



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 9148/2021P

In the matter between:

HOSPITAL ASSOCIATION OF SOUTH AFRICA

APPLICANT

and

HEAD OF DEPARTMENT, KWAZULU-NATAL

DEPARTMENT OF HEALTH

FIRST RESPONDENT

THE MEMBER OF THE EXECUTIVE COUNCIL FOR

KWAZULU-NATAL DEPARTMENT OF HEALTH

SECOND RESPONDENT

SOUTH AFRICAN NURSING COUNCIL

THIRD RESPONDENT

Coram: Seegobin J

Heard: 02 February 2022

Delivered: 10 March 2022

ORDER

The following order is granted:

1. The applicant is granted, in the interest of justice, an extension of time and condonation, in terms of section 9 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') for its failure to institute proceedings within the period prescribed in section 7 of PAJA.

2. The first respondent's failure and/or refusal to issue Letters of Support to the applicant's members is hereby reviewed and set aside.
3. The first respondent's failure and/or refusal to issue Letters of Support to the applicant's members is substituted with an order directing the first respondent to, within ten (10) days from service of this order, issue Letters of Support to the applicant's members in terms of the Regulations Relating to the Accreditation of Institutions as Nursing Education Institutions (GN R173, GG 36234, 8 March 2013) read with the National Department of Health Circular 1 of 2018 issued on 23 November 2018.
4. The first and second respondents are ordered to pay the costs of this application, such costs to include the costs of two (2) counsel.

JUDGMENT

Seegobin J

Introduction

[1] This application concerns the training and placement of nurses within the health care system of KwaZulu-Natal. By virtue of their training and sense of caring, nurses occupy the single most important component in any health care system in the world. It goes without saying that they are the frontline workers, the everyday heroes who stand between life and death. Apart from caring for patients and helping them to cope with their illnesses, nurses have always been at the forefront of change in health care and public health. But as this application shows, their importance appears to be lost on the authorities in charge of public health in this Province.

[2] This application is being pursued by the Hospital Association of South Africa or HASA as it is commonly referred to. HASA is a voluntary association with a membership comprising of approximately 80% of the over 200 private hospitals in South Africa, including but not limited to Life Healthcare Group Proprietary Limited, Mediclinic Southern Africa Proprietary Limited, and National Hospitals Proprietary

Limited. HASA's founding and other affidavits in these proceedings have been deposited to by its Chief Executive Officer, Dr Dumisani Sizwe Bomela.

[3] The first respondent is the Head of Department ('the HOD') of the KwaZulu-Natal Department of Health ('the Department') who is the administrative and accounting officer of the Department. The HOD is cited in this application as the public official who is specifically mandated to issue public and private Nursing and Education Institutions ('NEIs') with Letters of Support in terms of the National Department of Health Circular 1 of 2018 ('the Circular') issued on 23 November 2018.

[4] The second respondent is the Member of the Executive Council ('the MEC') who is responsible for the Department.

[5] The third respondent is the South African Nursing Council ('the Nursing Council'), established as a juristic person in terms of section 2 of the Nursing Act 50 of 1978 (now repealed) and which continues to exist as such under the provisions of the Nursing Act 33 of 2005 ('the Nursing Act'). The Nursing Council is entrusted to 'establish, improve, control conditions, standards and quality of nursing education and training. . .'.¹ The Nursing Council is also a statutory body which accredits nursing education institutions. Whilst no specific relief has been sought against the Nursing Council it has, however, filed a brief advisory affidavit. I will deal with the contents of this affidavit later and make some comment on whether it was of any assistance to the court or not. The Nursing Council abides the decision of this court.

Issues

[6] This application was initially launched as one of urgency on 15 October 2021. With the application being opposed by the first and second respondents, the matter was adjourned for the filing of affidavits. By the time the matter served before me on the opposed roll on 2 February 2022 the issue of urgency had dissipated somewhat. This was mainly due to the fact that the matter had been accorded some preference on the opposed roll. The first and second respondents, however, still persisted with the view that the matter lacked urgency. Having regard to the nature of the relief being

¹ Section 3(d) of the Nursing Act.

sought and its importance to the health care system and the public at large, I consider that the matter is sufficiently urgent and requires finality.

[7] The two issues that require determination are first, whether the applicant should be granted condonation in terms of section 9 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), and second, whether the applicant is entitled to the relief set out in prayers 3, 4 and 5 of its notice of motion.

[8] The full extent of the relief set out in the notice of motion is the following:

- '1. That the rules relating to forms, services, notice and time period be dispensed with and this application be heard as one that is urgent as provided for in terms of Rule 6(12) of the Uniform Rules of Court.
2. Granting the applicant an extension of time and condonation, in terms of section 9 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") for the applicant's failure to institute proceedings within the period prescribed in terms of section 7 of PAJA in the interests of justice.
3. Reviewing and setting aside the first respondent's failure and/or refusal to issue letters of support to the applicant's members.
4. Substituting the first respondent's failure and/or refusal to issue letters of support to the applicant's members with an order directing the first respondent to, within ten days, issue letters of support to the applicant's members in terms of the Regulations Relating to the Accreditation of Institutions as Nursing Education Institutions (Government Notice R173 in Government Gazette 36234 of 8 March 2013) read with the National Department of Health Circular 1 of 2018 issued on 23 November 2018.
5. Ordering the first respondent to pay the costs of this application including the costs of two counsel.'

[9] At the opposed hearing on 2 February 2022, the applicant was represented by Mr Mooki SC and Mr Mohapi, the first and second respondents by Ms Bhagwandeem and Ms Govender and the third respondent by Ms Antulay.

Purpose of application

[10] HASA brings this application in order to review and set aside the alleged failure² or refusal³ by the HOD to issue the pre-requisite Letters of Support to those of HASA's members who have registered private higher education institutions (also known as private nursing education institutions) ('the decision') in terms of the Regulation Relating to the Accreditation of Institutions as Nursing Education Institutions⁴ ('the regulations') read with the National Department of Health Circular 1 of 2018 referred to above.

[11] The decision was communicated to HASA on 16 May 2019 when the Department informed HASA that no Letters of Support would be issued to any private nursing education institution for a period of three years. The verbally communicated reason given to HASA for the decision was that there was a surfeit of existing qualified nurses available who should be employed instead of training new nurses. Regrettably, according to HASA, the Department's decision and reasons are dismissive and superficial because the Department, in giving them, did not bother to provide HASA and its members with any evidence in this regard.

[12] In terms of the regulations referred to above, the issuing of Letters of Support is a pre-requisite to a process that will eventually come before the Nursing Council when the issue of accreditation will be dealt with. This is evident from the provisions of regulation 4, which deals with the submission of applications for accreditation as a nursing education institution. In the context of this application, regulations 4(1), 4(2) and 4(3) are important:

- '4. Submission of application for accreditation as a nursing education institution.—
- (1) The person in charge referred to in regulation 2 (1) must—
 - (a) apply for accreditation to the Council in writing, at least twelve (12) months prior to the intended date of commencement of the course, in a format and at a submission date as determined by the Council;
 - (b) submit to the Council the prescribed completed institutional self-assessment and institutional portfolio as specified in regulation 5;
 - (c) pay to the Council the prescribed application fee;

² Sections 6(2)(g) and 6(3)(a) of PAJA.

³ Section 6(2)(e) of PAJA.

⁴ Regulations relating to the accreditation of institutions as Nursing Education Institutions, GN R173, GG 36234, 8 March 2013.

- (d) provide evidence of meeting the requirements of regulation 2;
 - (e) provide evidence of meeting the prescribed accreditation requirements, criteria and standards for nursing education and training as determined by the Council;
 - (f) provide details of the nursing education and training programme(s) that the institution intends to offer; and
 - (g) *provide evidence of support from the relevant national or provincial health authority that there is a need for such education and training.*
- (2) *The application for accreditation must only be considered by the Council once all of the conditions and the requirements referred to in regulations 2 (1) and 4 (1) are met.*
- (3) *An incomplete application must not be considered and such an application must be returned to the applicant.’ (My emphasis.)*

[13] The provisions of regulation 4(2) and 4(3) must be read together with the provisions of the Circular dated 23 November 2018.

[14] According to its heading, the aim of the Circular is ‘to guide provinces on utilisation of public health establishments for clinical placement by nursing education institutions’.

[15] The Circular provides as follows:

‘1. The National Department of Health (NDoH) is currently facilitating implementation of new nursing programmes that will lead to registration in the categories contemplated in section 31 of the Nursing Act, 2005 (Act 33 of 2005). These programmes are aligned to the Higher Education Qualifications Sub-framework and offered in compliance with the requirements of the Department of Higher Education and Training.

2. In line with provisions of the South African Nursing Council (SANC) Government Notice No. 173 of 08 March 2013, all public and private NEIs that will require to place their students in public health establishments for clinical training are required to submit a letter of support signed by provincial Heads of Health (HODs) before application for accreditation by both Council on Higher Education (CHE) and SANC is considered.

3. HODs received numerous requests for letters of support from private nursing education institutions (NEIs) to place students in public health establishments for clinical training.

4. At its meeting held in February 2018, the Technical Committee of the National Health Council resolved that the Director-General would provide guidance to HODs for managing these requests.
5. Guidance is hereby provided as follows:
 - a) Priority for placement of students should be given to public sector NEIs; namely, nursing colleges and universities.
 - b) Request for letters of support from private NEIs should be considered in relation to provincial plans for human resources.
 - c) Existing memoranda of agreements (MOAs) that were entered into between provinces and NEIs with regards to legacy programmes should remain valid in line with the stated programme and dates of expiry of MOAs.
 - d) New MOAs between provinces and NEIs will have to be entered into to support implementation of new nursing programmes.
 - e) Request for letters of support from private NEIs for the new qualifications should indicate evidence of existing clinical training facilities outside of public health establishments. These clinical training facilities, should be SANC-accredited and aligned to SANC guidelines per programme.
6. The implementation of this circular becomes effective on the date of issue.'

[16] HASA contends that when one has regard to the provisions of regulation 4(2) and (3), read with the provisions of the Circular, it becomes clear that the HOD's Letters of Support are necessary for the Nursing Council to consider the accreditation applications of HASA members who have Department of High Education and Training (DHET) registered Private Higher Education Institutions (PHEIs) in KwaZulu-Natal. HASA submits that its members meet all the requirements to have Letters of Support issued to them and to have their accreditation applications considered by the Nursing Council, which is the statutory body mandated to evaluate the nursing training programmes and institutions. HASA accordingly contends that its members' accreditation applications are thus hampered by the decision and as such, these applications cannot be considered by the Nursing Council.

[17] HASA further contends that the passage of time since 16 May 2019 has not dissipated the urgency of this matter because (a) in this period HASA has been in prior

extended engagements with the Department with the aim of seeking a peaceable and amicable resolution, and (b) more importantly, the adverse impact of the decision on HASA's members whose accreditation applications cannot be considered due to the lack of Letters of Support from the Department, is continuously adverse to HASA's members and harmful to members of the public in that the KwaZulu-Natal healthcare system is in need of suitably qualified nurses.

Need for training and placement of nurses in KwaZulu-Natal

[18] According to HASA, nurses comprise about two-thirds (65%) of South Africa's health care workers. This fact has not been disputed either by the HOD or the Nursing Council. In the founding affidavit, Dr Bomela states that the context within which HASA seeks accreditation for its members to train new nurses in various disciplines and within which it brings this application, is against the backdrop of:

(a) The Covid-19 pandemic in relation to which, like most countries, South Africa has just recovered from the peak rate of the third wave (at the time when this application was instituted) of infections.

(b) An aging nursing population in KwaZulu-Natal and nationally, as is evident from the population to nurse ratio in South Africa (set out in para. 32.2 of the founding affidavit) obtained from the 2018 (pre-Covid-19) national census in the face of technological advancements in the discipline of medicine and evolving complexities in the treatment of patients.

(c) A feature online article by Health24 of 7 October 2021,⁵ pointing to a looming health care crisis in the country's aging nursing population. The article reports, based on credible statistics, that almost half of the nursing workforce in South Africa is set to retire in the next 15 years. The article suggests that existing shortages of nurses will become even greater unless concrete steps are taken to boost training and retention of nurses.

(d) The specific regulatory framework for the education and training of nurses which requires that any nursing education institution obtains a Letter of Support, in this instance from the HOD.

⁵ <https://www.news24.com/health24/news/public-health/ageing-nurses-a-crisis-on-the-horizon-20211007>.

[19] In paragraphs 33 - 39 of HASA's founding affidavit, Dr Bomela alludes to the broader pandemic context and the dire need for more nurses to be trained and placed. He says the following:

‘33. Our country, like most, has just come out of the third wave of the COVID-19 pandemic and is making progressive strides in the national roll-out of the vaccine. Yet we are far from completely putting COVID-19 pandemic behind us. Far from over, the COVID-19 pandemic has dealt a blow on the frontline human resources of both the public and private healthcare sector as the country continues its fight against the virus, inter alia, through administering the vaccine – key to which national campaign nurses have been.

34. The impact of COVID-19 pandemic on the nursing workforce has been pronounced across the globe. It is common knowledge that nurses are the mainstay of healthcare. They are the backbone of the healthcare system and have been in the frontline of the national response and fight against COVID-19 pandemic, but not without the grave cost of the many lives of nurses who have been lost to the fight against the COVID-19 pandemic.

35. In the public sector, nurses have fallen ill and have died during the fight against COVID-19 pandemic, often because of the poor provision of personal protective equipment (PPE) and the initially low roll-out of the vaccine to South African healthcare frontline workers including to nurses. Many other nurses are experiencing work related stress and burnout. These challenges are not unique to our country, but are faced by most countries and, as such, have been documented and underscored by the International Council of Nurses (ICN), a federation of more than 130 national nurse associations representing the more than 20 million nurses worldwide, in its report published on 30 May 2021, made available online <https://onlinelibrary.wiley.com/doi/epdf/10.1111/inr.12681>.

36. The South African healthcare system and industry, in which HASA members operate, has not been immune to the adverse impacts of the COVID-19 pandemic on healthcare workers, particularly on nurses. The impact of the COVID-19 pandemic is such that it has now left the province of KwaZulu-Natal with a shortage of nurses.

37. The COVID-19 pandemic has therefore brought about a marked proportional decrease in the available number of nurses in both the public and private healthcare sectors in various disciplines.

38. As a considerable healthcare system contributor, HASA has identified the need to train and staff its members' hospitals with suitably qualified nurses in all disciplines in KwaZulu-Natal, inter alia, as part of the response to the COVID-19 pandemic but

also having regard to the post-pandemic societal needs in the province in an increasingly changing world.

39. I interpose to mention that added to this context brought about by the COVID-19 pandemic strain on the nursing profession, is the long-standing adverse impact that the phasing out of legacy qualification programmes and the transition to implement new higher education qualification programmes has had to significantly reduce the nursing profession outputs from education institutions. The crisis of a declining nursing population is not only exacerbated by the strain put on it by the COVID-19 pandemic, but it has been a long time in the making due to the inadequate general output of qualified nurses in recent years.'

Regulatory context

[20] I have already dealt with some of the relevant regulations which govern the process of accreditation of nursing education institutions and nursing education programmes by the Nursing Council. Accreditation has been defined by the regulation 1 to mean

'certification of an institution, for a specified period, recognising it as a nursing education institution with the capacity to offer a prescribed nursing programme, upon compliance with the Council's prescribed accreditation requirements, criteria and standards for nursing education and training.'

[21] The conditions and requirements for the accreditation of an institution as a nursing education institution is governed by regulation 2 which provides:

'2. Conditions and requirements for accreditation of an institution as a nursing education institution.—(1) An institution may be accredited as a nursing education institution if—

(a) it has a designated person in charge of the nursing education and training institution who—

- (i) is registered with the Council as a professional nurse;
- (ii) has an additional qualification in nursing education;
- (iii) is in possession of a management qualification;
- (iv) holds at least a bachelor's degree in nursing; and
- (v) holds a nursing qualification that is a level higher than the highest qualification offered by the nursing education institution or, if the highest qualification offered is a doctoral degree, a nursing qualification at an equal level;

- (b) in the case of a private institution, it is registered with the Department of Higher Education and Training in terms of relevant legislation;
 - (c) in the case of a public entity, it is established or declared by the Minister of Education as a higher education and training institution in terms of relevant legislation;
 - (d) the programme is accredited with the Council on Higher Education; and
 - (e) the programme meets the accreditation requirements, criteria and any standards for nursing education and training as determined by the Council from time to time.
- (2) Such an institution must have—
- (a) a formal agreement(s) with one or more of the relevant authorities responsible for clinical facilities, which address the clinical learning opportunities, clinical accompaniment and supervision needs of learners placed in such health services;
 - (b) a fixed physical address;
 - (c) access to sufficient clinical facilities that are appropriate for the achievement of the outcomes of the programme; and
 - (d) evidence of quality control mechanisms over clinical education and training.
- (3) Such institution must demonstrate that there is a need for the programme to be accredited.
- (4) Such institution must have infrastructure and resources that are adequate and relevant for the achievement of the outcomes of the programme.’

[22] The accreditation process itself is dealt with by regulation 3 which provides:

- ‘3. Accreditation process.—(1) The accreditation process includes—
- (a) the submission of an application for accreditation;
 - (b) the review of application for accreditation;
 - (c) an audit, which may include an audit visit, to validate the evidence referred to in submitted documentation;
 - (d) a decision regarding accreditation; and
 - (e) the issuing of an accreditation certificate if the application is successful.
- (2) The institution must be accredited by the Council to offer a programme prior to the commencement of such programme.
- (3) The process may be extended if the information and documentation required at any stage during the accreditation process is incomplete or if there is a delay in the submission of such information.’

[23] Reverting for a minute to the Circular of 23 November 2018, HASA avers that its understanding of the object of the Circular's pre-requisite for Letters of Support to be obtained from the HODs of Departments, insofar as it applies to this matter is, firstly, to prevent congestion in the number of clinical training placements in public health establishments and, secondly, to ensure that the public health care system is not burdened with an oversupply of health care personnel or that nurses would be trained but thereafter have no placements.

[24] During argument, Mr Mooki emphasized that HASA's members' application for accreditation and its need for Letters of Support is not at odds with the objects of the Circular, the regulations or the Nursing Act, as its members will absorb all of the nurses intended to be trained. Mr Mooki further submitted that the Department will not suffer any financial prejudice in respect of any training as HASA will ensure that all training is done at HASA's expense.

[25] HASA contends that the Department's moratoria on the training of nurses in different disciplines, in addition to its decision of 16 May 2019 not to issue Letters of Support to private nursing education institutions, have had an obvious effect on the decline in the availability of qualified nurses for placement in both the public and private sector.

[26] By virtue of the decision, the Department has maintained that it does not wish to issue HASA members with Letters of Support in so far as, fundamentally, there is a surfeit of qualified enrolled nurses and enrolled nursing assistants in KwaZulu-Natal and that rather than training new nurses, existing trained nurses should be employed by HASA's members. At no stage, however, has the Department provided HASA with particulars of the surfeit of existing qualified nurses who the Department contends should instead be employed by HASA's members.

HASA's engagement with the department after the decision of 16 May 2019

[27] HASA contends that since the decision of the HOD on 16 May 2019, HASA engaged in extended engagements with the Department as chronicled by Dr Bomela in the founding affidavit. Bearing in mind that one of the issues to be resolved in this application is HASA's failure to institute these proceedings without undue delay and

within a period of 180 days of the administrative decision as required by section 7(1) of PAJA, it is therefore necessary, in my view, to have full regard to the chronology provided by Dr Bomela of HASA's engagements with the Department. This chronology appears in the founding affidavit as follows:

85.4 On 20 June 2019, Ms Vermaak, the Netcare Education Faculty Manager, a co-representative with me of HASA during these engagements with the Department, requested advice from Dr Makhanya at a CPASSA (College Principals and Academic Staff of South Africa forum) meeting held on 13 and 14 June 2019 regarding the issuing of letters of support, where she indicated that she would take it up. It appears that there is a miscommunication with relation to the Circular. Dr Makhanya provided feedback a week later from the meeting during which she indicated that she had raised the matter with the Department at a meeting and that the Circular should not apply to PNEIs linked to hospital groups. She informed us that feedback would follow in this regard from the Department. However, no feedback was received and we made continuous follow-ups through HASA to which no feedback from the Department was forthcoming.

85.5 On 8 August 2020, after it took some time and persistence on HASA's part, we had our first meeting with the erstwhile HOD and Mr Bongani Shezi.

85.6 On 29 August 2020, HASA held a follow-up meeting with the Department. The minutes of this meeting appear in annexure FA7.

85.7 On 19 September 2020, the Department's requested documents in the previous meeting, indicating Netcare's commitment to employ all students and student numbers in relation to the KwaZulu-Natal campus, was submitted to the Department which documentation was signed by the Netcare Human Resources Director of KwaZulu-Natal.

85.8 On 21 October 2019, HASA held a meeting where it appeared that there was good collaboration and progress between the Department and HASA. During this meeting, the Department requested additional information that HASA was requested to add to its letter of commitment, which HASA did and submitted to Mr Shezi on 23 October 2019.

85.9 At the meeting, officials of the Department indicated that they would prepare all the information and present it to the HOD within the following two weeks, for approval and feedback to HASA. However, no feedback was ever received and on HASA's follow-up in early December 2019, HASA was informed telephonically by Mr Shezi that due to the appointment of the new MEC and HOD for the Department, they require a

briefing from their provincial team and that the matter would be discussed at a later stage.

85.10 On 21 February 2020, HASA sent a letter to the Department and escalated the matter to the national department by copying the Chief of Staff of the National Department of Health in which HASA expressed its exasperation in relation to the Department's failure or refusal to issue HASA members with letters of support. Thereafter, I received a call from Dr Annand [sic] [Anban] Pillay (an official of the Department) regarding the letter which HASA had sent to the Chief of Staff at the national department. Dr Pillay indicated that feedback would be given by Department, but still no feedback was subsequently provided by the Department.

85.11 On 23 April 2020, Ms Vermaak followed up on HASA's escalation of the matter to the National Department requesting the National Department of Health to assist and intervene. Ms Vermaak spoke in this regard to Dr Kobie Marais of the National Department.

85.12 Then on 31 July 2020, after HASA's patient wait to receive the assistance and intervention of the national department, Dr Marais eventually reverted to Ms Vermaak saying that HASA must contact the Department.

85.13 On 7 September 2020, I addressed the letter which I have mentioned in paragraph 62 above (FA8) to the HOD, to which we have received no response to date.

85.14 For a period of ten months from September 2020 to July 2021, we continued in our painstaking engagements with the Department and the other concerned accreditation stakeholders in an effort to obtain the letters of support, but none were forthcoming.

85.15 On 19 July 2021, HASA obtained a legal opinion from its attorneys of record, Werksman Attorneys, on HASA's legal recourse options. The legal opinion is not produced because it is privileged communication between attorney-and-client.

85.16 Given HASA's increasing frustration with the Department and being left with no option but to seek recourse through court action, on 20 September 2021, counsel was briefed to advise on the merits of the present application and on drafting and settling the papers. Thereafter, HASA members assisted by HASA's attorneys, junior and Senior Counsel drafted and settled the papers and had to consult and comment on the draft papers involving all of HASA's members inputs before the application could be eventually launched thereafter on 14 October 2021.'

[28] On 7 September 2021, Dr Bomela addressed a letter (Annexure FA8) to the HOD and to which he appended a schedule of the chronology referred to above as Annexure 1 dealing with HASA's extended engagement with the Department.

[29] In the above letter, Dr Bomela reiterated the following under part B of the letter which dealt with the requirements communicated by the Department during meetings:

'Hospital Association of South Africa ("HASA") has previously engaged with the KZN DOH in 2019 as supported by the attached list outlining the sequence of events [Annexure 1]. In our collaborative engagements, the KZN DOH communicated the following:

1. No clinical placement will be granted to Private NEI's in the KZN public health facilities. To this end Netcare Education [i.e. and the other HASA PHEIs] has secured sufficient clinical placement with the necessary Memoranda of Agreement in place in a variety of suitable and credible clinical facilities that will meet the programme requirements.
2. Nursing Education Institutions ("NEI") must provide confirmation from the directors of the group that all students will be employed by Netcare on successful completion of their education and training. Failure to employ qualifying student may impact on granting further letters of support.
3. Letters of support from KZN DOH will be issued annually.
4. No objection from the KZN DoH for the private NEI's offering the Advanced Diploma in Midwifery and Post Graduate programmes as long as no clinical placement is required, and no public students may be accepted to study as private NEI's.

The Private NEI's are committed to continue to comply with the requirements to secure and maintain the approval of the KwaZulu Natal Department of Health and continue the collaborative and mutual beneficial relationship going forward and so doing contribute to the social fabric of the province.

HASA requests an urgent meeting with KZN DoH to address these issues and to attempt to find a mutually workable solution in the interests of the nursing community as a whole. HASA representatives will avail themselves at the convenience of the KZN DoH and in view of the time lapse due to the Covid-19 risk adjusted strategies of South Africa we propose a meeting in the next week in order to address these issues with the aim to resolve asap. Your attention to the matter will be much appreciated.' [My emphasis.]

[30] In an effort to avoid litigation and having regard to the long history of prior engagements with the Department as highlighted above, the attorneys for HASA, Werksmans Attorneys, addressed a further letter to the Department as a final demand on 17 September 2021, the relevant portions of which read as follows:

'3.4 the Department has averred that there is a surfeit of qualified enrolled nurses (EN) and enrolled nursing assistants (ENA) (nurses) in KwaZulu-Natal and rather than training new nurses, members of our client should employ existing trained nurses. This position apparently aligns with the province's obligations in terms of paragraph 5(b) of the circular, dealing with the application of provincial human resources plans to the issuing of LoS, published by the national Department of Health as Circular 1 of 2018, dated 23 November 2018 ("the Circular"). However, and despite requests, no evidence of the surfeit of qualified nurses in KwaZulu-Natal has been produced by the Department to date. In this regard –

- 3.4.1 there have now been no undergraduate or specialised nurses trained in KwaZulu-Natal since 2019, thus chronically compromising access to healthcare services in the province both presently and into the near future;
- 3.4.2 with the onset of the COVID-19 pandemic in early 2020 greater strain has been placed on the local healthcare system with the need to have additional resources, including trained nurses in various disciplines, to deliver the required healthcare services;
- 3.4.3 the effects of the COVID-19 pandemic have included nurses passing away and suffering from burn-out and thus unable to work thus further reducing the number of qualified nurses available to our client's members in KwaZulu-Natal;
- 3.4.4 with the introduction of the vaccinations, the need for vaccination centres and services has drawn nurses out of hospitals and into pharmacies and sub-acute facilities thus placing further strain on the number of nurses available to our client's members in the private hospital sector in KwaZulu-Natal;
- 3.4.5 with the vaccinations inevitably to be permitted to persons in younger age groups and the expected further waves of the COVID-19 pandemic, the abovementioned strain will undoubtedly worsen as the demand for vaccinations and nurses to provide the vaccinations grows;
- 3.5 the Department has become unresponsive to our client's requests to advance the matter and issue the necessary LoS [Letters of Support];
- 3.6 all of the requisite information, for purposes of issuing the LoS, has been supplied by our client and its various members to your offices – on numerous occasions;

3.7 our client has made the urgency of the provision of LoS clear in its e-mail to your offices of 30 August 2021:

“HASA members are very anxious to know about the training numbers as there is still the [South African Nursing Council] SANC process that must take place after the issuing of the letters by the province, i.e. the SANC have to take our applications through their Education Committee and then to the Council meeting for the final approval of the January 2022 intake and their process is set to take place by October 2021. Therefore, we are required to get the letters to the SANC as soon as possible. This means this matter is extremely urgent from HASA’s viewpoint, hence HASA’s repeated enquiries about the progress.”

4. In light of what is set out above, we advise that –

4.1 the need for the relevant LoS is obvious, more particular, to facilitate the training of nurses in KwaZulu-Natal. The training of nurses is a national prerogative in circumstances where nurses are required to ensure proper access to healthcare services as contemplated in section 27 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”);

4.2 in so far as the provision of the LoS is an administrative function, our client is entitled to procedurally fair administrative action pursuant to our client’s rights, and those of its members, in terms of section 33 of the Constitution and the provisions of the Promotion of Administrative Justice Act No. 3 of 2000 as well as various pronouncements by the Constitutional Court;

4.3 the inordinate delays in this matter, which have resulted in the inability of our client’s members to train nurses in KwaZulu-Natal for two years, are without cause or reason and have substantially limited the availability of qualified and trained nurses, in various disciplines, throughout the province, which is an untenable state of affairs with reference to your constitutional obligation to facilitate access to healthcare services and the prevailing COVID-19 pandemic;

4.4 there is thus no basis or reason for any continued delay in issuing the LoS – such a continued delay is unreasonable and irrational.

5. Accordingly, we have been instructed to demand, as we hereby do, that the LoS be issued as soon as possible but by no later than 16:00 on Monday, 27 September 2021, failing which our client shall have no option but to approach the relevant court for assistance.

6. We await your urgent reply.’

[31] Needless to say, no response was forthcoming from the Department. The Department took no steps to dispute the factual accuracy of the contents of this letter nor did it provide any reason for its refusal or failure to issue the requisite Letters of Support.

[32] HASA's increasing frustration left it with no option but to try and seek recourse through court action. The present application was accordingly launched as a matter of urgency on 20 September 2021. What gave rise to the urgency at that stage was the fact that the Nursing Council's next meeting at which the accreditation applications for HASA's members' nursing education institutions in the Province for 2022 was scheduled to take place on 11 and 12 November 2021. However, as it now transpires, such meetings are held at least 3-4 times a year. This, of course, does not detract from the fact that the issue relating to the Letters of Support remains a burning issue which has to be resolved before the Nursing Council can deal with issues of accreditation.

Department's opposition

[33] The preliminary affidavit filed by the HOD does not take the matter anywhere. The affidavit amounts to nothing more than a diatribe of complaints against HASA for creating urgency where none existed. Even in preliminary form, it does little to answer the fundamental concerns that HASA raises regarding the Letters of Support. Apart from quoting the relevant portions of the applicable regulations *verbatim*, it does nothing else. The only point of substance raised by the Department is the PAJA delay. As mentioned already, this is one of the two main issues to be resolved in the matter.

[34] In a supplementary answering affidavit filed by the Department, the HOD continues to assert that there is a surfeit of nurses in the province but once again, fails to put up any evidence in this regard. It is on this basis that the Department attempts to justify its moratorium regarding the granting of the requisite Letters of Support to HASA's members.

[35] In para 6.2 of the supplementary answering affidavit, the HOD accuses HASA of creating 'a completely false perception' in order to mislead the court in relation to the process involving the issuing of Letters of Support. The 'false perception' that

HASA is said to have created is to the effect that (a) the first and second respondents (HOD and MEC) can simply issue Letters of Support on a rubber-stamped basis without following the necessary processes to ensure compliance with the applicable laws and directives in relation to the training of nurses; (b) that Letters of Support will guarantee the accreditation of the applicant's members' nursing training programs; and (c) that if the applicant is provided with Letters of Support, the accreditation will be approved by the third respondent (the Nursing Council) at the next sitting of the Council on 11 and 12 November 2021.

[36] The Department thereafter goes on to deal with the objects of the Nursing Act and the various provisions that govern the accreditation process. The Department contended that the only moratorium issued by it was that of 9 September 2016 but that this moratorium terminated on 23 November 2018. Consequently, during 2019 the moratorium was no longer in effect.

[37] In paragraphs 12 and 13 of the supplementary affidavit, the Department points to the fact that it is constrained by a lack of funds to accommodate nurses trained by both public and private NEIs. It points out that members of HASA and another organisation called PHEPSA are the only two privately operated NEIs.

[38] The Department contends that it did not only engaged with HASA regarding the issue of training and placement of nurses but that it also engaged with PHEPSA. Arising from these engagements, the HOD sought a report from one Mr Themba Mntambo of the Department to conduct an analysis from available information and to advise (a) on what numbers should be allocated to PNEIs; (b) how to split the numbers per PNEI, and (c) a proposed contract. On receipt of the report on 1 October 2021, a decision was taken to allocate 50 placements for Higher Certificate in Nursing and 50 placements for the Diploma in Nursing. The nett effect of this was that the PHEPSA group will be allocated 100 placements and HASA 100 placements. This information was communicated to HASA and PHEPSA on 21 October 2021 and was accompanied by a copy of a draft Memorandum of Agreement (MOA). PHEPSA agreed with the allocation and signed the MOA. HASA on the other hand, did not accept the allocation.

[39] Both in its supplementary replying affidavit as well as in argument, HASA asserted that the Department was acting in bad faith. The Department had known all along that HASA had satisfied the requirements for 230 nurses. The Departments' stance in offering an allocation of 100 placements on 21 October 2021 was nothing more than a knee-jerk reaction to the litigation that was now on the go. The Department had simply failed to address critical issues raised by HASA of the looming crisis of the shortage of nurses in KwaZulu-Natal and the strain of an aging nursing population as well as the ravaging impact of the Covid-19 pandemic. Additionally, the financial constraints and lack of resources to train and place nurses, as complained of by the Department, did not have any bearing on the matter as HASA had made it clear that it would not only train such nurses but that it will also absorb them into its structures.

Nursing Council's role in these proceedings

[40] The Nursing Council was of no assistance in the matter. Being a critical role player in the health care system, it was disappointing to note that it adopted a rather supine approach in the matter. It could have, for instance, provided the court with useful information and relevant statistics of the number of nurses in the Province, whether the need to train more nurses was necessary, the effect of the Covid-19 pandemic on nursing and the general state of health care from a nursing perspective, etc. It chose instead to set out the various provisions that regulate the accreditation process.

The PAJA delay

[41] Admittedly, there has been a substantial delay on the part of HASA in instituting these proceedings since the communication of the decision to it on 16 May 2019. Proceedings for judicial review under section 7(1)⁶ of PAJA must be instituted without delay and before the expiry of 180 days from the date of the administrative action

⁶ Section 7(1) provides that:

'(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date—

(a) subject to subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or
(b) where no such remedies exist, on which the 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.'

sought to be reviewed. Section 9,⁷ however, empowers a court to extend the prescribed period where the interests of justice so require.

[42] The SCA has held that whether the interests of justice require the extension of the time-frame for the institution of review proceedings in terms of section 9 of PAJA ‘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.’⁸

[43] The factors to be considered in the enquiry and the particular weight to give to each one, will depend on the nature of the case.⁹ In this regard, an assessment of what the interests of justice require is case-specific and a wide range of considerations are relevant to the enquiry.¹⁰

[44] The SCA (per Navsa JA) in *SANRAL*¹¹ opined that since ‘the challenges to the Board's decision and the decisions of the Transport Minister in terms of s 27 of the Act¹² are based on the principle of legality, it does not, for practical

⁷ Section 9 provides as follows:

⁹ Variation of time.— (1) The period of—

(a) 90 days referred to in section 5 may be reduced; or

(b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.

(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.’

⁸ *Camps Bay Ratepayers' and Residents' Association and another v Harrison and another* [2010] ZASCA 3; [2010] 2 All SA 519 (SCA) para 54. See also *Aurecon South Africa (Pty) Ltd v City of Cape Town* [2015] ZASCA 209; 2016 (2) SA 199 (SCA) para 17.

⁹ *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* [2009] ZASCA 85; 2010 (1) SA 333 (SCA) para 82; *City of Cape Town v South African National Roads Agency Ltd and others* [2015] ZAWCHC 135; 2015 (6) SA 535 (WCC) para 21. In para 22, the court went on to observe that ‘the broad nature of the exercise enjoins the court to have regard, amongst other matters, to what the review application is about, its prospects of success and the broader consequences, in the context of the delay, of it being upheld or turned away’.

¹⁰ *City of Cape Town v South African National Roads Agency Ltd and others* [2015] ZAWCHC 135; 2015 (6) SA 535 (WCC) paras 25 and 30.

¹¹ *South African National Roads Agency Ltd v City of Cape Town* [2016] ZASCA 122; 2017 (1) SA 468 (SCA) para 78.

¹² The South African National Roads Agency Limited and National Roads Act 7 of 1998.

purposes, matter whether condonation for the delay in launching the application is approached in terms of the provisions of PAJA or otherwise.’

The learned judge went on to demonstrate in paras 79 and 80,¹³ that ‘in both instances, ultimately the decision whether to condone the delay is based on whether the interests of justice so require’.¹⁴

[45] Delay is not necessarily decisive because while ‘[f]inality is a good thing . . . justice is a better’.¹⁵

[46] The application of the delay rule involves a two-stage enquiry, namely (a) whether there was an unreasonable delay, and (b) and if so, whether the delay should be condoned.¹⁶ The first stage is a factual enquiry upon which a value judgment is made in light of all the relevant circumstances. Thus, the assessment of delay and prospects of success, viewed with all other relevant factors, are intertwined.¹⁷

¹³ The judge held as follows:

‘[79] Before the advent of PAJA, it was recognised by our courts that an undue and unreasonable delay on the part of an aggrieved party in initiating review proceedings might cause prejudice to other parties to the proceedings and that, therefore, in such cases the court should have the power to refuse to entertain the review. An associated rationale for what became known as the ‘delay rule’ was the public-interest element in the finality of decisions by repositories of state power, whatever their nature. In this regard see *Harnaker v Minister of the Interior* 1965 (1) SA 372 (C) at 376H – 377D and 380; *Wolgroeiens Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41D – F; and *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2010 (1) SA 333 (SCA) ([2009] ZASCA 85) (*Oudekraal 2*) para 33. This court in *Wolgroeiens* (at 39B – D) held that in the event of a complaint that there was an unreasonable delay in initiating review proceedings, the following had to be decided: (a) whether an unreasonable time had passed and; (b) if so, whether the unreasonable delay ought to be condoned. It held, in relation to the last-mentioned enquiry that a court exercises a judicial discretion with regard to all the relevant circumstances. At common law this rule applied also in relation to what we now describe as challenges based on the principle of legality.

[80] In *Tasima (Pty) Ltd v Department of Transport* [2016] 1 All SA 465 (SCA) ([2015] ZASCA 200) paras 29 – 30, this court observed that in considering whether to extend the 180-day period in terms of s 9, a court would be guided by what the interests of justice dictate. In order to determine that question, regard should be had to all the facts and circumstances. 67 This equates with how the judicial discretion on whether to condone a delay was exercised before the advent of PAJA. There is no maximum period provided for in PAJA and the cases in which the 180-day period was extended are diverse in relation to the period of delay. 68 Simply put, whether one is considering condoning a delay either under the provisions of PAJA or beyond it, the same determining criterion applies, namely, the interests of justice. Viewed thus, a definitive classification of the nature of the impugned decisions is not strictly necessary, particularly if regard is had to the challenge essentially being one of legality.’

¹⁴ *South African National Roads Agency Ltd v City of Cape Town* [2016] ZASCA 122; 2017 (1) SA 468 (SCA) para 78.

¹⁵ *Ras Behari Lal and others v the King Emperor* [1993] All ER Rep 723 at 726C-D, quoted with approval in *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* [2009] ZASCA 85; 2010 (1) SA 333 (SCA) para 80.

¹⁶ *Associated Institutions Pension Fund and others v Van Zyl and others* 2005 (2) SA 302 (SCA) para 47. See also *Gqwetha v Transkei Development Corporation Ltd and others* [2006] 3 All SA 245 (SCA).

¹⁷ *Aurecon South Africa (Pty) Ltd v City of Cape Town* [2015] ZASCA 209; 2016 (2) SA 199 para 17.

[47] Applying the above principles to the present application, I consider that the Department has failed dismally to provide a direct answer to HASA's claims, both in relation to its application for Letters of Support as well as its failure to bring its application for review within the prescribed time limit. The Department has not been able to dispute the fact that since the impugned decision, the parties were involved in extended engagements in an effort to try and reach an amicable solution to the problem. Additionally, the Department has not been able to deny HASA's claims relating to the need to train more nurses, the aging nursing population in KwaZulu-Natal and the impact of the Covid-19 pandemic on the health care system in general and nursing in particular.

[48] Instead of addressing the real issues raised by HASA, all of which I may add are in the public interest, the Department engaged in a finger-pointing exercise that serves no purpose whatsoever. The granting of Letters of Support to HASA's members will not in any way cause any material prejudice, financial or otherwise, to the Department. As HASA has been at pains to point out, both in the papers and in argument, that the relevant HASA members in need of Letters of Support will absorb all the nurses intended to be trained and accordingly the accreditation applications of such members will not in any way affect the Department's human resources plan, nor would the nurses intended to be trained be in need of the Department's placements.

[49] A disappointing aspect of the Department's opposition is that it seems to labour under a belief that the Letters of Support are the be all and end all of the accreditation process. It is clear from a reading of the regulatory framework and the Nursing Council's advisory affidavit that the process is an onerous and lengthy one, one that is really undertaken by the Nursing Council and not by the Department. This being the case, I agree with Mr Mooki, that it does not lie in the mouth of the Department to pontificate on the Nursing Council's role and the process to be followed before it.

[50] Whilst the Department sought to refute the suggestion that its allocation of 100 students to HASA's members for the training programme was nothing more than a knee-jerk reaction to these proceedings, there is, in my view, every indication that it was indeed so for the following reasons:

- (a) First, it knew all along that the Letters of Support that were applied for by HASA was 230 (Netcare 100, Joint Medical Holdings 30 and Life Healthcare 100).
- (b) Second, the 100 nursing students that the Department purported to approve falls woefully short of HASA's members' requirements.
- (c) Third, the reaction of the Department does not resolve the issue in that all that it is authorised by law to do is to offer the requisite Letters of Support in order for HASA's members' applications to be considered by the Nursing Council. As mentioned already, after all, it is only the Nursing Council that is empowered under the regulations to approve and determine the numbers. In my view, HASA has reacted correctly by rejecting what can only be described as an 'unlawful bargain' made in the face of impending litigation.
- (d) Fourth, the Department has in my view, quite disingenuously put up as evidence of its engagements with HASA, minutes in relation to the PHEPSA group. It fails to mention that the only real response it made to HASA was the aforesaid allocation of 100 students.
- (e) Fifth, it is deeply concerning that instead of owning up to its mistakes and taking responsibility for its failure to address the critical issues raised by HASA over such a long period, the Department chooses to sustain this rather reprehensible conduct by pegging its case on technical defences that have no merit whatsoever.

[51] I consider the issues raised by HASA in these proceedings to be matters of great public importance. I am satisfied on the evidence produced by HASA that it was involved in extensive engagements with the Department over a long period of time. HASA's assertions that these engagements were embarked upon by it in order to find an amicable solution to the problem could not be disputed by the Department. Furthermore, HASA has accounted fully for the delay in bringing these proceedings. In all the circumstances, I am of the view that HASA has conducted itself most appropriately throughout. Regrettably, the same cannot be said for the HOD and the Department. Accordingly, I am satisfied that a proper case for condonation has been made and it is in the public interest that such condonation be granted.

Was the Department's conduct unreasonable and irrational?

[52] I consider that the Department must know that without the Letters of Support, HASA members will just not be able to train nurses in various disciplines, and where

there are critical shortages in such disciplines, HASA members will not be able to provide access to the health care services in those identified disciplines. By failing to accede to HASA's ongoing requests for such Letters of Support, it is clear on the papers that the Department is behaving unreasonably. It is also clear that the Department is limiting the public's right to access to health care services in the Province in direct contravention of the provisions of section 27¹⁸ of the Constitution.

[53] The Department is, after all, a government institution and public functionary. As such, it is subject to the applicable provisions of legality and administrative law. The law requires such administrators to behave in a manner that is reasonable, open, fair, transparent and honest. These principles are underscored by the provisions of section 33¹⁹ of the Constitution and the relevant provisions of PAJA.

[54] It is most concerning that the Department's decision, in failing to provide the requisite Letters of Support, was made without any supporting evidence. This exercise of public power or the performance of a function authorised by the empowering provisions set out in the regulatory framework above, is, in my view, so unreasonable

¹⁸ Section 27 provides that:

'27. Health care, food, water and social security.— (1) Everyone has the right to have access to—

(a) health care services, including reproductive health care;
 (b) sufficient food and water; and
 (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.'

¹⁹ Section 33 provides as follows:

'33. Just administrative action.—(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must—

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 (c) promote an efficient administration.'

that no reasonable person could have so exercised the power or performed the function in terms of section 6(2)(h)²⁰ of PAJA and/or in terms of the principle of legality.

[55] It is also obvious that there is no connection and basis for justifying the conclusion reached by the Department for its refusal having regard to the material available to it and its conclusion reached, as set out in terms of section 6(2)(f)²¹ of PAJA and/or the principle of legality.

Should condonation be granted?

Appropriate remedy

[56] The power of a court on review to substitute or vary administrative action or correct a defect arising from such action, depends upon a determination that a case is 'exceptional' in terms of section 8(1)(c)(ii)(aa)²² of PAJA. As explained by the SCA in *Gauteng Gambling Board v Silverstar Development*:²³

'Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that

²⁰ This section provides that:

'(2) A court or tribunal has the power to judicially review an administrative action if—

...

(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.'

²¹ This section provides as follows:

'(2) A court or tribunal has the power to judicially review an administrative action if—

...

(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.'

²² The section provides that:

'(1) The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders—

...

(c) setting aside the administrative action and—

...

(ii) in exceptional cases—
 (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action.'

²³ *Gauteng Gambling Board v Silverstar Development Ltd and others* 2005 (4) SA 67 (SCA) para 28.

a decision to exercise a power should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.’

[57] Hefer AP, in *Commissioner, Competition Commission v General Council of the Bar of South Africa and others*,²⁴ said the following:

‘[14] It is not necessary to deal at length with a reviewing Court’s power to substitute its own decision for that of an administrative authority. Suffice it to say that the remark in *Johannesburg City Council v Administrator, Transvaal, and Another* that ‘the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary’ does not tell the whole story. For, in order to give full effect to the right which everyone has to lawful, reasonable and procedurally fair administrative action, considerations of fairness also enter the picture. There will accordingly be no remittal to the administrative authority in cases where such a step will operate procedurally unfairly to both parties. As Holmes AJA observed in *Livestock and Meat Industries Control Board v Garda*

“ . . . the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and . . . although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides”.

[15] I do not accept a submission for the respondents to the effect that the Court *a quo* was in as good a position as the Commission to grant or refuse exemption and that, for this reason alone, the matter was rightly not remitted. Admittedly, Baxter lists a case where the Court is in as good a position to make the decision as the administrator among those in which it will be justified in correcting the decision by substituting its own. However, the author also says:

“The mere fact that a court considers itself as qualified to take the decision as the administrator does not of itself justify usurping that administrator’s powers . . . ; sometimes, however, fairness to the applicant may demand that the Court should take such a view.” (Footnotes omitted.)

[58] It is so that an administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by virtue of its composition, by experience and by its access to sources of relevant information

²⁴ *Commissioner, Competition Commission v General Council of the Bar of South Africa and others* 2002 (6) SA 606 (SCA) paras 14-15.

and expertise to make the right decision. The court typically has none of these advantages and is required to recognise its own limitations.²⁵ It is for this reason why remittal is almost always the prudent and proper course.²⁶ This is not to say, however, that in every case a remittal is the only option. Section 8(1)(c)(ii)(aa) of PAJA allows a court in exceptional circumstances to make a substitution at its discretion. Furthermore, '[t]hat nothing is to be gained by remittal is also relevant to the issue of fairness'.²⁷

[59] Based on its reasons to increase the nursing population in the Province and the failure on the part of the HOD to address the concerns outlined herein, HASA contends for an order substituting the decision with an order directing the HOD to issue the Letters of Support to HASA's members within 10 days in terms of section 8(1)(c)(ii) of PAJA on the basis that the issuing of such letters does not require a polycentric or technical proficiency that is beyond the remit of this court. HASA has demonstrated, quite adequately in my view, that there is a need for nurses in private health care institutions in KwaZulu-Natal. Such an assessment is based solely on logic and demographics and requires no scientific or other expertise. In the circumstances I see no reason for a remittal.

[60] The unduly long delay on the part of the HOD to make the necessary allocation, persuades me that a substitution is required. I accordingly conclude that this is an exceptional case, one that falls squarely in the public interest. An order in terms of prayers 3 and 4 is thus justified. I have renumbered these paragraphs as well as effected slight amendments thereto in the order made hereunder.

Costs

[61] I see no reason why costs should not follow the result. Furthermore, I consider that the issues raised by HASA are important and complex enough to warrant the employment of two counsel.

²⁵ *Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 SCA paras 47–50.

²⁶ *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) para 42.

²⁷ *Gauteng Gambling Board v Silverstar Development Ltd and others* 2005 (4) SA 67 (SCA) para 40.

Order

[62] In the result, I make the following order:

1. The applicant is granted, in the interest of justice, an extension of time and condonation, in terms of section 9 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') for its failure to institute proceedings within the period prescribed in section 7 of PAJA.
2. The first respondent's failure and/or refusal to issue Letters of Support to the applicant's members is hereby reviewed and set aside.
3. The first respondent's failure and/or refusal to issue Letters of Support to the applicant's members is substituted with an order directing the first respondent to, within ten (10) days from service of this order, issue Letters of Support to the applicant's members in terms of the Regulations Relating to the Accreditation of Institutions as Nursing Education Institutions (GN R173, GG 36234, 8 March 2013) read with the National Department of Health Circular 1 of 2018 issued on 23 November 2018.
4. The first and second respondents are ordered to pay the costs of this application, such costs to include the costs of two (2) counsel.

SEGOBIN J

Appearances

Counsel for the applicant	:	Mr O Mooki SC
Assisted by	:	Mr SL Mohapi
Instructed by	:	Werksmans Attorneys
C/O	:	Shepstone & Wylie Attorneys
Ref.	:	Mr N Kirby/Ms Z Mthiyane
Counsel for the 1 st and 2 nd respondents	:	Ms N Bhagwandeem
Instructed by	:	Cassim Rahman Attorneys
C/O	:	The State Attorney (KZN)
Ref.	:	Mr N Ramlall/vp/24/00175/2021/H/P23
Counsel for the 3 rd respondent	:	Ms T Antulay
Instructed by	:	Maponya Attorneys
C/O	:	Viv Green Attorneys
Ref.	:	Mrs T Antulay