared the Applicant's research proposal for his dissertation, rather than he himself doing so. That investigation has been temporarily interdicted by an interim court order.*
- 152. There was no finding in the Report in respect of the Applicant. The only finding was that there was substantial evidence that Professor Ijeoma irregularly admitted students that did not meet the minimum requirements for the post graduate degrees. The report concentrated on Professor Ijeoma's admission to Honour degrees without meeting the minimum requirements. This formed the basis of the motivation by the SIU for a proclamation, which is why the President's Proclamation specifically referred to Honours degrees and not Master's Degrees. This constituted the legal basis for the Applicant's relief in the matter of Lubabalo Oscar Mabuyane and President of South Africa, Special Investigation Unit and University of Fort Hare.*

153. *Accordingly, there is no legal basis for the allegation that the Applicant was not afforded an opportunity to make representations – neither the investigation nor the finding was relating to him. . .’*

[18] On the date of the hearing of this application, counsel for the applicant Mr *Salukazana*, indicated that in the light of the University’s above quoted averments, this Court shall not have to make any pronouncement on the lawfulness of the Horison Forensics’ investigation and the resultant report. No contrary submissions were made by Ms *Gordon-Turner*, who appeared for the University. This disposes of the challenge against the forensic investigation and resultant report.

[19] Apart from this, the University opposes the remaining relief sought by the applicant. It asserts, as the main basis for the applicant’s exclusion from the qualification, that he did not meet its stipulated admission requirements. Accordingly, so says the University, there was no need to afford the applicant an opportunity to make representations.

[20] The University states, additionally, that, to the extent that the applicant intended to access the MA degree through the RPL policy, there is no record of his application for admission in terms of the said policy and the approval thereof by Senate. Thus, says the University, the applicant did not apply for the recognition of his prior learning. Other than these assertions, the University contends that on 12 April 2021, it invited the applicant to produce proof that he was qualified to register for the MA degree, but he failed to do so. In its view, this sufficed for the purposes of affording the applicant a fair hearing.

[21] The University’s RPL policy envisages, in summary, the identification, assessment and recognition of the skills and knowledge gained by individuals in either formal, informal or non-formal contexts as a gateway to academic

qualifications where the student does not meet the specified minimum requirements for admission to those qualifications.

[22] In refuting the allegation that its decision to deregister the applicant is unreasonable and irrational, the University states that the position of the two other students to which the applicant refers is distinguishable from his. In this regard it states that the admission requirements for the qualification for which the said students were registered are distinct from those applicable to the applicant's qualification. On these bases, the University contends that it did not have to consider the RPL in the case of the students concerned as they met the requirements stipulated for the MPA to which they were admitted.

The unreasonable delay

[23] As a liminary defence to the application, the University states that the application falls to be dismissed on the ground that it was unreasonably delayed. On this score, the University contends that the application is late by 772 days whereas in terms of 7(1) of PAJA, an application for review must be brought within a reasonable period but not beyond 180 days from the date on which the impugned decision was made.

[24] That the application was unreasonably delayed is denied by the applicant. He states in this regard, that the 180-day period commenced running in May 2023. This, according to the applicant, is when he learned of 'the true reasons' for his deregistration. The applicant states, in the alternative, that, even were this Court to find that there has been undue delay in bringing the review, it is in the interests of justice that the application be heard.

The background facts

[25] The following are the background facts of this application which are either common cause between the parties or were not seriously disputed.

[26] The applicant is the Premier of the Province of the Eastern Cape. In 2017, he applied to the University to be registered as a part-time student, for the MA degree. His application form dated 15 November 2016 is titled “APPLICATION FOR ADMISSION POSTGRADUATE 2017.” Attached to it is his CV in which he outlined his prior work experience including his roles in political leadership, and his undergraduate academic qualification certificate. The exact extent of the applicant’s prior experience is not relevant for the present purposes. Both the applicant’s B.Com degree and matric certificates are annexed to this application.

[27] Additional to the minimum admission requirements for postgraduate qualifications as set out above, the Faculty of Management and Commerce Prospectus for 2017 (the faculty prospectus) stipulates the following admission requirements for the research model of the MA degree for which the applicant was registered:

- (a) Learners must hold a four-year Bachelor’s degree or Honours in the subject of Public Administration.
- (b) A person shall not be regarded as a learner unless such person has been admitted to the degree required (Public Administration)
- (c) Note that an assessment of work profile, research potential and other professional qualifications may be required.
- (d) Applicants may be invited to an interview and/or required to write a paper.

[28] As regards the procedure entailed in the admission of a student to various academic qualifications, in terms of the RPL, the relevant portion of General Rule 20 stipulates the following:

‘G.20 RECOGNITION OF PRIOR LEARNING (RPL)

20.1 RPL Applications

20.1.1 Applications for RPL shall be submitted to the Faculty Manager for pre-screening by the Faculty RPL Committee.

20.1.2 Applications for RPL may be submitted throughout the year; however, the deadline for the endorsement of RPL credit, where a prospective student wishes to register for further study in the following year, is the last Senate meeting of the preceding year.

20.2 RPL Fees

Prospective students shall be expected to contribute towards RPL administrative fees. The contribution shall not exceed the cost of a full-time face-to-face module/course or programme.

20.3 RPL Assessment Process

20.3.1 The assessment shall involve the process of collecting evidence and making judgments about the knowledge, skills and values that shall prove competence and shall articulate with the outcomes of a desired module/course and/or programme.

20.3.2 The assessment process shall abide by the assessment, moderation and reporting procedures that constitute the UFH rules and regulation of the assessment of student learning.

20.4 RPL Assessment Methods

A range of assessment methods may be utilized based on their appropriateness to a particular context, student, discipline and programme consistent with the University of Fort Hare Assessment Policy.

20.5 Appeal Against RPL Assessment Results

In the event of a dispute over RPL assessment result(s), the prospective student shall submit a duly motivated appeal in writing to the Registrar of the University within 21 days of the release of the result.

A panel of two members shall be nominated by the Registrar and the Executive Dean from amongst the University staff, including a member of the Teaching and Learning Centre, provided that he/she was not involved in the initial RPL process. The recommendation of the panel shall be considered as final.

20.6 Awarding RPL Credit

Prospective students with prior learning, however obtained, may apply to have their prior learning assessed against the learning outcomes for a specific qualification and/or module/course(s) as outlined in the University RPL Policy for acceptance for the following purposes:

20.6.1 Access into a particular course/module or programme when a candidate is able to demonstrate, through appropriate assessment(s), the entry or exit outcomes of the course/module or programme preceding that particular course/module or programme.

20.6.2 . . .

20.6.7 . . .

20.7 RPL applications for the purpose of access into a particular module/course/programme may be submitted to the respective faculty throughout the year; however, the deadline for submission is 31 October preceding the year of study. The period prior to registration shall allow the applicant sufficient time to gather evidence and to prepare for the RPL assessment. This period shall also allow for administrative procedures to be complied with prior to the successful RPL candidate being allowed to register.

20.8 Credit Transfer once a prospective student has been awarded credit on the basis of RPL, subsequent credit transfer based on these learning outcomes should not include revisiting the RPL assessment, but should be based on credit transfer agreements, articulation arrangements or other agreements between institutions.

20.9 Registration

Prospective students who have been granted RPL credit must comply with the University rules for registration for undergraduate qualifications (UFH General Prospectus Rule G3) or postgraduate qualifications (UFH General Prospectus Rule G16), whichever is appropriate.’

[29] Following his admission to the qualification, the applicant undertook various research project programs under the auspices of the Faculty of Management and Commerce with Professor Ijeoma as his research supervisor. Various correspondences were exchanged between the applicant and various personnel from the faculty concerning his research assessments. Their content is not relevant

for the present purposes as it is not in dispute that such correspondence was exchanged.

[30] In the year 2020 and following the suspension of Professor Ijeoma from the employ of the University, the applicant was assigned a new research supervisor. This came to pass. The applicant concluded a research supervision agreement with his new supervisor, and he thereafter continued with his research project.

[31] It was amidst an investigation into alleged acts of fraud, corruption and maladministration in the admission of students to postgraduate qualifications in the department, that the University undertook a review of the postgraduate admissions in that department. On 22 February 2021 the Faculty of Management and Commerce's committee named the Faculty Research and Higher Degrees Committee (the FRHDC or the committee) held a meeting whose agenda entailed the exclusions of Master's and Doctoral students in the Public Administration Department. The basis for the exclusions was that there was a group of students who were admitted to the respective postgraduate degrees in an irregular manner. Among the matters recorded in the minutes of the FRHDC's meeting is the fact that at the time of his admission to the MA degree in 2017, the applicant was in possession of the Senior Certificate and the B.Com degree. There is indeed no dispute that the applicant possesses these academic qualifications.

[32] On 12 March 2021 the committee recommended to Senate the exclusion of the applicant and two other students from their respective Master's qualifications. Senate, on 12 March 2021, approved the exclusion of the applicant from the qualification. This decision was communicated to the applicant in the letter written by the University's Registrar, Mr Njabulo Zuma (Mr Zuma) dated 15 March 2021. The relevant portion of the letter reads as follows:

‘RE: Senate decision regarding Mr LO Mabuyane (Registration No. . . .)

At the University Senate meeting, 12 March 2021, a recommendation was presented by the Faculty of Management and Commerce arising from a review they had conducted in respect of students who were supervised by Professor Edwin Ijeoma before his departure from the employ of the University. The recommendation was deliberated upon and approved by Senate.

As Secretary of Senate, I herewith inform you that Senate has decided to exclude and deregister you from the Master of Administration for not complying with the minimum admission requirements for the degree, including the Recognition of Prior Learning rules.

You are welcome to reapply once you can demonstrate that you meet the minimum requirements.

Yours sincerely'

[33] On 17 March 2021, the applicant requested reasons for Senate's decision to exclude him from the qualification. In response, in the letter dated 19 March 2021, Mr Zuma stated the following:

'Further to my letter of 15 March 2021, and in response to your letter dated 17 March 2021 wherein you requested to be provided with "reasons, including copies of policies that informed the determination that [you] did not meet the minimum requirements for admission to the degree", I wish to state the following:

In terms of s15.2 of the General Rules,

"A person shall not be admitted as a candidate for a Master's degree unless he/she

G15.2.1 has successfully completed a four-year bachelor's degree at the University; or

G15.2.2 has successfully completed an honours degree following a three-year bachelor's degree at the University; or

G15.2.3 has successfully completed a similar higher education qualification at the appropriate level on the NQF, and which, in the opinion of Senate, is equivalent to or higher than the examinations prescribed for an Honours degree at the University; or

G15.2.4 has submitted her/his honours mini-dissertation for examination with the consent of the supervisor and within the deadline stipulated by the University."

In the absence of the above requirements, an applicant may still access a Master's degree through the Recognition of Prior Learning (RPL), provisioned for in rule G20. This

should be read in conjunction with the University's policy on the Recognition of Prior Learning, which sets out the access criteria as well as advanced standing granted to students based on learning acquired through formal, informal and non-formal means.

S20.6 of the General Rules provides for the recognition of prior learning:

"Awarding RPL credit. Prospective students with prior learning, however obtained, may apply to have their prior learning assessed against the learning outcomes for a specific qualification and/or module/course(s) as outlined in the University RPL Policy for acceptance for the following purpose(s):

20.6.1

Access into a particular course/module or programme when a candidate is able to demonstrate, through appropriate assessment(s), the entry or exit outcomes of the course/module or programme preceding that particular course/module or programme."

The recommendation tabled at Senate indicates that you did not meet any of the minimum requirements for admission required by either 15.2 or 20.6. And it was on those grounds that Senate resolved to exclude and deregister you from the Master of Administration.

I have herewith attached a copy of the Recognition of Prior Learning (RPL) policy. Should you need copies of the General as well as the Faculty of Management and Commerce Prospectuses, please let me know so I can courier same to you in hardcopies.

Yours sincerely'

[34] The applicant, on 26 March 2021, submitted an ostensible appeal against the decision to deregister him. This was followed by the letter dated 12 April 2021, in which Mr Zuma, inter alia, stated that the University had no record of the applicant having satisfied the RPL requirement as a precursor to his admission to the qualification. Mr Zuma further invited the applicant to produce evidence that he qualified for admission to the qualification. On 27 May 2021, Senate deliberated on the applicant's supposed appeal and resolved to confirm his deregistration. More will be said later on in this judgment about the minutes of this latter meeting of Senate. Against this background, I set out below, the parties' respective cases shorn of all irrelevant nuances and undertones that tinge their versions.

The case for applicant

[35] The applicant's principal contention is that he was registered for the MA degree based on the University's RPL policy, not on the basis that he possessed the Honour's degree. He further states that he has never made a claim that he was in possession of an Honour's degree or a four-year Bachelor's degree. He submitted his application accompanied by his CV, and that his application was assessed by three different administrators before it was approved by Senate. After his admission to the Master's program, he underwent the various assessments entailed in it which included the presentation of his research proposal before the relevant faculty committee. The applicant goes on to state that the last communication he received from the University was regarding the allocation of a new research supervisor following the suspension of Professor Ijeoma. He was not informed of any investigation or review of his admission. He learned of the matter concerning the alleged irregularity of his admission from the media.

[36] The applicant contends that the University was obliged to afford him a reasonable opportunity to make representations before making the decision of 12 March 2021 to deregister him as a Master's student. He goes on to allege that the University's decision is procedurally unlawful for failure to afford him a fair hearing.

[37] The applicant takes issue with the University's invitation in the letter dated 12 April 2021, for him to submit evidence proving that his admission to the qualification complied with the General Rules. He contends that the invitation for representations after the impugned decision to deregister him does not cure its unlawfulness.

[38] In substantiating the review grounds of unreasonableness and irrationality, the applicant states that in deciding to deregister him, the University failed to take

into account relevant considerations, which in his case was whether he met the requirements for admission under the RPL when he was admitted. He further contends that the requirements against which the FRHDC assessed his admission to the qualification did not include the RPL in circumstances where they should have. Those admission requirements were listed by the committee in its minutes dated 22 February 2021 as being the following:

- (i) Learners must hold a four-year Bachelor's degree or Honours in the subject of Public Administration.
- (ii) A person shall not be regarded as a learner unless such person has been admitted to the degree required (Public Administration)
- (iii) Note that an assessment of work profile, research potential and other professional qualifications may be required.
- (iv) Applicants may be invited to an interview and/or required to write a paper.

[39] The applicant further states that the University's decision was unreasonable, irrational and arbitrary in that in the case of the two other students who were also the subject of the review, the RPL was considered but not in his case. In this regard the applicant makes reference to students with student numbers 3826 and 8043, respectively.

[40] Student 3826 was registered in 2011 for the MPA degree. This student was in possession of the Senior Certificate and Bachelor of Arts (BA) degree from UNISA. The requirements for admission into the MPA program are listed by the committee in the minutes as follows:

- (i) A four-year Bachelor's degree or Honour's degree or similar degree at NQF Level 7 or 8
- (ii) Consideration may be given to those with three-year Bachelor's degree and extensive managerial experience.

(iii) A CV must accompany an application.

(iv) Note that applicants may be invited for an interview and/or required to write a paper.

[41] The committee found that this student met the minimum requirements for ‘admissions 2017 No.2.’ It also recorded that the department was requested to provide extensive managerial experience prior to the student’s admission in 2011.

[42] Student number 8043, like the first mentioned student, was registered for the MPA degree in 2017. He possessed a Senior Certificate and no Honour’s degree. This student had the Bachelor of Commerce degree from University of KwaZulu Natal. The committee listed the following as the requirements for this student’s admission to the qualification:

(i) A four-year Bachelor’s degree or Honour’s degree or similar degree at NQF Level 7 or 8

(ii) Consideration may be given to those with three-year Bachelor’s degree and extensive managerial experience.

(iii) As a transdisciplinary degree that focuses on training and development of candidates drawn from public sector work environment, consideration may be given to working staff with extensive managerial experience.

(iv) A CV must accompany an application.

(v) Note that applicants may be invited for an interview and/or required to write a paper.

[43] The committee also found that student number 8043 met the minimum requirements for ‘admissions 2017 No.2.’ As with the first student, it further recorded that the department was requested to provide extensive managerial experience prior to the student’s admission in 2017.

[44] The applicant’s complaint is that the FRHDC did not include the RPL as one of his admission avenues when it ought to have done so, even though he submitted

his CV and sought admission under the RPL in the light of his work experience. He further states that the committee did not request the department to provide evidence of his work experience when it should have done so.

[45] The applicant goes on to state that the committee's recommendation to Senate for his exclusion was a misrepresentation of the requirements for his admission resulting in Senate not having regard to the RPL in its decision to exclude him. He also contends that the unequal and discriminatory treatment that he received compared to the two other students renders the decision to deregister him unreasonable and arbitrary.

The supporting affidavit of Professor Ijeoma

[46] Professor Ijeoma is the former Head of the Department of Public Administration, Bhisho Campus. Prior to his suspension he supervised the applicant's Master's research program and was responsible for the oversight of his and other students' various other assessments of his research work.

[47] Professor Ijeoma further confirms that there are, in addition to the minimum admission requirements stipulated in the General Rules, certain concessions granted to applicants for admission to academic qualifications. According to him, those concessions ought to be in line with the general university minimum requirements. He further explains that the admission requirements differ from one applicant to another according to factors such as age, academic achievements, employment status, and the student's extensive work experience post undergraduate degree. This is done in terms of the RPL policy.

[48] According to Professor Ijeoma, the RPL process may be undertaken before admissions or graduation in line with the schedules and the availability of the relevant units of the University that constitute the RPL implementation committee.

[49] Professor Ijeoma further states that the applicant's application for admission followed three different stages which involved different committees of the University. Those are the selection stage, which was undertaken by the faculty's selection committee which he chaired as the head of the department. The committee comprised senior academics and senior administrators from the Department of Public Administration.

[50] The selection committee at the Bhisho Campus did not deal with the admission but merely selected applicants from a list of those that applied. All the application forms which were collected from the three campuses of the University in Alice, East London and Bhisho were sent to the administrators at the Bhisho campus for processing. The administrators stored the application forms in their offices and scheduled a selection committee meeting. Each committee member was involved in the selection process, and they brought to his attention all the applications they recommended for his signature.

[51] The second stage was the shortlisting which the faculty committee comprising academic staff and administrators undertook. The records of all the selection and shortlisting committee meetings were kept by one Ms Phumza Foko as the main administrator and the person who represented the Department in the faculty selection and shortlisting meetings.

[52] The shortlisted student would then be recommended for admission by the Registrar as the final arbiter of all the admission applications. The applicant's application form was among those recommended for admission by the Registrar. The Registrar at the time was Professor M. Somniso, and he had approved the applicant's application. Professor Ijeoma goes on to state that his role in the applicant's application for admission was limited to the first stage of selection. Professor Ijeoma further states that the department and faculty's selection and

shortlisting committees do not have the authority to admit a student without the approval of the Registrar.

[53] According to Professor Ijeoma, the applicant did not claim that he had an Honour's degree when he submitted his application. His application was considered based on the University's RPL policy and his extensive work experience in the public administration sector. He further states that this is the norm in terms whereof many public servants are accepted into the Master's program and it was not exclusive to the applicant or the University of Fort Hare.

[54] It is Professor Ijeoma's evidence further that Senate approved the applicant's application for admission and registration as the ultimate decision-making body of the University. This fact is denied by the University.

The University's case

[55] The University alleges that the review has been unreasonably delayed by 772 days. In this regard, it states that it is prejudiced as some of the evidence necessary to defend its decision may have been lost. Moreover, some employees from whom the information relating to the applicant's admission may be sought may no longer be available.

[56] The nub of the defence advanced by the University on the merits or the review is that it was not required to afford the applicant a hearing once it became evident that he did not meet the admission requirements for the MA degree as set out in General Rule 15.2 and the additional faculty Rules. Furthermore, the applicant was invited to make representations by its letter dated 12 April 2021.

[57] That the applicant was admitted to the MA degree based on the RPL is strenuously contested by the University. In this regard, the University alleges that during the review of the admission of postgraduate students in the Department of

Public Administration, it did not find any record of the applicant's application for admission to the Master's program in terms of the RPL. It also did not find any record of the approval of that application by its Senate. The University further states that the applicant's failure to provide proof of compliance with the RPL policy upon the invitation in the letter dated 12 April 2021 fortified its conclusion that his enrolment was irregular.

[58] It is the University's version further, that the applicant's comparison between his admission and that of the two other students is of no avail to his cause. According to the University those two other students were registered for the course work model of the MPA degree which has distinct admission requirements. Moreover, they had met the requirements for admission to their respective postgraduate studies. For these reasons, it was not necessary in their case to consider the recognition of their prior learning. Hence, they were not excluded from their studies.

[59] Quite apart from all the foregoing, the University has, in this case, consistently invited the applicant to start afresh and apply for the recognition of his prior experience as the gateway to the MA degree.

The applicant's explanation of the delay

[60] In explaining the delay in bringing this review the applicant contends, in the first instance, that there has not been any delay. He further states that when he was informed of deregistration in March 2021, his legal representatives sought further information and documents from the University. On 15 April 2021 a notice of intention to institute legal proceedings against the University was given by the applicant through his legal representatives. During May 2023, he launched proceedings against the President of the Republic, the SIU and the University. He learned for the first time during those proceedings that the reason for his

deregistration was the findings made in the Horison forensic investigation report. He launched this review in July 2023, within 2 months of discovering ‘the true reasons’ for his deregistration. Relying on *Centre for Child Law and Others v South African Council for Educators and Others*,¹ he contends that he was entitled to wait for the true reasons for his exclusion and he cannot be faulted for having done so. According to the applicant, the 180-day period commenced in May 2023.

[61] The applicant further states that the 180 days that section 7(1) of PAJA stipulates within which an application for review must be brought does not, in any event, apply in the present case since the present review is premised on the legality gateway.

The record of the decision under review

[62] Additional to the parties’ affidavits in support of their respective cases, the record of the impugned decision (the record) was placed before me. It entails, among other things, the minutes of the meeting that was held by the FRHDC on 22 February 2021 and the minutes of the special meeting of Senate held on 27 May 2021.

[63] It is opportune to make reference to excerpts of the minutes of the Senate meeting of 27 May 2021 regarding, inter alia, the applicant’s admission into the Master’s degree. In that meeting, the following was said by the University’s Registrar Mr Zuma:

‘MR ZUMA: [I]n terms of the rules the applicant must actually satisfy Senate that they have the requisite prior learning, and it has been assessed and it

¹ *Centre for Child Law and Others v South African Council for Educators and Others* (1289/2022) [2024] ZASCA 45; 2024 (4) SA 473 (SCA) (9 April 2024), para 11.

is equivalent to the levels that are expected and then the student is admitted on that basis.

So, it never should happen, or [be] applied retrospectively, the way I understand it and in the manner that the rules are crafted. So when this matter was looked at, it was looked at purely at that: was this requirement in terms of the policy and the rules met. And the answer was overwhelmingly pointing in the direction that it wasn't, it was not. And if you look at the policy somewhere, it says Senate itself must actually endorse this when it happens before the student is in the system. . . and all these processes properly recorded, and the portfolio exists, and it is assessed and Senate is aware of and so on. So, the records of Senate dating back to 2016 we could not pick it up that Senate even looked at or approved or endorsed this having happened before the student got into [this]. . . I do not dispute the fact that if the student had done the RPL, in my view, which will remain my view is he probably would have made it, through RPL into this program. But the fact of the matter is that it was not done...'

[64] Professor Buhlungu, in turn, made the following assertions on the issue of the applicant's admission to the master's qualification:

‘PROF BUHLUNGU: [I]n my view, the problems were not created by this candidate... The issue was caused in fact in the first instance by a person, a staff member, a professor who had become a law unto himself. Who had gone rogue, who admitted students willy nilly, who put student's reputations and careers at risk, who was allowed by this institution for many, many years to run his own show and therefore to recruit people and bring them under the false impression that they're not going to do anything, I run this show. Come, I'll register, no RPL for you. That's the problem.

**That's the person that has caused this institution problems.
And that matter is still going to continue to run...'**

[65] The minutes of the FRHDC meeting relate to the already mentioned two students with numbers 8043 and 3826 who were admitted in 2011 and 2017, respectively, to the MPA qualification.

The issues to be determined

[66] The narrow issue before me is whether the University lawfully deregistered the applicant as a master's student. On a broader level, I am called upon to determine the following:

- (a) Whether the applicant was afforded a hearing (the *audi* rule) before the decision to deregister him was made, and whether the University was absolved of the obligation to invite the applicant to make representations before it took the decision to deregister him.
- (b) Whether the University applied itself in making the decision to exclude the applicant from the Master's qualification by taking into account relevant considerations.
- (c) As the University's liminary defence, I must determine whether the application was unreasonably delayed and whether, if it was, there is any justification for this Court to entertain it despite such delay.
- (d) A further point of law which was raised on the date of the hearing of the application, namely, that the University acted *ultra vires*, in other words, beyond the scope of its powers when it deregistered the applicant.

The parties' legal submissions

[67] Regarding procedural fairness, Mr *Katz* submitted that the applicant did not receive prior notice of the review of his admission and was not afforded an opportunity to make representations before the decision was taken. Counsel submitted that at the crucial point of the decision of 12 March 2021, the applicant was not afforded a hearing.

[68] In buttressing the contention that the University failed to take into account relevant considerations, it was submitted that the applicant's prior experience was not considered in making the impugned decision. The FRHDC as the reviewing committee did not consider the applicant's RPL in circumstances where, as required by General Rule 15.4, it should have. The result was that the approval of the applicant's exclusion by Senate did not take account of his prior learning and experience.

[69] Counsel emphasized that the mention of the RPL by the University only appears in the letter dated 19 March 2021 which, according to its writer, Mr Zuma, was the elucidation of the letter dated 15 March 2021 – this does not assist the University. The fact of the matter, so the submission went, is that when Senate approved the exclusion, there was no consideration of the RPL. The *ex post facto* invitation by Senate on 12 April 2021 to the applicant to produce evidence of the RPL does not render the decision of 12 March 2021 lawful. The decision remains irrational.

[70] It was counsel's submission further that the unequal treatment between the applicant and students 8043 and 3628 in the same evaluative process renders the decision arbitrary.

[71] Counsel took the view that the first declaratory relief is appropriate in the circumstances of the case on the basis that the facts set out in this case demonstrate that the applicant was admitted in accordance with the University's own processes.

Furthermore, the University has given no logical explanation for how the applicant progressed through his master's studies under the supervision and assessment of various faculty committees if his registration was irregular. Counsel highlighted the fact that even after the suspension of Professor Ijeoma, the applicant's studies continued without being questioned by the University to the extent that the University suggested an impropriety on his part.

[72] Although Mr *Katz* accepted that the applicant's application did not specifically indicate that he was applying for the RPL, he nonetheless submitted that the signature of Professor Ijeoma must be taken to signify the powers delegated to him by Senate to determine the applicant's application for the RPL. He went on to submit that the procedural errors of Professor Ijeoma should not be used to disadvantage the applicant. For this reason, Mr *Katz* urged upon this Court to exercise its discretion in favour of granting the first declaratory relief.

[73] Mr *Salukazana* submitted, additionally, that if this Court finds that the deregistration was unlawful, the result is that the applicant remains the student of the University. Thus, the University is at large to re-institute the process of considering the applicant's prior learning and experience.

[74] As regards the delay, Mr *Salukazana* persisted with the contention that the 180-day period commenced running in May 2023 when the applicant became aware of the fact that the real reason for his deregistration was the forensic investigation report. Mr *Salukazana* further submitted that in the event this Court finds that the 180-day period began running in March 2021, it ought to find that the interests of justice favour the hearing of the review in that the matter concerns unlawful conduct by the University. He took the view that the generalized prejudice contended for by the University fails as a valid reason for the complainant about the delay. In this regard, he submitted that no specific details

have been given by the University as to what evidence has been lost and how it would affect its ability to defend the impugned decision.

[75] It was further submitted on behalf of the applicant that the University's contention that it has no record of the applicant having applied for the RPL is fatal to its defence as it points to its own failures in record keeping. Hence, the applicant should not be disadvantaged by that failure.

[76] On behalf of the University, it was submitted that the contention that the findings of the forensic report were the basis of the exclusion is misguided. Ms *Gordon-Turner* emphasized the fact that the applicant was provided with the reasons for his exclusion 19 March 2021 and went as far as 'appealing' the decision. He never complained that those reasons were insufficient. On these bases, counsel submitted that the May 2023 argument cannot come to the applicant's aid.

[77] Ms *Gordon-Turner* went on to submit that the interests of justice are not served by the hearing of this review and that no prejudice befalls the applicant. In this regard, she submitted that any prejudice that may ensue on the part of the applicant is ameliorated by the fact that the University's invitation to him to re-apply for the RPL is still open.

[78] On the merits of the application, counsel for the respondent took the view that the University's invitation to the applicant on 12 April 2021 to present evidence of his prior learning and experience met the requirement of procedural fairness. She persisted with the contention that the decision to exclude the applicant is not irrational since the applicant did not have an Honour's degree. Therefore, he was not lawfully admitted to the MA degree. It was further submitted that there is no evidence that the applicant made a separate application for the RPL, hence it is not open to him to rely on the fact that his prior experience was not considered.

[79] As regards the alleged unequal and discriminatory treatment of the applicant, *Ms Gordon-Turner* submitted that since the MPA degree to which the two other students were admitted has different admission requirements to those applicable to the applicant's MA degree (research work), the issue of unequal and discriminatory treatment does not arise.

The legal principles

[80] Lawfulness, reasonableness and procedural fairness are the indispensable elements of administrative action in this country's constitutional order. The constitutional imperative of just administrative action enjoins those exercising public power to observe the rules of administrative justice in making decisions that materially and adversely affect the rights of others.

[81] PAJA promotes efficient administration and good governance; and creates a culture of accountability, openness and transparency in the exercise of public power or the performance of public function, by giving effect to the right to just administrative action. This much is apparent from the long title of this statute.

[82] Section 1 of PAJA defines "administrative action" to mean any decision taken, or any failure to take a decision, and "decision" to mean any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to, *inter alia*, doing or refusing to do any other act or thing of an administrative nature.

[83] That the impugned decision of the University is an administrative action as defined in section 1 is not in dispute. Regarding procedural fairness in relation to administrative action, a right which section 33 of the Constitution protects, section 3 of PAJA provides as follows:

- (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.

[84] The various grounds on which an administrative action may be reviewed by a court of law or tribunal are set out in section 6(2) of PAJA.²

[85] In order to curb prejudice and to promote finality and certainty in decision-making, section 7(1) of PAJA requires that a review under section 6 be brought without unreasonable delay and not later than 180 days after the date on which the

² Section 6 provides as follows:

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. In terms of section 6(2) of PAJA, a court or tribunal has the power to judicially review an administrative on several grounds including where –

(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;

(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.

person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

[86] In the discussion that follows, I deal with the issues before me as delineated above.

Discussion

[87] The preliminary point of unreasonable delay must be disposed of first. In dealing with the delay, the applicant states that the 180 days that section 7(1) of PAJA stipulates within which an application for review must be brought does not apply in the present case since the present review is premised on the legality gateway.

[88] When regard is had to the basis of the review as articulated in the applicant's founding affidavit, this must be taken as an error. It is not available to the applicant to state, on the one hand, that the review is founded on the provisions of PAJA, and, when the shoe pinches, so to speak, state that the review is brought under the legality principle. As Petse AJ put it in *Nkuna Nkuna Traditional Council v Minister of Rural Development and Land Reform and Others*,³ even in the context of a legality review time is still of essence and importance. This entails that legality reviews, too, must be instituted without undue delay.⁴ In the context of legality reviews, the court would embark on a two-pronged inquiry, namely, first, whether the delay is unreasonable or undue, and, secondly, whether if it is unreasonable, it must be overlooked.

³ *Nkuna Traditional Council v Minister of Rural Development and Land Reform and Others* (LCC108/2019) [2026] ZALCC 14 (5 March 2026).

⁴ *Ibid*, para 24.

[89] It is discernible from the applicant's papers that he became aware of the decision and the reason for it in March 2021. I accept the further steps that he took in trying to seek redress, which entailed the supposed appeal of the decision, which appeal was ostensibly considered by Senate on 12 April 2021. The review was brought more than two years after the outcome of the supposed appeal. The respondent has computed the delay to be 772 days. I have no qualms with this computation.

[90] The 180-day period within which a review may be brought may be extended by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned. This is in terms of section 9(1) of PAJA. In terms of section 9(2), the court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.

[91] Far from merely being an interlocutory issue, the question of delay under the PAJA dispensation engages the merits of the case. The Constitutional Court has held that a court should be slow to allow procedural obstacles to prevent it from looking into a challenge of the lawfulness of the exercise of public power.⁵ It is indeed so, that promptitude in bringing the review of the impugned decision is equally a feature of the rule of law. Hence, the courts are not to tolerate undue delays in the launching of review applications.

[92] The approach to be followed in determining the question whether it is in the interests of justice that the review be heard despite the unreasonable delay was

⁵ *Khumalo v MEC for Education KwaZulu Natal* 2014 (5) SA 579 (CC), para 47 – 48; *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC), para 68.

articulated in *Camps Bay Ratepayers' and Residents' Association v Harrison*⁶ as follows:

‘Section 9(2) however allows the extension of these time frames where ‘the interests of justice so require’. And the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success.’⁷

[93] As held in *South African National Roads Agency v Cape Town City*,⁸ the merits of the impugned decision must be a critical factor when a court embarks on a consideration of all the circumstances of a case in order to determine whether the interests of justice dictate that the delay should be condoned.⁹ Equally significant in the determination whether unreasonable delay is to be condoned is the nature and extent of the illegality raised in respect of the impugned decision.¹⁰

[94] Although prejudice does not play a prominent role in the context of a PAJA review (since the court has remedial powers to grant just and equitable relief in terms of section 8 of PAJA), it is necessary to state that the parties’ counsel

⁶ *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA), where Maya JA as she then was, quoted from *Van Wyk v Unitas Hospital* 2008 (2) SA 472 (CC) paras 20 and 22; *Tasima (Pty) Ltd v Department of Transport* [2015] ZASCA 200; [2016] 1 All SA 465 (SCA) paras 29-30.

⁷ Ibid, para 54.

⁸ *South African National Roads Agency v Cape Town City* 2017 (1) SA 468 (SCA), para 81.

⁹ Ibid, para 81.

¹⁰ *Notyawa v Makana Municipality and Others* (CCT115/18) [2019] ZACC 43; 2020 (2) BCLR 136 (CC); [2020] 4 BLLR 337 (CC); (2020) 41 ILJ 1069 (CC) (21 November 2019) para 49.

confirmed before the hearing of the matter that the issue of lack of sufficient evidence in the form of an adequate record does not arise. I agree.

[95] As of April 2021, the applicant was able to give notice to the University of his intention to institute the review. Moreover, and as pointed out by counsel for the University, he has never complained of the deficiency of the reasons provided to him in the letter dated 19 March 2021 for his deregistration. It ought to follow that as of April 2021 he had been fully informed of the reasons for his exclusion. If he believed that he was not, he would have taken further steps and persisted with his request for the reasons for his exclusion. He did not. Instead, in 2023 he pursued other litigation involving the SIU.

[96] It is, therefore, not available to the applicant to rely on the discovery he made in 2023 in the proceedings involving the SIU as the point at which he became aware of ‘the true reasons’ for his exclusion. An ineluctable finding is that the explanation given by the applicant for the delay is scanty. What the facts of the application suggest regarding the delay issue is that the applicant became aware of the reasons for his exclusion as early as March 2021. The version of the University that the application is 772 days late must be accepted as correct.

[97] In *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd*,¹¹ it was held that once the 180 days has been reached the delay is taken to be unreasonable as pre-determined by the legislature. This must be the starting point for the purposes of the present case. But this is not the end of the enquiry as I must still determine whether the delay must be overlooked. As held in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*¹² the

¹¹ *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* [2013] 4 ALL SA 639 (SCA), para 26.

¹² *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC), para 55 – 57.

prospects of success must also play a prominent role in the determination of the question whether the delay may be overlooked.

[98] On the University's own showing, it did not afford the applicant an opportunity to make representations before the decision to exclude him was made. As its justification, it states that it was manifest that the applicant's admission was irregular since he did not possess the Honour's degree which would have qualified him for admission to the Master's degree. If a finding is made against the University on this point, the applicant would be successful in challenging the lawfulness of his deregistration. This portends prospects of success of the review. The decision can thus not be insulated by the refusal to hear the review on the ground of the unreasonable delay. For this reason, I shall exercise my discretion in favour of overlooking the delay.

The ultra vires point

[99] In support of the contention that the University acted beyond its powers in deregistering the applicant, reference was made to section 37 of the Higher Education Act 101 of 1997 (the Act). This section provides as follows:

Admission to public higher education institutions

(1) Subject to this Act, the council of a public higher education institution, after consulting the senate of the public higher education institution, determines the admission policy of the public higher education institution.

(2) The council must publish the admission policy and make it available on request.

(3) The admission policy of a public higher education institution must provide appropriate measures for the redress of past inequalities and may not unfairly discriminate in any way.

(4) Subject to this Act, the council may, with the approval of the senate-

(a) determine entrance requirements in respect of particular higher education programmes;

- (b) determine the number of students who may be admitted for a particular higher education programme and the manner of their selection;
- (c) determine the minimum requirements for readmission to study at the public higher education institution concerned; and
- (d) refuse readmission to a student who fails to satisfy such minimum requirements for readmission.

[100] The long title of the Act contains the following objective:

‘To regulate higher education; to provide for the establishment, composition and functions of a Council on Higher Education; to provide for the establishment, governance and funding of public higher education institutions; to provide for the appointment and functions of an independent assessor; to provide for the registration of private higher education institutions; to provide for quality assurance and quality promotion in higher education; to provide for transitional arrangements and the repeal of certain laws; and to provide for matters connected therewith.’

[101] It is so that section 37 of the Act does not expressly provide for the University’s powers to deregister students. It was submitted on behalf of the applicant that the University’s powers in terms of section 37 of the Act are limited to the admission of students. Counsel went on to suggest that whenever a student’s admission is found to be defective, the University’s only recourse is to seek a self-review of the decision to admit that student. Resulting from this, so the contention went, it was not open to the University to arrogate unto itself the powers it does not have, to deregister the applicant.

[102] On behalf of the University, it was submitted that the power to deregister a student is a primary implied power endowed to Senate by section 39 of Institutional Statute of the University of Fort Hare (the Statute).¹³ The relevant portion of section 39 of the Statute provides that:

¹³ Promulgated by Government Gazette 43288, 08 May 2020.

- ‘(1) The Senate is accountable to the Council for academic, research and community engagement activities as contemplated in section 28(1) of the Act.
- (2) The functions of the Senate are as follows:
- ...
- (i) considers and approves recommendations from its committees, including Faculty Boards;
 - (j) ensure legal compliance in regard to academic matters;
- ...’

[103] Learned author Hoexter¹⁴ states that the Act as a whole and the purpose for which it was enacted may indicate whether further powers are reasonably incidental to the express authority that has been given. She further suggests that the question to be asked is whether the main purpose of the statute cannot be achieved without the implied powers or whether the implied power is necessary to the proper functioning of an administrative body.

[104] It seems to me that the distinction between ancillary implied powers and primary implied powers is necessary. In *GNH Office Automation CC v Provincial Tender Board, Eastern Cape*,¹⁵ it was held that powers may be presumed to have been impliedly conferred because they constitute a logical or necessary consequence of the powers which have been expressly conferred, because they are reasonably required in order to exercise the powers expressly conferred, or because they are ancillary or incidental to those expressly conferred.

¹⁴ Cora Hoexter & G Penfold *Administrative Law in South Africa* 3 ed (2021), at p 52, under the heading “The context of the provision.”

¹⁵ *GNH Office Automation CC v Provincial Tender Board, Eastern Cape* 1998 (3) SA 45 (SCA), at 51G-H; see also *Matatiele Municipality v President of the Republic of South Africa* 2006 (5) SA 47 (CC), para 50.

[105] Regarding primary implied power, Madlanga J who wrote for the majority in *AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services*,¹⁶ explained the position as follows:

[70] A primary power may be express or implied. It is express if it is specifically provided for. Examples of express primary powers are the President's power to appoint the head of the intelligence agency, which featured in *Masetlha*, and the power to determine or alter provincial boundaries, which featured in *Matatiele Municipality*. The primary power is implied if it is not expressly provided for. It is implied from a reading of the Act and a consideration of all that must be factored in the interpretative exercise. It owes its existence to provisions of the Act and everything that is relevant to the interpretative exercise. The fact that provisions of the Act, including provisions conferring other primary powers, may shed light on whether an implied primary power exists does not mean the implied primary power derives its existence from these provisions. These provisions and all that must be factored in determining whether a primary implied power exists serve as interpretative tools that point to its existence. As we now know, the Constitution plays a crucial role in that interpretative exercise.

[71] So, the interpretative exercise is not confined to the four corners of a statute. The answer to the question whether an implied primary power exists is yielded by the usual interpretative exercise that seeks to establish what a statute or a provision in it means. There is nothing unusual about this. That, in the main, available jurisprudence and learning on implied powers concerns ancillary implied powers does not mean there aren't primary implied powers. And cases like *Masetlha* and *Matatiele Municipality* never suggested otherwise. If we were to say they did, we would be erring. They pronounced on something different, which is what was before them. That is, in each instance the question was whether the ancillary implied power at issue existed. They did not in the least purport to declare that there is nothing like an implied primary power. And they could not have so declared as that was not before the Court. In other words, they did not suggest that an interpretative exercise can never yield the result that an implied primary power is provided for in a statute. To put it bluntly, the question whether there may be an implied primary

¹⁶ *Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services* 2021 (3) SA 246 (CC).

power was irrelevant to the issues at hand in those cases. Thus, those cases are of no assistance to us in the present matter.’ (footnotes omitted).

[106] The University’s annual prospectus contains its General Rules and Regulations which deal, *inter alia*, with requirements for admission to various courses of study. These Rules and Regulations have legal force and effect and are binding to it and its students.

[107] The University’s admission policies are established in terms of the Institutional Statute. The Statute has as its purpose, appropriately paraphrased, ‘to give effect to any law relating to the University and to promote its effective and responsible management and governance in respect of matters not expressly prescribed by any law and guidelines.’¹⁷

[108] To my mind the power to deregister students is a primary implied power owing its existence to the above quoted provisions of section 39(2) of the University Statute. A question that needs to be asked, is how the University would meaningfully enforce legal compliance with the determined minimum admission requirements without the power to deregister those students who are found to have been admitted without meeting the minimum admission requirements. If in each case where the admission of students has been found not to have complied with the prescribed admission requirements the University must have recourse to self-review, to borrow from the words of Madlanga J,¹⁸ the provisions of section 39(2) University Statute ‘would be hollowed out and left without meaningful operability.’

[109] The submissions made on behalf of the respondent in refuting the *ultra vires* point commend themselves to me as they accord well with the principles of the law

¹⁷ See ‘Schedule’ to the Statute.

¹⁸ *Amabhungane*, para 78.

as I have discussed above. The contention that the University does not possess the power to deregister students cannot be sustained. The *ultra vires* point must accordingly fail. With that said, the power to deregister students cannot be exercised willy nilly, it must be exercised in accordance with the principles of administrative justice. Mr *Cohen* with whom Ms *Gordon-Turner* appeared for the University, confirmed this well-entrenched legal principle. This brings me to the merits of the present case.

The merits

[110] On the merits of the application the starting point is that on its own version, the respondent did not afford the applicant an opportunity to make representations before it made the decision on 12 March 2021 to deregister him. In this regard it contends, as mentioned, that once it became evident that the applicant did not possess the Honour's degree nor a four-year Bachelor's degree, it was not necessary for it to afford him a hearing before excluding him from the qualification.

[111] As regards the recognition of the applicant's prior learning and experience under the RPL Policy, the University makes two contentions – the first is that the applicant never applied for admission to study towards the MA degree in terms of the RPL route. The second is that despite its invitation to the applicant to produce evidence of his application for the RPL, he failed to produce it.

[112] From the facts as I have outlined, two questions arise. The first question is whether the University was absolved of the duty to afford the applicant a hearing as it suggests, only on the ground that he did not meet the requirement of the Honour's degree or a four-year Bachelor's degree. The second is whether the *ex post facto* invitation extended to the applicant to prove that his enrolment was compliant with the General Rules, met the threshold of procedural fairness.

[113] The determination of the first question is to be made upon the balancing of various factors including the nature of the decision, the right affected by it, the circumstances in which the decision was made, and the consequences resulting from it.¹⁹

[114] The applicant alleges that the last communication he received from the University was regarding the allocation of a new research supervisor following the suspension of Professor Ijeoma. He was not informed of any investigation or review of his admission. He learned of the allegations of his irregular admission from the media. The University has not disputed this version. These facts are material since the applicant says that he never participated in the review of his admission, and he was never consulted.

[115] Learned author Hoexter²⁰ puts the principle of procedural fairness this way:

‘. . . [p]rocedural fairness is a principle of good administration that requires a sensitive rather than heavy-handed application. Context is all-important: the content of fairness is not static but must be tailored to the particular circumstances of each case. There is no room now for the all-or nothing approach to fairness that characterised our pre-democratic law, an approach that tended to produce results that were either overly burdensome for the administration or entirely unhelpful to the complainant.’

[116] In *Gavric v Refugee Status Determination Officer, Cape Town and Others*,²¹ the following was said:

¹⁹ *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Mukhwevho Intervening)* [2001] ZACC 19; 2001 (3) SA 1151 (CC); 2001 (7) BCLR 652 (CC), para 102.

²⁰ Footnote 14 supra, at p501.

²¹ *Gavric v Refugee Status Determination Officer, Cape Town and Others* (CCT217/16) [2018] ZACC 38; 2019 (1) SA 21 (CC); 2019 (1) BCLR 1 (CC) (28 September 2018).

[79] It is nevertheless necessary to state that a person can only be said to have a fair and meaningful opportunity to make representations if the person knows the substance of the case against her. This is so because a person affected usually cannot make worthwhile representations without knowing what factors may weigh against her interests. This is in accordance with the maxim *audi alteram partem* (hear the other side), which is a fundamental principle of administrative justice and a component of the right to just administrative action contained in section 33 of the Constitution.

[80] In order to give effect to the right to a fair hearing an interested party must be placed in a position to present and controvert evidence in a meaningful way. . . a decision maker was under an obligation to disclose adverse information and adverse policy considerations, and give an affected person an opportunity to respond thereto. If an administrator is minded to reject the explanations of an interested party, she should at least inform the party why she is so minded and afford that party the opportunity to overcome her doubts.’

[117] The admissions that the University’s Vice-Chancellor, Professor Buhlungu made in the Senate meeting of 27 May 2021 regarding the absence of impropriety on the part of the applicant (and other students) are significant. The alleged deviant conduct of Professor Ijeoma is a matter which, in Professor Buhlungu’s own words, had been allowed by the University to continue unabated for years. Significantly, this revelation would have become manifest during the review of the postgraduate qualifications from the Department of Public Administration which the University conducted.

[118] Resulting from Professor Buhlungu’s admissions it must be accepted that when Senate deliberated on the matter concerning the applicant’s admission, it had no evidence suggesting that he had in any way acted improperly in relation to his admission. What Professor Buhlungu’s assertions suggest is that the applicant acted bona fide when he submitted his application in the form already described

even though according to the University it was not the proper manner of applying for admission in his circumstances.

[119] Apart from this, the applicant's CV outlining his qualifications and prior work experience was already filed in the University's records. The applicant was permitted to proceed through the various stages of the master's program which continued after the departure of Professor Ijeoma. To my mind, it would have been clear to the University by then whether the applicant acted in complicity with Professor Ijeoma. Notably, the applicant was assigned a new research supervisor, and, in that regard, he was caused to sign a research supervision agreement with the newly assigned research supervisor whereafter he continued with his studies.

[120] These are factors which should have weighed heavily in the mind of the makers of the decision to deregister the applicant. They should have underscored the need to afford him a hearing, an opportunity to present evidence that would support his case and to controvert whatsoever allegations of non-compliance with the University Rules as may have been levelled against him, before the decision was made. This, so that the decision maker would be properly and correctly informed before making the decision. This is an indispensable requirement of a just administrative action.

[121] The stance adopted by the University is problematic – on the one hand it strongly contends that it had no obligation to afford the applicant a hearing before making the adverse decision against him in the light of the clear indication that his enrolment was irregular. Yet on the other hand, it deemed it necessary, after making the decision, to invite him to present evidence that would negate the findings of the irregularity of his enrolment. This presents a distortion of administrative justice when regard is had to the legal principles regarding procedural fairness.

[122] There is no indication that before the decision to deregister the applicant was made on 12 March 2021 it was in any way impractical then to inform him of the envisaged adverse decision and to invite him to make submissions on why the proposed decision should not be made. No case was sought to be made that there was any urgency that would have impelled the making of the decision without inviting the applicant to make representation.

[123] Fundamentally, the FRHDC had an opportunity at its meeting of 22 February 2021, to call to aid the department at most, for the collation of evidence of the applicant's prior learning and experience. This is in keeping with General Rule 15.4 which requires the University to consider the minimum admission requirements for post graduate qualifications in conjunction with the RPL policy. Moreover, this is the same exercise the committee undertook in respect of the two other students mentioned elsewhere in this judgment. This is indicative of the fact that the committee was alive to the relevance of the evidence of prior learning in assessing the affected students' admission.

[124] The University has asserted that the fact that the applicant failed to produce proof of his application for the RPL despite being called upon to do so after the decision was taken served to fortify or justify the decision to deregister him. The dictum of Ngcobo J who wrote for the minority in *Masetlha v President of the Republic of South Africa and Another*²² is instructive in this regard, where he said the following regarding the duty to act fairly:

²² *Masetlha v President of the Republic of South Africa and Another* (CCT 01/07) [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (3 October 2007).

‘[203] Compliance with a duty to act fairly required the President to convey to the applicant that he was of the view that the relationship of trust between him and the applicant had broken down irreparably and that for that reason he was contemplating altering the applicant’s term of office so as to terminate the appointment earlier. The applicant should have been given an opportunity to comment on these matters...

[204] The applicant should have been consulted not only on the question whether the relationship of trust had broken down but also on the terms and conditions that would apply to the termination of the contract. The fact that the applicant may have had little or nothing to urge in his own defence is a factor alien to the enquiry whether he is entitled to a prior hearing. It cannot be an answer therefore to suggest that a fair hearing could not have made a difference to the result. The duty to act fairly is a vital one. . .’ (my own emphasis)

[125] Once the decision was made to deregister the applicant, it is unavailing to the University to state that he was subsequently afforded an opportunity to produce proof that he made the application for his admission in terms of the RPL policy. In the circumstances of the present case, the University’s decision to deregister the applicant was taken without due regard to procedural fairness. The decision could not *ex post facto* be sanitized of unlawfulness by the invitation it subsequently extended to the applicant to present evidence to controvert the alleged irregularity of his admission. On this ground alone, the review should succeed.

[126] Even if I am wrong in making these findings, there are other bases on which the University’s decision is susceptible to being reviewed and set aside. I turn to deal with those grounds.

The irrationality argument

[127] At the heart of the irrationality complaint are the above mentioned students with numbers 3826 and 8043 who were registered for the MPA degree. The minutes of the FRHDC meeting are of importance in this regard. A distinction is

drawn by the University between the admission requirements for the Master's degree that the applicant registered for – the MA; and the MPA for which the two students were registered. In this regard, the University contends that for students 8043 and 3826 the RPL had no relevance in the light of the requirements for their admission.

[128] Counsel for the University submitted that there is nothing irrational about the University's differentiation between these two students and the applicant. She went on to submit that the requirements as tabulated by the committee are different for each of the two qualifications. The submission went on to suggest that there is no evidence to support any assumption that the two students were admitted in terms of the RPL.

[129] Counsel's submissions miss the fundamental point regarding what the FRHDC states in the minutes. Ex facie the minutes, footnote 1 to the first row of *'the 5th column'* titled "*Minimum Requirements for Admission*" indicates that those minimum requirements *'were taken from the University's prospectus at the time of first registration for the degree'*.

[130] For student 8043 who was registered for the MPA in 2017, it must be accepted that the relevant prospectus is 2017. If what the FRHDC states is to be accepted, the minimum requirements for admission to the Master's qualification are as listed in General Rule 15. 2. It is beneficial to repeat those requirements here, and they are as follows:

- (1) A four-year Bachelor's degree at the University; or
- (2) An Honour's degree at the University; or

- (3) A similar higher education qualification at the appropriate NQF level, and which in the opinion of Senate, is equivalent to or higher than the examinations prescribed for an Honours degree at the University; or
- (4) An Honours mini-dissertation for the examination with the consent of the supervisor and within the deadline stipulated by the University.

[131] I have already indicated that Rule 15.4 requires the relevant administrator to read these requirements in conjunction with the University's policy on the recognition of prior learning.

[132] In respect of student 3826 who was registered for the same MPA degree in 2011, the record does not entail the University prospectus for 2011 in keeping with footnote 1 to the minute. That being the case, the FRHDC concluded, in respect of the two students, that they met the minimum requirements for admission into the MPA in terms of 'admissions 2017 No.2'. Although it is rather curious that student 3826 was registered in 2011 in terms of the 2017 admission rules, it is logical to conclude that both students' admission was reviewed against the admission requirements prescribed by General Rule 15.2 of the 2017 prospectus as quoted above.

[133] Here lies the discomfort I have with the University's contentions on the irrationality argument. When students 8043 and 3826 were registered for the MPA they both did not have Honour's degrees. When regard is had to the minimum requirements for admission in terms of the afore quoted General Rule 15.2, it is axiomatic that with their respective Senior Certificates and undergraduate degrees, they would not have qualified for admission as they both did not have the Honour's degrees. This is where the RPL would have become relevant.

[134] I note that in as much as the University has, in the case of the applicant, made reference to the faculty prospectus which sets out additional requirements for

the MA qualification, it omitted the requirements of the same faculty for the MPA qualification. Relevant to note from the faculty prospectus is that the listed requirements for the MA which the applicant registered for do not include the submission of a CV. I will assume without deciding that the additional faculty rules for the admission of an MPA student, if there are any, include the submission of a CV.

[135] The faculty prospectus referred to in respect of the applicant, save for not including the requirement of the CV, indeed mirrors Rule 15.2 by stipulating the following requirements among others: a four-year Bachelor's degree at the University; or Honour's degree at the University; or similar higher education qualification at the appropriate NQF level, and which in the opinion of Senate, is equivalent to or higher than the examinations prescribed for an Honours degree at the University.

[136] Significant to note regarding the faculty prospectus is that it provides for additional requirements. This much is confirmed by the deponent to the University's answering affidavit. The FRHDC minutes clearly indicate that the requirements that were under consideration were the '*minimum admission requirements*.'²³ Rather inexplicably, the FRHDC conflated the minimum admission requirements as set out in the relevant University prospectus according to footnote 1, with certain additional faculty requirements. I say this on the basis that, General Rule 15.2 of the 2017 prospectus in terms of which the FRHDC upheld the admission of students 8043 and 3826 makes no reference to the requirement of extensive managerial experience or the submission of a CV together with the application for admission. I do accept, however, that this may very well be additional faculty requirements for the MPA degree. However,

²³ Emphasis intended.

significantly, the reasons recorded by the committee for the applicant's exclusion was that he had no Honour's degree.

[137] The importance of these observations lies with the fact that the FRHDC appears to have used different review criteria for students 8043 and 3826. These are the reasons I say this: the two students did not possess the Honour's degrees or any of the other alternative minimum requirements which General Rule 15.2 stipulates. This fact notwithstanding, the committee concluded that they met the '2017 No. 2' admission requirements. The committee proceeded to note that the department was requested to provide evidence of RPL in respect of the two students. It is rather odd that this request was made for absolutely no reason as the submission made by the University's counsel seemed to suggest.

[138] This is compounded by the fact that in the letters dated 15 March 2021 and 19 March 2021, none of the additional faculty requirements against which the FRHDC reviewed the admissions under consideration are mentioned by Mr Zuma as having been the basis on which Council excluded the applicant from the qualification. This suggests that Council made its decision based on the minimum requirements for admission as set out in G15.2. I interpose to add that the submission that was made by Mr *Salukazana*, that, the letter of 15 March 2021 makes no reference to the RPL requirement, is incorrect. The said letter does indicate that the RPL was one of the requirements that Council concluded were not complied with by applicant.

[139] Here is the corollary of the afore going analysis: for Council's determination of the recommendation to exclude the applicant from the qualification, the RPL was one of the requirements which, according to it, the applicant ought to have complied with. The disjuncture, however, emerges from the fact that the FRHDC

which conducted the review did not consider the RPL in the case of the applicant. The minutes of the FRHDC meeting referred to above confirm as much.

[140] If we accept as we must, that, the minimum admission requirements for the postgraduate qualifications are as set out in General Rule 15.2 whether the program is course work or research, it hardly lies in the mouth of the University to state that the case of these two students has no bearing in the determination of the irrationality complaint. The position of the applicant and the two other students was no different. I come to the conclusion that the distinction sought to be drawn in order to explain why the RPL was not considered by the FRHDC when reviewing the applicant's admission is artificial. The irrationality complaint must accordingly be upheld.

The failure to take into account relevant considerations

[141] That the FRHDC conflated the additional faculty admission requirements with the minimum admission requirements laid down in General Rule 15.2 for postgraduate qualifications presents the difficulties I have discussed above.

[142] Significantly, I do not envisage that the additional faculty requirements would supersede General Rule 15.2 as read with General Rule 15.4. The applicant, like students 8043 and 3826, did not possess the Honour's degree. The corollary of this is that the FRHDC was still required at the level of its review to consider whether the applicant had qualified for admission under the RPL, yet it did not.

[143] For these reasons, it ought to follow that the University failed to take into account the relevant considerations in reviewing the applicant's admission. The

question that remains is whether an order declaring that the applicant was lawfully registered for the MA degree should be granted. It is to this issue that I now turn.

The first declaratory relief

[144] In terms of section 8(2) of PAJA, this Court has the remedial powers of declaring the rights of the applicant in relation to the decision to deregister him. Furthermore, section 21(1)(c) of the Superior Courts Act 10 of 2013 provides that the High Courts may in their discretion enquire into and determine any existing, future or contingent right or obligation at the instance of any interested person, notwithstanding that such person cannot claim any relief consequential upon the determination.

[145] An applicant for declaratory relief as in the present case, must satisfy the court of no more than the fact that he or she is a person interested in an “existing, future or contingent right or obligation.”²⁴ In determining whether or not a declaratory order should be made the court must first be satisfied that the applicant is a person interested in an ‘existing, future or contingent right or obligation’, and if so satisfied, it must decide whether the case is a proper one for the exercise of the discretion conferred on it.²⁵

[146] In the context of the present case, the applicant seeks an order declaring that he was lawfully registered under the RPL policy. I have outlined the provisions of General Rule 20 which governs RPL applications. I do not propose to repeat them.

[147] But first, I would be remiss not to remark on the real implications of the assertions that were made at the University’s Senate meeting by the University’s Registrar and Professor Buhlungu. They suggest, regrettably, that at a certain time

²⁴ *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005(6) SA 205 (SCA), at para17 and 18.

²⁵ *Durban City Council v Association of Building Societies* 1942 AD 27; *Reinecke v Incorporated General Insurances Ltd* 1974(2) SA 84 (A) at 95C.

in the administration of the University, a fissure emerged which widened over time into treacherous tides of polluted administration of its academic qualifications in the Department of Public Administration. On the admission of Professor Buhlungu, the applicant was one of the victims of the maladministration together with many other students whose reputation and careers were adversely affected.

[148] It would generally be undesirable that the students of the University's Department of Public Administration whose governance Professor Ijeoma allegedly collapsed must bear the brunt of the professor's actions in the absence of evidence of improper conduct on their part, or evidence that they acted in complicity with him. Those students include the applicant. However, equally important is the need to preserve the integrity of the University's academic qualifications across its faculties.

[149] I must interpolate to state this *en passant*: for the students who are less fortunate than the applicant in terms of employment or social strata, what Professor Buhlungu portrays reaches beyond the issue of the integrity of governance in the University. For many of those students, who in most cases access tertiary education under difficult socio-economic circumstances, the absence of recognition of the qualifications or academic credits as they may have obtained from the blighted Department of Public Administration meant a delay in the attainment of higher education and thus the betterment of possibilities for employment. Simply put, their right to higher education was rendered illusory. This, in a country fraught by poverty and high levels of unemployment.

[150] That Mr Mabuyane is a public figure in government is acknowledged and unreservedly accepted. Resulting from this, there is an even more onerous duty on him to abide by the law in all his dealings across the board. With that being said, it is necessary to take several steps back in order to see the forest for the trees.

Section 9(1) of the Constitution guarantees everyone equality before the law and the right to equal protection and benefit of the law.

[151] This matter concerns Mr Mabuyane in his capacity not as Premier of the Province, but as the student of the University who is bound by its laws in the same way as any other student. It would be unconscionable of this Court to set different standards of equality by reason of his political or social standing. The right to equality in this sense goes both ways – where there is evidence of improper conduct on the part of Mr Mabuyane, he must be held accountable. Conversely, where no such evidence exists, accountability cannot be upheld at the cost of his rights. Courts of law are not to be used as vehicles for injustice.

[152] For Mr Mabuyane, this all means that he too cannot be allowed to benefit from the maladministration even though according to Professor Buhlungu none of the department's students, not even him, were the cause of the academic quagmire and the systemic breakdown that has now landed on the doorstep of this Court. A delicate balance must now be struck!

[153] At the hearing of the matter, I asked both counsel whether the University's RPL policy required a separate application for the recognition of a student's prior learning as envisaged in Rule 15.4 whose provisions are quoted above. Counsel for the University answered this question in the affirmative. I agree with her response for the reasons that follow immediately below.

[154] From a reading of Rule 20, an application form for admission accompanied by a student's CV cannot perfect the admission process where the student does not possess any of the minimum requirements stipulated in General Rule 15.2 for admission to a post graduate qualification.

[155] Rule 20 provides that the applications for the RPL for the purposes of admission to postgraduate qualifications (whether Honour's, Master's or Doctoral degrees) must be submitted by 31 October of the year preceding the year in which the student wishes to register for further study. This is to allow the student sufficient time to gather evidence (of prior experience) and prepare for the RPL assessment.

[156] The RPL assessment is undertaken in accordance with the afore quoted provision of General Rule 20. Once the assessment has been undertaken, Senate must endorse the credits awarded. This is done on the last Senate meeting of the year preceding the one on which the student desires to register for further study. It is only once the RPL credits have been awarded and endorsed by Senate will the student be permitted to register for the desired qualification. That registration must be in accordance with the General Rules.

[157] For the purposes of postgraduate qualifications, General Rule 16 regulates the registration of students. Since it is not disputed that the applicant registered for the MA degree, I do not propose to repeat the registration process applicable for postgraduate qualifications. The bone of contention is whether when he was so registered he had met the minimum requirements and whether, in the event that he accessed the qualification via the RPL, he made the necessary application for the recognition of his prior learning and experience.

[158] I am unable to ignore the fact that in stark contrast to the clarity with which Rule 20 regulates the RPL applications, Professor Ijeoma's account of how the process would unfold is that "*the RPL process may be undertaken before admissions or graduation following the schedules and the availability of the relevant units of the University that constitute the RPL implementation committee.*" For the person whose department was, on his own showing, where the applicant's

application for admission originated, this is worryingly vague and perhaps telling of how willy nilly the professor may have admitted students in the department that he headed, much to their possible peril, as Professor Buhlungu opined.

[159] The applicant has alleged that when he made his application for admission to the MA research program, he included his CV as he was placing reliance on his work experience ‘to demonstrate that he qualified to be admitted into the qualification’ and not on the basis that he possessed the Honour’s degree.

[160] In an ideal system of governance not engulfed in the maladministration I refer to above, there would be in existence, even at department level, a clear record of one form or the other of the applicant’s application for the RPL. The University alleges, and the minutes of its Senate meeting as quoted above support the allegation that no record could be found of an application by the applicant for the recognition of his prior learning and experience in accordance with the University’s rules and RPL policy.

[161] Fundamentally, the applicant himself only states that he submitted his application accompanied by his CV, and that his application was assessed by three different administrators before it was approved by Senate. Apart from the fact that the University denies that the applicant’s application was approved by Senate, it is difficult to comprehend how an application form accompanied by a CV was considered sufficient by the three committees for admission to the Master’s degree. The applicant indicated in his application that he held a B.Com degree which is a three-year Bachelor’s qualification. He sought admission to the Master’s qualification which required an Honours degree or a four-year Bachelor’s degree from the University. General Rule 20 stipulates what ought to be done where a student seeks the recognition of his prior learning and experience as a gateway to postgraduate studies.

[162] That the three administrators, on the applicant's version taken together with the supporting affidavit of Professor Ijeoma, endorsed his application as being compliant with the University Rules points to one or both of the following things: a deeply rooted failure in governance in the University's Department of Public Administration, or a serious misunderstanding of the University's General Rules on the part of those charged with implementing them at the time the applicant made his application.

[163] An irresistible finding is that despite what the applicant understood when he submitted his application with his CV, and notwithstanding his bona fides, his application for the RPL was not made and assessed in accordance with what the General Rules stipulate.

Remedy

[164] Section 172(1)(a) of the Constitution enjoins this Court to declare law or conduct that is inconsistent with the Constitution to be invalid to the extent of its inconsistency. In the context of PAJA reviews, section 8(1) of PAJA gives the court remedial powers to grant any order that is just and equitable.

[165] An attempt was made by the University's counsel to divorce the decision of 12 March 2021 from the decision that the University made at the meeting of Senate on 27 May 2021. This separation is, with respect, ill-conceived. The decision of 12 March 2021 is the *fons et origo* of the present matter. Once it was made, the University became functus officio. It had no lawful basis to revisit it. As held in *Member of the Executive Council for Health, Eastern Cape and Another v*

*Kirkland Investments (Pty) Ltd t/a Eye and Lazer Institute*²⁶ where the decision of the state organ was defective, such organ must apply formally for a court order to set it aside, so that the court can properly consider its effects on those subject to it.

[166] The decision of 12 March 2021 remained of legal effect until a court of law sets it aside. It could not be ignored or withdrawn by officials as though it is a non-decision on the basis that they considered it incorrect. For that would result in confusion and conflict, to the detriment of the administration and the public. It would undermine the courts' supervision of the administration.²⁷ It is of no consequence that Senate sought to deal with the applicant's appeal letter dated 26 March 2021 at the meeting of 27 May 2021.

[167] An ineluctable finding is that the deregistration of the applicant was unlawful for failure to afford him an opportunity to make representations before the decision was made and on account of being irrational and unreasonable. It falls to be set aside.

[168] Mr *Katz* invited this Court to exercise the wide remedial power in terms of section 172(1)(b) of the Constitution and grant a just and equitable relief which entails upholding the applicant's admission in accordance with the first declaratory relief. In making this submission, he relied on *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited*.²⁸ In *Gijima*, the Court, despite the declaration of invalidity of the tender award, considered the fact that certain rights may have accrued to Gijima and obligations accordingly performed

²⁶ *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* (CCT 77/13) [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) (25 March 2014); *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* (41/2003) [2004] ZASCA 48; [2004] 3 All SA 1 (SCA); 2004 (6) SA 222 (SCA) (28 May 2004), para 26.

²⁷ *Ibid*, para 89 -92.

²⁸ *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* (CCT254/16) [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) (14 November 2017) (*Gijima*).

in terms of the tender. It ordered that the declaration of invalidity must not have the effect of divesting Gijima of rights to which – but for the declaration of invalidity – it might have been entitled.²⁹

[169] In the context of the present case, the facts establish that Mr Mabuyane's RPL application was not made and assessed in terms of the University's General Rules, in particular Rule 20. Whether substantively and *de facto* he is in a position to produce the evidence of his prior learning and experience on the standards and in the manner that General Rule 20 envisages was not an issue before me. The issue before me was whether he applied as a fact, for the RPL. This is what distinguishes the context of the accrued rights as it applied in *Gijima* from how it should apply in the present case. I must accordingly decline Mr *Katz*' invitation.

[170] It behoves this Court to uphold the integrity of the University's academic qualifications for the greater good of public interest and the subsequent beneficiaries of the right to higher education. For this reason, the applicant's prayer for a declaration that he was lawfully registered for the Masters in Administration must be declined as not being appropriate in the circumstances of the present case.

[171] With that said, I have had regard to the course that the FRHDC followed in the review of the admission of the two other students with numbers 8043 and 3826 when it requested the department to provide evidence of their prior experience. A finding has already been made that there was no reason why the same course was not followed in respect of the applicant as General Rule 15.4 envisages.

[172] It is trite that the remedy that the court grants must be fair to all those affected by it, and yet effectively vindicate the rights violated.³⁰ On the one hand,

²⁹ Ibid, para 54.

³⁰ *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2007 (3) BCLR 300 (CC); 2007 (3) SA 121 (CC) para 29.

the right of the applicant to just administrative action must be preserved; and on the other, the integrity of the University's academic qualifications must be preserved, and accountability, transparency and fairness promoted. I come to the conclusion that this will be achieved by an order directing the University to re-start the process of reviewing the applicant's admission to the MA degree having regard to procedural fairness. With that said, I turn to deal with the remaining question of costs.

Costs

[173] The general rule is that the successful litigant must be awarded its costs unless there are exceptional circumstances which justify a deviation therefrom. It is trite that in awarding costs, the court exercises its discretion in accordance with what is fair between the parties. One of the factors that the court takes into consideration in its determination, is the extent of the parties' success in a given lawsuit. Although the applicant has been partially successful, the aspect on which his application succeeded is substantial. There is no reason to deprive him of his costs.

[174] Counsel for both parties agreed that costs of two counsel are warranted in the present matter. The test regarding costs consequent upon the employment of two counsel is trite – it is whether the employment of two counsel was a wise and reasonable precaution on the part of the litigant.³¹ In this connection, various factors, including the importance of the case, the involvement of complex issues of

³¹ *De Klerk v Steven-Lee Properties* (297/12) [2013] ZASCA 54 (04 April 2013), at paragraph 21; *Long Beach Homeowners Association v MEC for Economic Development, Environmental Affairs and Tourism (Eastern Cape) & Others*, unreported Full Bench Appeal judgment per Pickering J in case number CA 316/2017, Eastern Cape Division, Grahamstown, delivered on 29 March 2019, at paragraph 48.

fact and law are the relevant considerations. The present matter is not only of great importance, but a matter of public interest which implicates complex issues of the law. There is merit in the submission that costs of two counsel must be allowed.

[175] Uniform Rule 67A regulates the issue of the scale at which costs shall be taxable. The default position in terms of this Rule is that, in the absence of a contrary indication, counsel's costs will be recovered on scale A, unless the application of a higher scale is justified by careful reference to clearly identified features of the case that mark it out as unusually complex, important or valuable. It has been held that run-of-the-mill cases, which must be the vast majority of cases in the High Court, should not attract an order on the B or C scales.³² I have already made a finding that that the matter is of great importance engaging complex issues of the law. Costs on scale C are justified.

Order

[176] For all the foregoing reasons, I make the following order:

1. The decision of the first respondent (the University) to deregister the applicant from the academic qualification of Master's in Administration ("the qualification"), is hereby declared unlawful and constitutionally invalid; and it is reviewed and set aside.
2. In terms of section 8(1)(c)(i) of PAJA, the matter is remitted to the University with the following directions:
 - 2.1 The University shall start the review of the applicant's admission to the qualification afresh.

³² *Mashavha v Enaex Africa (Pty) Ltd* 2025 (1) SA 466 (GJ), para 16.

- 2.2 The University shall receive such evidence as may be produced by the applicant and/or the Department of Public Administration as envisaged in General Rule 15.4 of the University's Prospectus, 2017, of his prior learning and experience for the purposes of assessing his eligibility to register for the qualification.
3. The University shall pay the costs of this application which costs shall include costs of two counsel where so employed. Such costs shall, furthermore, be payable on scale C referred to in Rule 67A of the Uniform Rules of Court.

L. RUSI

JUDGE OF THE HIGH COURT

Appearances:

For the applicant : *Adv. A Katz SC*
Adv. M Salukazana
Adv. I Mpofu

Instructed by SAKHELA INC.,
Mthatha

For the first respondent : *Adv. F Gordon-Turner SC*

Adv. L Matiso

Adv. E Cohen

Instructed by : MOTSOENENG BILL ATTORNEYS
Sandton
c/o GORDON MCCUNE ATTORNEYS
King Williams Town

Date heard: 18 June 2026

Date delivered: 02 July 2026