THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 574/2022

In the matter between:

NATIONAL STUDENT FINANCIAL AID SCHEME	**APPELLANT**
and	
SAMANTHA LETTIE MOLOI	**FIRST RESPONDENT**
LINDA MAKHAZA	**SECOND RESPONDENT**
KEABETSWE MOTAUNG	**THIRD RESPONDENT**
THE UNIVERSITY OF THE WITWATERSRAND	**FOURTH RESPONDENT**
THE MINISTER OF THE DEPARTMENT OF HIGHER EDUCATION AND TRAINING	**FIFTH RESPONDENT**

Neutral citation:	*National Student Financial Aid Scheme v Moloi and Others* (574/2022) [2024] ZASCA 66 (03 May 2024)
Coram:	DAMBUZA ADP and HUGHES, MABINDLA-BOQWANA, GOOSEN and MOLEFE JJA
Heard:	9 May 2023
Delivered:	3 May 2024

Summary: Administrative Law – determination of eligibility criteria for a university bursary scheme by the National Student Financial Aid Scheme (NSFAS) in consultation with the Minister of the Department of Higher Education in terms of s 4*(b)* of the National Financial Aid Scheme Act No 56 of 1999 – exclusion of second qualification (postgraduate) Bachelor of Laws (LLB) degree – decision to exclude the degree constituted policy formulation and therefore executive action – decision rationally connected to the purpose for which power was given – consultation with Universities South Africa and the South African Union of Students satisfied the procedural fairness requirement – legitimate expectation for funding under the NSFAS guidelines not established.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Kollapen J, sitting as court of first instance):

1 The appeal is upheld with no order as to costs.

2 The order of the high court is set aside and replaced with the following:

'The application is dismissed with no order as to costs'.

JUDGMENT

Dambuza ADP (Hughes, Mabindla-Boqwana, Goosen and Molefe JJA concurring)

Introduction

[1] The first appellant, the National Student Financial Aid Scheme (NSFAS) appeals against an order of the Gauteng Division of the High Court, Pretoria (high court) in terms of which its decision to discontinue the funding of the Bachelor of Laws (LLB) degree, as a second university qualification, was reviewed and set aside. The appeal is with the leave of this Court.

The facts

[2] NSFAS is the principal body charged with the function of management of a bursary scheme established in terms of the National Student Financial Aid Scheme Act 56 of 1999 (the NSFAS Act or the Act). It is a juristic person established in terms of s 2 of the Act. Its objective is 'to provide financial aid to eligible students who meet the criteria for admission to a higher education

programme'. It manages the financial aid scheme in terms of guidelines issued by it, in consultation with the second appellant, the Minister of National Department of Higher Education and Training (the Minister) in terms of s 4*(b)* of the Act. The guidelines are updated and published annually. They are approved by the national Cabinet after inputs from the national government departments which are vested with policy formulation and budget allocation for students.

[3] The first edition of the guidelines was implemented in 2019. Although prior to 2019 NSFAS facilitated student funding, the bursary scheme under consideration was only introduced in 2018. The Minister supervises the administration of the scheme.

[4] On 11 March 2021, the Minister released a media statement in which he announced changes to the 2020 guidelines for the bursary scheme. The changes were driven by a shortfall in the budget allocated to the bursary scheme for the 2021 academic year. The result was that NSFAS was not able to commit to funding students in the same manner as before. It did not have a budget to support all its commitments. The Minister explained in the media statement that NSFAS could only commit to funding all returning beneficiaries of the scheme. It was unable to confirm funding for new university students. He advised that the guidelines for the 2021 university funding criteria would be published accordingly.

[5] The Minister gave a number of reasons for the budget shortfall. Most significant was the COVID-19 pandemic. During the lockdown period, the scheme had to continue paying student allowances even when universities were closed. The academic year had to be extended without allocation of additional funds for the extended academic period. There was also an increase in the number of students qualifying for funding as a result of job losses by their previous

funders because of the COVID-19 pandemic. On the other hand, prior to the onset of the pandemic, National Treasury had started to implement budget cuts across government departments as a result of relentless deterioration in the economy.

[6] On 11 March 2021, the Minister released a further media statement in which he advised that Cabinet had approved reprioritisation of the Department of Higher Education and Training (DHET) budget to ensure that 'all deserving – NSFAS qualifying students' would receive funding. The good news was that, in addition to funding continuing students who met the qualifying criteria, NSFAS would also be funding new students who qualified for the bursary scheme. The Minister emphasised that NSFAS funding was primarily provided for students registered for a first undergraduate qualification, although in the past the scheme had been extended to 'some limited second qualifications in key areas'. In 2021 there would be no funding for new entrants in second or postgraduate qualifications, as these qualifications were the responsibility of the National Research Foundation. However, students that were already registered (continuing) for postgraduate degrees would still be funded if they met the qualifying criteria.

[7] The 2021 guidelines were published on 28 March 2021. They were effective from 26 March 2021. They amended the 2020 guidelines in certain respects, particularly with regard to criteria for eligibility for funding under the scheme. The effect of the amendments was that for 2021 no funding would be allowed for second or postgraduate university qualifications.

[8] The first to third respondents, who were studying at the University of the Witwatersrand (Wits University or Wits) at the time, brought an application before the high court, challenging the defunding of the postgraduate LLB (pursued as a second qualification) under the 2021 guidelines. There were two

pathways by which to attain an LLB degree at Wits University at the time of institution of the proceedings. The first was a two-year postgraduate stream, which was available on completion of a BA (Law) Degree. The second was a three-year postgraduate stream, which was available on completion of any other undergraduate degree. Wits University did not offer the third stream LLB which was available at other universities, namely, the four-year LLB which was on offer to matriculants as an undergraduate programme.[1]

[9] The first to third respondents were all enrolled for postgraduate LLB at Wits University. Prior to registering for the two-year LLB programme, the first respondent, Ms Samantha Moloi, had been studying for a BA (Law) degree at the same University, from 2018. After completing the BA (Law) degree, in 2020, she proceeded to register for the two-year LLB degree at the start of the 2021 academic year. She did so without applying to NSFAS for funding for the LLB degree. She believed, as she stated in her founding affidavit, that she would be automatically funded by the scheme, given that, that was the only avenue through which to attain LLB at Wits University at the time. Her belief stemmed from the 2020 guidelines in terms of which the LLB degree was one of the exceptions from the rule excluding postgraduate qualifications from NSFAS funding. She only learnt in March 2021 that the postgraduate LLB had been defunded.

[10] The third respondent Mr Keabetswe Motaung was in the same position as Ms Moloi, except that he was in the first year of the three-year programme when the 2021 guidelines were published. The second respondent Ms Linda Makhaza was in the second year of the three-year LLB studies in 2021. Despite having been approved for NSFAS funding with effect from 2020 she was advised by the

[1] It appears that the availability of the four year LLB Degree changed annually.

University that NSFAS was not funding her for 2021, and that she would have to refund all the fees that had been paid by the scheme on her behalf, from 2020.

[11] The three respondents contended that they had a legitimate expectation that NSFAS would fund their LLB studies, as the degree was a 'professional requirement' for employment as lawyers. They argued that, if it were not for the 2021 guidelines, they would all be eligible for NSFAS funding as they were under the 2020 guidelines; they had registered for the LLB degree on the basis of the guidelines that were in place at the start of the 2021 academic year. They sought an order that the decisions by the Minister and NSFAS, reflected in the media statements and the 2021 guidelines, be reviewed and set aside, in as far as they provided for the defunding of postgraduate qualifications.

[12] The legal basis for the respondents' challenge was two pronged. The application was brought under s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and under the principle of legality. Under PAJA they contended that the approval of the revised eligibility criteria by the NSFAS Board on 11 March 2021, and the Minister's concurrence in those criteria on 26 March 2021, in terms of s 4*(b)* of the NSFAS Act, were administrative actions. They maintained that the Minister and the NSFAS Board: (a) failed to act in a procedurally fair manner in that they never afforded the affected students an opportunity to make representations prior to the decision being made; (b) made the decision for an ulterior motive; (c) failed to consider relevant factors; (d) made decisions which were not rationally connected to the purpose for which power was given under s 4*(b)* of the Act; and (e) made decisions which were so unreasonable that no reasonable person could have made them.

The contested guidelines (criteria for eligibility for funding under the NSFAS bursary scheme)

[13] The structure and content of the annual guidelines was more or less the same every year. In each year, changes were made to a limited number of clauses. In terms of the general provisions, the scheme afforded financial support to academically deserving students from poor and working-class backgrounds, to obtain their first undergraduate qualification. A student who was a recipient of a social grant from the South African Social Security Agency (SASSA) automatically met the financial criteria and was eligible for a bursary. Once a student applied for funding to NSFAS, they automatically accepted the terms and conditions of the NSFAS Bursary Agreement (NBA). A student would only receive funding once they met all the criteria. Approved funded programmes at universities were all undergraduate 'whole qualifications'[2]. Postgraduate qualifications were generally not funded.

[14] In addition to the general rule excluding postgraduate studies from funding, each edition of the guidelines contained exceptions to the exclusion. The 2020 edition excluded from the general rule, the postgraduate Certificate in Education (PGCE), the Postgraduate Diploma in Accounting, and the LLB degree. Certain Bachelor of Technology (BTech) programmes that are required for registration with a professional body as a chartered accountant also formed part of the exceptions. In 2021, other than students completing postgraduate qualifications, the only other exception was students who had obtained a Higher Certificate and were to register for a Diploma or Degree'.

[2] In terms of s 1 (definitions section) of the National Qualifications Framework Act, 2008, a "part qualification" means an assessed unit of learning that is registered as part of a qualification. A "qualification" means a registered national qualification. Other than these definitions Clause 6.1.1 of the 2020 guidelines (see para 15 below) defines 'whole qualifications' as degrees, diplomas, and higher certificate programmes offered by public universities.

[15] To illustrate the amendments made to the 2020 guidelines, I first set out the relevant clauses in those guidelines. Clauses 5 and 6 of the 2020 guidelines regulated the '[q]ualifying criteria for the DHET bursary scheme'. In the relevant parts they provided that:

'5.7 A student can only be funded for one qualification at one institution at any one time.

5.11 Students who have already studied at a university or obtained a prior university qualification do not qualify as FTEN [First Time Entry] students even if they are entering the first year of a new programme. Students starting a university qualification for the first time, but who have already achieved a TVET qualification may qualify as university FTEN students.[3]

5.12 In general a university student is eligible for funding for only one undergraduate qualification. There are a few exceptions where a second undergraduate qualification would be supported, such as those students who have obtained a Higher Certificate and go on to a Diploma or a Degree.

6. Scope of the DHET Bursary for university students

6.1 Approved funded programmes for university students

6.1.1 Approved funded programmes at universities are all undergraduate whole qualifications, ie degree, diploma or higher certificate programmes, offered by a public university.

6.1.2 Additional courses that are not core requirements of a whole qualification are not funded. Occasional programmes are not funded.

6.1.3 The only cases where a second qualification is funded are where it is a professional requirement for employment. The Postgraduate Certificate in Education (PGCE) is funded. In addition certain Bachelor of Technology (BTech) programmes are funded where there is a professional requirement for completion – a separate list of funded BTech programmes is provided.

6.1.4 In general postgraduate qualifications, including Postgraduate diplomas, honours degrees, masters and PhD degrees are not funded. The only postgraduate qualifications funded are Postgraduate Diploma in Accounting [(certain PGDA)] and LLB as indicated in the NSFAS funded qualifications list.'

[16] In the 2021 guidelines the respective clauses read as follows:

[3] Clauses 5 and 6 of the 2020 guidelines.

'5.7 NSFAS may re-assess the financial eligibility of any students at any point whilst funded by NSFAS and reserves the right to withdraw funding if the student no longer meets the financial eligibility criteria.

. . .

5.13 Students who have already studied at a university or obtained a prior university qualification do not qualify as FTEN (first time entry) students even if they are entering the first year of a new programme. Students starting a university qualification for the first time, but who have already achieved a TVET qualification may qualify as a university FTEN student.

5.14 A university student is eligible for funding for only one undergraduate qualification. There is one exception which is those students who have obtained a Higher Certificate and go on to a Diploma or Degree'.

. . .

6. Scope of the DHET Bursary for university students

6.1 Approved funded programmes for university students

Clauses 6.1 and 6.2 read the same as in the 2020 guidelines. Clause 6.1.3 provided that:

'*Postgraduate qualifications, including postgraduate certificates, postgraduate diplomas, honours degrees, Masters and PhD degrees are not funded, except in the case of continuing academically eligible students from 2010 completing their qualifications*'. (Emphasis added)

There was no clause 6.1.4 in the 2021 guidelines'.

[17] The effect of clause 6.1.3 of the 2021 guidelines was to defund all postgraduate qualifications, including those that had been exceptions to the disqualifying rule under 6.1.3 and 6.1.4 of the 2020 guidelines. This affected the three student respondents. In addition, Ms Makhaza was also disqualified under the provision for re-assessment of financial eligibility, clause 5.7 of the 2021 guidelines.

The high court judgment

[18] The high court traversed the historical context of the two, three and four year LLB programmes, as set out in the 2014 Higher Education Qualifications

Sub-Framework Policy (HEQSF) [4] and the 2018 Report on the National Review of LLB Programmes in South Africa (2018 report). It highlighted the importance of locating the LLB programme 'in its proper context', and found that to consider it as a postgraduate qualification, as NSFAS and the Minister did in clause 6.1.3 of the 2021 guidelines, ignored the historical imbalances in our education system. The reasoning ignored the need to ensure that those who leave university do so with a professional or career qualification, the court found. Furthermore, the use of 'qualification' was an irrational 'narrowing of focus' which detracted from the status of the LLB 'programme' in terms of the grading of the HEQSF.

[19] The high court, also found that the eligibility criteria (and guidelines) constituted implementation of policy because they were 'the nuts and bolts of the funding framework', which the Act contemplated. The decision to approve them was an administrative decision. The Minister had an obligation to consult prospective LLB students as a group of persons who were likely to be affected by the amendments to the 2020 guidelines. Consultation with Universities South Africa[5] (USAF) and South African Union of Students (SAUS) organisations fell short of compliance with the requirement of procedural fairness under s 6 of PAJA. Consequently, the decision to exclude the postgraduate LLB programme from funding was irrational and inconsistent with the objectives of NSFAS, to support deserving students.

[4] A 'single qualifications framework' policy document issued by the Council on Higher Education (CHE) in terms of the National Qualifications Act 2008 (NQF) 'for the establishment of a single qualifications framework for higher education to facilitate the development of a single national co-ordinated higher education system . . . to enable the articulation of programmes and the transfer of students between programmes and higher education institutions as envisaged in White Paper 3, A programme for the transformation of Higher Education (1997)'. See Government Notice No 36116 published dated 17 October 2014.

[5] An umbrella body of the 26 public universities in South Africa. Each institution pays an annual membership fee. The cumulative fees fund operations of the institution. The Vice-Chancellors, as accounting officers of the respective individual institutions constitute the institution's Board of Directors. https://usaf.ac.za as at 27 April 2024.

On appeal

[20] NSFAS contended, as a starting point, that the high court misdirected itself in relation to the factual basis of its decision. None of the student respondents met the eligibility criteria for further financial aid from it, NSFAS contended. Furthermore, the high court misconstrued the premise for the development of the eligibility criteria and guidelines, which was statutory policy-formulation of the same character as the input and acquiescence to the guidelines by National Treasury, the Minister of Finance and the National Cabinet. All of them were exercising their executive powers when approving the budget reprioritisation and the eligibility criteria. Consequently, the provisions of PAJA were not applicable to their decisions, because the determination of the eligibility criteria and funding allocation was a polycentric exercise of executive power. The Minister also contended that the order of the high court was an encroachment on the executive powers and functions of the national cabinet, and on the NSFAS and Treasury policy formulation and budget allocation powers.

[21] The appellants highlighted that Ms Moloi was not registered for LLB when the 2021 exclusion came into effect. Neither had she applied for NSFAS funding for her 2021 studies. Her allegation about automatic funding was placed in dispute.[6] Similarly, Mr Motaung did not meet the criteria for funding under the 2021 guidelines.

[22] They argued that Ms Makhaza, already a holder of a National Diploma in Public Administration and an Honours degree in that discipline, also did not qualify for NSFAS funding under the 2021 guidelines. She was not a first-time entry student. Her household income was higher than the threshold required for

[6] It is not necessary to make a determination of the nature envisaged under the *Plascon-Evans* rule or determined the correctness of the factual premise on which the high court made its findings in this case because, the main issue is the constitutional validity of the eligibility criteria and the relevant portions in the 2021 guidelines.

eligibility under the scheme. Consequently, she did not meet the NSFAS financial eligibility and approved study programme criteria. Further, she had applied to register for a Master of Arts in development studies at the University of Zululand and had submitted her dissertation proposal for that degree. She had not been funded by NSFAS when she studied for the first two qualifications. There was therefore no basis for legitimate expectation for funding for an LLB degree.

Discussion

Mootness

[23] At the hearing of the appeal, submissions were made on whether an order granted by this Court would have a practical effect because the 2022 and 2023 guidelines had since been issued. Although all the parties agreed that further guidelines had since been issued, there was disagreement on whether an order of this Court on this appeal would be of any practical effect. The order granted by the high court was in the following terms:

'1 NSFAS decision and the Minister's concurrent decision, taken in terms of section 4(b) of the NSFAS Act, to discontinue NSFAS funding of the second undergraduate and certain postgraduate qualifications are reviewed and set aside only to the extent that they relate to the LLB programmes and

2 NSFAS and DHET's subsequent decision to discontinue the funding of second undergraduate degrees and certain postgraduate qualifications are reviewed and set aside only to the extent that they relate to the LLB programmes reflected in the amendment in the 2021 guidelines.'[7]

[24] Paragraph 1 of the order appears to be a self-standing order of general application. It is not necessarily limited to the eligibility criteria decision as it appears in the 2021 guidelines. In this sense, that part of the order is not time bound. It may impact on guidelines that the Minister and NSFAS might determine in the future. I do not, however, make a firm finding in this regard, but recognise

[7] There was also an order of costs in favour of the respondents.

the uncertainty that might arise. In the circumstances, I agree with the submission on behalf of the Minister that the interests of justice would best be served by determination of the appeal.

An exercise of executive power or an administrative action?

[25] Given that our courts have affirmed the requirement of procedural fairness in respect of the exercise of public power (with a few exceptions) it seems to me that it may not be strictly necessary to determine whether the decision complained of in this case is an executive or administrative action. This is so because the main basis for the challenge to the eligibility criteria was failure to afford the respondents opportunity to make representations prior to determining the criteria. Moreover, the reasoning of the high court seemed to straddle both the legality and PAJA review grounds. Nevertheless, for clarity and completeness, I explain why, in my view, the determination of the 2021 eligibility criteria was an executive action. In doing so I refer to the determination of the eligibility criteria by NSFAS and the Minister's acquiescence thereto, including their incorporation in the guidelines as one decision, in alignment with the provisions of s 4*(b)* the Act – the source of the power exercised.

[26] The courts have cautioned that the distinction between an executive and administrative action can be elusive.[8] In *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* [9] this Court explained the challenge as follows:

'What constitutes administrative action – the exercise of the administrative powers of the state – has always eluded complete definition. The cumbersome[10] definition of that term in PAJA

[8] *Minister of Defence and Military Veterans v Motau and Others* 2014 ZACC 18; 2014 (5) SA (CC); 2014 (8) BCLR 930 (CC).
[9] *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* [2005] ZASCA 43; [2005] 3 All SA 33 (SCA); 2005 (6) SA 313 (SCA); 2005 (10) BCLR 93 (SCA) (13 May 2005).
[10] The definition of 'administrative action' in s 1 of PAJA is made particularly cumbersome by its incorporation of a number of terms that are themselves defined and often overlap.

serves not so much to attribute meaning to the term as to limit its meaning by surrounding it within a palisade of qualifications'.

[27] This Court then suggested the following approach to determining whether a particular act is an administrative action:

'[24] Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so. Features of administrative action (conduct of 'an administrative nature') that have emerged from the construction that has been placed on s 33 of the Constitution are that it does not extend to the exercise of legislative powers by deliberative elected legislative bodies, nor to the ordinary exercise of judicial powers, nor to the formulation of policy or the initiation of legislation by the executive, nor to the exercise of original powers conferred upon the President as head of state. Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.

[25] The law reports are replete with examples of conduct of that kind. But the exercise of public power generally occurs as a continuum with no bright line marking the transition from one form to another and it is in that transitional area in particular that

''[d]ifficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of s 33''.

In making that determination

'[a] series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33.'[11] (footnotes omitted)

[11] Greys Marine fn 7 paras 24 and 25.

[28] Section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) defines an administrative action as:

'(i) . . . any decision taken, or failure to take a decision, by-

(a) An organ of state, when-

(i) Exercising a power in terms of the Constitution or a provincial constitution;

(ii) Exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public functioning terms of an empowering provision,

(c) Which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-

(d) *(aa) the executive powers or functions of the National Executive*, including the powers or functions referred to in sections 79 (1) and (4), 84 (2)*(a), (b), (c), (d), (f), (g), (h), (i)* and *(k)*, 85 (2) *(b), (c), (d)* and *(e)*, 91 (2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution . . .' . (Emphasis added)

The exclusion of executive powers and functions of the National Executive under ss (1)*(d)* is of particular significance in this instance. It immediately becomes apparent that the decision under consideration was an exercise of executive powers and therefore did not fall under PAJA.

[29] The submission on behalf of NSFAS and the Minister, that the impugned decision was an exercise of executive authority, finds additional support in the provisions of s 4(*b*) of the Act and in the objectives of the guidelines. The objectives of the guidelines were: (1) to provide a framework for the implementation of the bursary scheme for 2021, and to delineate the roles and responsibilities of all implementing partners and bursary recipients; (2) to outline the scope and detail of the scheme, and the processes necessary to give effect to the student funding provided by NSFAS to deserving students in university education; and (3) to outline high-level rules applicable to the bursary programme.

[30] In providing the framework for implementation of the bursary scheme, the guidelines were regulatory in nature. They constituted the organisational structure, a protocol or a set of rules that would guide and control the implementation and administration of the bursary scheme. The determination of the guidelines, including the eligibility criteria, was not a day-to-day, bureaucratic implementation of policy or legislation.

[31] It was submitted on behalf of the student respondents that the determination of the eligibility criteria constituted a separate decision from the determination of the guidelines. The proper approach, however, is to consider the eligibility criteria within the scheme of the guidelines, comprehensively. An examination of the eligibility criteria in isolation is inconsistent with the established approach to interpretation, analysis and comprehension of legal documents in this country.[12] For example, in determining the qualifying criteria for eligibility for funding, in clause 5 the guidelines set the parameters with respect to citizenship of potential beneficiaries; financial thresholds to be met (financial qualification criteria); allowances to be given to different categories of students, the scope of university qualifications to be funded; and the role and responsibilities of universities in the administration of the scheme. The determination of the criteria is a specified function of NSFAS (in consultation with the Minister), under s 4*(b)* of the Act. Under s 4, NSFAS performs the following functions:

'**Functions of NSFAS. -** The functions of NSFAS are-

(a) to allocate funds for loans and bursaries to eligible students;

(b) to develop criteria and conditions for the granting of loans and bursaries to eligible students in consultation with the Minister;

(c) to raise funds as contemplated in section 14 (1);

[12] See for example, *Airports Company South Africa v Big Five Duty Free (Pty) Limits and Others* [2018] ZACC 33; 2019 (2) BCLR 165 (CC); 2019 (5) SA 1 (CC).

(d) to recover loans;

(e) to maintain and analyse a database and undertake research for the better utilisation of financial resources;

(f) to advise the Minister on matters relating to student financial aid; and

(g) to perform other functions assigned to it by this Act or by the Minister.'

[32] Indeed, under s 4 some of the functions performed by the NSFAS entail what may be regarded as bureaucratic day-to-day administration of the bursary scheme. These include allocation of funds for loans and bursaries to eligible students, recovery of loans, and maintenance of a database. These functions are allocated to NSFAS alone. However, the function that is allocated under s 4*(b)* is executed together with the Minister. The exercise of the power conferred under s 4*(b)* requires a wide discretion. It entails consultations with other government departments, more particularly, the Minister of Finance who controls the government budget. Together with National Treasury, NSFAS considers and weighs the state of government financial circumstances at a particular time against the objective of assisting students from poor and working class families to attain a university qualification. A policy determination is then made on the range of beneficiaries to whom the bursary will be offered in given circumstances. In this instance, following adverse economic developments, the budget allocation to the Department had to be re-prioritised, and Cabinet had to consider and approve these changes. These steps are not mere administration of legislation.

[33] The respondents' contention that the exercise of power only entailed limited implementation of developed criteria and conditions for the granting of loans and bursaries is untenable. The balancing process undertaken in determining the regulatory structure and content of the guidelines demonstrates that the exercise of power was not mere administrative implementation of legislation.

[34] Similarly untenable is the argument that consideration of budgetary constraints must be excluded from the determination of the nature of the power exercised in this instance, because it falls under s 14(2)*(c)* of the Act and thus outside the realm of s 4*(b)*. Determination of use of allocated budget was a crucial aspect of the impugned decision. In fact, budget consideration is always a component of policy determination. And, as the Constitutional Court put it in *National Treasury and Others v Urban Tolling Alliance and Others (Road Freight Association as applicant for leave to intervene)(OUTA)*: [13]

'[67] . . . the duty to determine how public resources are to be drawn upon and re-ordered lies in the heartland of Executive Government function and domain. What is more, absent any proof of unlawfulness or fraud or corruption, the power and prerogative to formulate and implement policy on how to finance public projects resides in the exclusive domain of the National Executive subject to budgetary appropriations by Parliament.

[68] Another consideration is that the collection and ordering of public resources inevitably calls for policy-laden poly-centric decision making. Courts are not always well suited to make decisions of that order'.

[35] Consequently, on a comprehensive consideration of the nature of the power conferred in terms of s 4*(b)* of the NSFAS Act, the impugned decision was an exercise of executive power.

Rationality

[36] It is a trite principle of Administrative Law that public power must be sourced in the law and the Constitution.[14] Courts must review the exercise of public power to ensure compliance with this principle. The principle of legality

[13] *National Treasury and Others v Urban Tolling Alliance and Others (Road Freight Association as applicant for leave to intervene)* 2012 (11) BCLR 1148 (CC).

[14] *Masethla v The President of the Republic of South Africa* 2008 (1) BCLR 1 (CC); (2008) (1) SA 566 (CC) para 77-81.

requires that exercise of executive power must be rationally related to the purpose for which it is conferred.

[37] Much of the respondents' case, in contending that the decision of NSFAS and the Minister was irrational, revolved around the use of the word 'qualification' with reference to the LLB programme in the impugned guidelines, as opposed to a study 'programme'. In terms of the HEQSF 'qualification' means, 'the formal recognition and certification of learning achievement awarded by a credited institution'. '[P]rogramme' means 'the purposeful and structured set of learning experiences that lead to a qualification'. In terms of s 1 of the National Qualifications Framework Act, 2008, 'qualification' means a registered national qualification'.

[38] As stated, the high court found that the 'narrowing of focus' and reference, in the 2021 guidelines, to LLB as a 'qualification' was procedurally and 'substantively' irrational. Furthermore, there was no rational justification for permitting financial support for the undergraduate LLB study programme and none for postgraduate degrees. The high court also considered irrational the defunding of LLB in the context of disadvantaged students who did not meet the four-year (mainstream LLB) admission requirements, especially when Wits University did not offer the four-year undergraduate LLB. The court was of the view that the failure to fund the second qualification LLB, undermined the objective of bridging the socio-economic gap which underpinned the decision to promote attainment of an LLB degree by previously disadvantaged students.

[39] First, it is not only in the impugned guidelines that the LLB degree was referred to as a qualification. It was similarly referred to in the 2020 guidelines. Furthermore the reference to postgraduate 'qualifications' in the 2021 guidelines, was not only in respect of the LLB degree. In clause 6.1.3, the term was used in

respect of 'postgraduate certificates, postgraduate diplomas, honours degrees, masters, and PhD degrees . . .'. In my view, the term was chosen for its inclusive quality, to refer, collectively, to different types of postgraduate qualifications.

[40] There was no dispute about the increased need for funding which NSFAS and the Minister had to provide for in 2021. The distinction between the two and three-year LLB programmes, on one hand, and the four-year LLB, on the other, was obviously based on the fact that the former were second qualifications whereas the latter was a first undergraduate higher education qualification. In this context, the 2021 guidelines were adopted for a legitimate government purpose, which was the funding of the first undergraduate degree for each student, given the prevailing financial constraints, to enable NSFAS to fund as many beneficiaries as possible. The fact that this Court or a different member of the executive might have dealt differently with the challenge of decreased budget is not a valid basis to interfere with the revised eligibility criteria. In *Albutt v Centre for the Study of Violence and Reconciliation*[15] the Constitutional Court held that:

'Courts may not interfere with means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if objectively speaking they are not, they fall short of the standard demanded by the Constitution'.

Was the exclusion of the second degree LLB unreasonable?

[41] Reasonableness is a proportionality assessment as envisaged in s 36 of the Constitution that provides for limitation of rights in terms of a law of general application, to the extent that the limitation is reasonable. Our courts have

[15] Ibid para 51.

preferred the rationality test over reasonableness, as a measure for legality of executive action. In *Soobramoney v Minister of Health (Kwazulu-Natal)*[16] the Constitutional Court rejected Mr Soobramoney's claim for an order that the state render to him life-saving dialysis on the basis that the right to emergency medical treatment was not available in respect of chronic medical conditions, even if they were life threatening. Within the context of the right of access to healthcare services guaranteed in s 27 of the Constitution, and the challenge of an under-resourced healthcare system, the Court found that the requirements set by the State for eligibility free renal dialysis medical treatment had not been shown to be unreasonable.[17]

[42] Two years later, in *New National Party v Government of the Republic of South Africa*[18] the Constitutional Court clarified its approach as follows:

'Decisions as to reasonableness of statutory provision are ordinarily matters within the exclusive competence of Parliament. This is a fundamental doctrine of separation of powers and to the role of Courts in a democratic society. Courts do not review provisions of Acts of Parliament on the grounds that they are reasonable. They will do so only if they are satisfied that the legislation is not rationally connected to a legitimate government purpose. In such circumstances the review is competent because the legislation is arbitrary . . . Reasonableness will only become relevant if it is established that the scheme, though rational, has the effect of infringing the right of citizens to vote. The question would then arise whether limitation is justifiable under the provisions of s 36 of the Constitution and it is only as part of this s 36 inquiry that reasonableness becomes relevant. It follows that it is only at that stage that the question of reasonableness has to be considered.'

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[16] *Soobramoney v Minister of Health* (*KwaZulu-Natal)* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR1696.

[17] The requirements were that a patient be curable within a short period of time and that s/he be eligible for a kidney transplant. Mr Soobramoney's kidneys had failed and his condition had been diagnosed as irreversible

[18] *New National Party v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) at para 24.

[43] However, in *The Government of the Republic of South Africa v Grootboom*[19] the Constitutional Court was more forthright in its application of reasonableness as a test for rationality of executive action. The Court held that in determining whether the State's housing programme was reasonable, a court had to consider whether the programme was capable of facilitating the right of access to adequate housing, and whether it was reasonably implemented. The Court held that reasonableness had to be understood within the context of the Bill of Rights, and the requirement that everyone be treated with care, concern and dignity. The Court found that because the State's housing programme made no provision for people in Mrs Grootboom's position of homelessness and extreme desperation, it was unreasonable and unconstitutional.

[44] In this case, the language of s 29(1)*(b)* of the Constitution incorporates reasonableness as a measure for adequacy of the action taken by the State to make further education accessible. The section provides that 'everyone has the right to further education, which the State, *through reasonable measures*, must make progressively available and accessible'. (Emphasis added).

[45] Accordingly, in this case, an assessment of the reasonableness of the impugned executive action is required for two independent reasons. First, because of the limitation of the constitutionally guaranteed right to further education, and secondly, because of the express reasonableness standard set in s 29 of the Constitution. The reasonableness inquiry is determined in the context described in the evidence. I have already referred to it. In addition, as directed in clause 1.1 of the 2021 guidelines NSFAS considered that the aim of providing the bursary funding was to assist poor and working-class students across the board. Within that context the amendments to the eligibility criteria had to maintain the general

[19] *The Government of the Republic of South Africa v Grootboom;* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) 1169 (CC).

approach that funding was for first-time entry students. Funding had to be maintained despite the challenges resulting from the ongoing effects of the COVID-19 pandemic, the pre-existing decline in the state of the country's economy, and the increased number of impecunious students. Within this context, it seems to me that the extent of the limitation of the s 29(1) *(b)* constitutional right, although seemingly harsh on those affected, was reasonable. The prioritisation of first time entry students at the expense of those who required a second qualification was not a disproportionate measure.

Legitimate expectation

[46] The respondents argue that the 2020 LLB exception was not the first one. Before the introduction of the 2019 guidelines, LLB was funded by NSFAS. They refer to responses given by NSFAS to frequently asked questions (FAQ) which were published in 2018. The published document indicated that 'NSFAS only *accepts* postgraduate applications for the following postgraduate qualifications . . . LLB'. (Emphasis supplied). The contention is that when the respondents commenced their BA degrees NSFAS was funding LLB postgraduate degrees, hence the legitimate expectation on their part.

[47] The doctrine of legitimate expectation usually arises in relation to procedural fairness. The principle gained recognition in our law in *Administrator, Transvaal and Others v Traub and Others*[20] where Corbett CJ held that a legitimate expectation may arise where an express promise had been made by a relevant authority or a where regular (well-established) practice had arisen which a claimant reasonably expected to continue. The test is objective and determination of whether an expectation, in the legal sense, exists, is made on a case-by-case basis.

[20] *Administrator of Transvaal and Others v Traub and Others* (4/88) [1989] ZASCA 90; [1989] 4 All SA 924 (A).

[48] Although limited instances of substantive expectation have been recognised in this country,[21] generally the courts are reluctant to afford such relief, being wary of fettering discretion of state authorities.[22] This case is a good example of why caution is required. In circumstances where NSFAS and the Minister had to ensure that the promise of a higher education qualification remains a sustained reality to an increased number of students, despite depleted financial resources, substantive expectation would be an improper consideration. Undue interference with powers assigned to the executive as an incident of legitimate government business must be avoided. As much as financial hardships which confront students pursuing second qualifications was real and the negative effects had to be understood, the courts could not tamper with the discretion of the executive to prioritise first time entry to higher education institutions, unless such discretion was exercises in a manner that offended the law and the Constitution.

[49] In any event, I am not satisfied that the respondents demonstrated that there was a well-established practice of funding of the second degree LLB programme. Given that the response to the FAQs was omitted from the 2019 guidelines it cannot be said that NSFAS made an unambiguous representation that the respondents could rely on, or that a well-established practice of funding the postgraduate LLB was established. The response to the FAQs only went as far as to indicate that applications for LLB funding are accepted. There was no specification as to whether this was in reference to the undergraduate or postgraduate LLB. Indeed it could be argued that the language of clause 6.1.4 in the 2020 guidelines did not stipulate that the funding of the postgraduate LLB

[21] See for example *Quinella Trading (Pty) Ltd v Minister of Rural Development* 2020 (4) SA 215 (T)*; Ampofo v MEC for Education, Arts Culture Sports and Recreation, Northern Province* 2002 (2) SA 215 (T).
[22] Hoexter, *Administrative Law*, 3rd ed, at 427.

was a special, once–off allowance. However, the clause had to be considered together with the repeated principle in the guidelines, that generally, the bursary scheme was aimed at assisting first time entry students.

Procedural fairness

[50] Section 33 of the Constitution guarantees to everyone a right of administrative action that is lawful, reasonable, and procedurally fair. Executive decisions are excluded from review under PAJA. Nevertheless, our courts recognise that exercise of executive authority must comply with the law and the Constitution. Consequently, although in *Masethla*[23] the Constitutional Court held that procedural fairness is not a requirement for the exercise of executive power. the Court has now refined its articulation of the principle. In *Albutt* the Constitutional Court recognised the right of victims of criminal conduct to be heard in Presidential pardon proceedings held under s 84 (2) (j) of the Constitution.

[51] In essence, the Constitutional Court in *Albutt* considered that when the President announced the special dispensation process he had outlined its objectives, the criteria, and the principles that would guide the decision making process.[24] It considered that the process outlined by the President to Parliament recognised that victim participation in line with the principles and the values of the Truth and Reconciliation Commission was the only rational means to contribute towards national reconciliation and unity. Consequently, the subsequent disregard of such principle without any explanation was irrational. However, the Constitutional Court emphasised that its findings in *Albutt* were confined to the circumstances of that case; particularly the fact that the crimes in question were committed with a political motive and the purpose of the pardons

[23] See fn 14 above.
[24] At 55. The objectives in that case included nation-building and national reconciliation.

was to promote national reconciliation and unity. It emphasised that its judgment in that case did not decide the question whether victims of other categories of applications for pardon are entitled to be heard.

[52] The case-by-case approach to determination of compliance with the procedural fairness requirement in executive action, and the nature and extent of procedures adopted by public administrators has continued in recent judgments of both this Court and the Constitutional Court. In *Motau*,[25] the Constitutional Court found that the Minister had been obliged to follow due process in terminating the respondents' positions on the Board of Armscor, as required by the Companies Act 71 of 2008. The Court added that procedural fairness obligations might attach independently of a statutory obligation, by virtue of the principle of legality. Other instances in which the Constitutional Court affirmed the requirement of procedural fairness include *Democratic Alliance v President of the Republic of South Africa* (also known as *Simelane*).[26] In this case, the President had ignored the evidence of Mr Simelane's dishonesty when he appointed him as the National Director of Public Prosecutions. Based on the principle of procedural irrationality the Constitutional Court held that the appointment was irrational and unconstitutional.

[53] The requirement of procedural fairness in exercise of executive authority bears broadly similar features to the parameters set out in PAJA for procedural fairness. Section 4 of PAJA prescribes that administrative action must be procedurally fair and that consideration must be given to whether a public inquiry, a notice and comment process, or both processes should be held, or whether a different procedure should be followed, to give effect to the right to a just

[25] See fn 7 supra.
[26] *Democratic Alliance v President of the Republic of South Africa and Others* [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 20133 (1) SA 248.

administrative action.[27] In terms of s 4 (4) an administrator may depart from the stipulated requirements of procedural fairness if it is reasonable and justifiable to do so.

[54] The factors relevant for the determination of whether such departure is justifiable include the objectives of the empowering provision, the nature and purpose of, and the need to take the administrative action, the likely effect of the administrative action, the urgency of taking the administrative action, and the need to promote efficient administration and good governance.[28] The similarities in the regulation of procedural fairness in administrative and the Courts' recognition of the procedural fairness imperative in executive decisions, all stem from the constitutional ground rule that procedural or process fairness is a requirement in all exercise of public power. Reasonable and justifiable departure from the fundamental rule is acceptable. Whether or not departure from the rule is reasonable and justifiable is determined on a case-by-case basis.

[55] Despite these similarities in approach to determination of legality in the exercise of public power, the distinction between procedural fairness under PAJA and procedural irrationality remains part of our law. In *Law Society South Africa v President of the Republic of South Africa and Others*.[29] The Constitutional Court explained the difference as follows:

'Procedural fairness has to do with affording a party likely to be disadvantaged by the outcome the opportunity to be properly represented and fairly heard before an adverse decision is rendered. Not so with procedural irrationality. The latter is about testing whether, or ensuring that, there is a rational connection between the exercise of power in relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power. I do not think that distinction is of relevance in this instance.

[27] Section 4(1)*(a)-(e)* of PAJA.
[28] Section 4 (4) *(b).*
[29] *Law Society South Africa v President of the Republic of South Africa and Others* [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC).

[56] In this case, the Minister consulted with the representatives of USAFand SAUS. No notification was sent out to the general student community inviting representations on the anticipated changes to the 2020 guidelines.

[57] The procedure adopted must be evaluated against the circumstances which precipitated the changes to the eligibility criteria. By all accounts, alarm bells started ringing during July 2020, when NSFAS wrote to the Department advising that there was a likelihood of increase in the number of funded NSFAS students in the 2021 academic year. On 22 September, NSFAS again wrote to the CEO of the Department advising of capacity and budgetary constraints. At that time, NSFAS was under administration. The Administrator described the entity as being in a state of 'dysfunction and maladministration'.

[58] At a meeting held on 14 October 2020 between officials the Department and the NSFAS executive committee the funding requirement policy impacts were presented, and possible cost cutting measures were explored. It is not clear what exact measures were investigated at that stage. It was only in January 2021 that a version of the NSFAS eligibility Criteria Policy Statement (dated 21 January 2021) was finalised. The intention was that the policy statement was to be the blueprint for assessment of financial and academic eligibility criteria for funding of first-time entry students and continuing students.

[59] From the Minister's first media statement, dated 8 March 2021, there was likelihood that even the first-time entry students were at risk of not being funded. It was only on 10 March 2021 that reprioritisation of the Department's budget was approved by National Cabinet. The second media statement, published on 11 March 2021, gives the impression that it was only on the previous day that the details on how, exactly, the scope of 2021 funding scheme would be structured.

It would have been impractical, in those circumstances, to afford the general student body opportunity to make representations, given that it was already past the usual start of the academic year and the determination of beneficiaries that still had to be done.

[60] There is no evidence from the SAUS or USAF as to how the information was shared with the rest of the students. However, in circumstances where the ultimate policy impact of the budgetary constraints was only established in early March 2021, timeous invitation for representations from potentially affected students was unattainable. Consultation with SAUS and USAF constituted reasonable and justifiable form of compliance with the requirement of procedural fairness. Consultation with student representative bodies is an acceptable form of communicating with students, although this is usually combined with notices published on University notice boards and websites. In my view, considering all those factors, the high court erred in setting aside the decision by the Minister and NSFAS to redirect the funding in the manner explained above. It must also be emphasised that, even without change in policy, the current respondents had not met the criteria as indicated.

[61] In the result, the appeal must succeed. Given that the respondents were asserting their constitutional rights to further education as provided in s 29 of the Constitution, there will be no costs order against them. I make the following order:

1 The appeal is upheld with no order as to costs.

2 The order of the high court is set aside and replaced with the following order:

‘The application is dismissed with no order as to costs’.

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N DAMBUZA
ACTING DEPUTY PRESIDENT

Appearances:

For the first appellant:	FJ Nalane SC with L Makapela
Instructed by:	Werksmans Attorneys, Johannesburg Symington & De Kok Attorneys, Bloemfontein.
For the first to third respondents:	H Rajah with N Chesi-Buthelezi and N Khooe
Instructed by:	Webber Wentzel, Johannesburg Webbers, Bloemfontein.
For the fifth respondent:	M I Thabede with N Seme
Instructed by:	State Attorney, Pretoria State Attorney, Bloemfontein.