



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 9526/24

Before: Sven Olivier AJ
Date of hearing: 8 and 9 July 2024
Delivered electronically on: 15 July 2024

In the matter between:

EZAGA HOLDINGS (PTY) LTD

Applicant

and

NATIONAL STUDENT FINANCIAL AID SCHEME COINVEST AFRICA (PTY) LTD First Respondent

COINVEST AFRICA (PTY) LTD Second Respondent

NORACCO CORPORATION (PTY) LTD Third Respondent

TENET TECHNOLOGY (PTY) LTD Fourth Respondent

MINISTER OF HIGHER EDUCATION, SCIENCE AND TECHNOLOGY Fifth Respondent

SPECIAL INVESTIGATING UNIT Sixth Respondent

JUDGMENT

Introduction

1. The National Student Financial Aid Scheme (NSFAS) is a statutory body, established in terms of section 3(1) of the National Student Financial Aid Scheme Act, 56 of 1999. NSFAS is also subject to the Public Finance Management Act, 1 of 1999, in terms of which NSFAS is listed as a Schedule 3A entity mandated for a specific economic or social responsibility of the Government. In terms of section 3(2) NSFAS is managed, government and administered by the NSFAS board.
2. NSFAS was conceptualised as a loan and bursary scheme in order to address the rising student debt problem in higher education institutions and give effect to the Government's commitment and duty to redress the inequities of the past. NSFAS accordingly provides financial aid to eligible students at public universities and Technical Vocational Education and Training (TVET) colleges who meet the criteria for admission to a further education and training program or to a higher education program.
3. The students are from poorer or working-class families who would otherwise be unable to afford to study. In the 2020 academic year NSFAS assisted close to 500,000 TVET students and close to 430,000 university students to obtaining financial aid, and awarded R41 billion in loans and bursaries for poor academically eligible students. This grew to R 47.6bn in 2023 serving a student population of 1.1 million.
4. Section 29(1)(b) of the Constitution provides that **"everyone has a right to further education which the state, through reasonable measures, must make progressively available and accessible."** In terms of section 4 of the National Student Financial Aid Scheme Act, 56 of 1999, NSFAS allocates funds for loans and bursaries to eligible students.
5. NSFAS is funded primarily by the South African National Department of Higher Education and Training. Since the inception of NSFAS funds allocated to it have increased substantially. The December 2017 Presidential pronouncement on Fee Free Higher Education has led to the need to redesign and restructure the organisation to enable it to deal with its existing requirements and, more importantly, to create a platform for the future as a full bursary provider.¹
6. Mr O Cook SC assisted by Mr Sive appeared for eZaga, Mr T Ngcukaitobi SC, assisted by Mr M Sulakazana, appeared for NSFAS, and Mr P Mokoena SC assisted by Ms Z Bhero-Manentsa appeared for the Special Investigating Unit (the SIU). Though their affidavits had been struck out, Ndita J, in an earlier ruling, had

¹ The NSFAS Request for Proposal, annexure FA2, page 11

afforded the second to fourth respondents the opportunity to address the Court at this hearing. Mr J Moorcroft appeared for the third respondent and Mr J Pammenter, assisted by Ms T Palmer appeared for the fourth respondent. I express my gratitude to counsel for their assistance with the heads of argument and notes which were filed and their argument in a matter with heavily disputed issues and complex legal principles.

The salient facts

7. The present urgent application arises from a tender bid advertised on 25 January 2022.
8. The salient facts are these. The tender earlier awarded to First National Bank was cancelled as Mr Nongogo, the then Chief Executive Officers of NSFAS gave the instruction that this, the second tender, be cancelled because the requirement for a bank licence was non-inclusive.² Publicly it was recorded that the requirement for the service fell away.
9. A third tender bid for a **“direct payment solution”** was advertised on 25 January 2022. The Request for Proposal invited bid proposals for the direct disbursement of allowances into bank accounts of NSFAS funded students for a period of 5 years.
10. Eighteen bids were submitted of which four were successful.
11. The tender was awarded to the four successful bidders, eZaga Holdings (Pty) Ltd, Coinvest Africa (Pty) Ltd, Norraco Corporation (Pty) Ltd and Tenet Technology (Pty) Ltd, on 15 June 2022. They are so-called fin-tech companies. The four successful bidders are respectively the applicant, and the second to fourth respondents in the present application. They were advised that they were to meet for negotiation on prices and value-added services. These price negotiations took place on 23 June 2022.
12. Subsequently, on 12 July 2022, they concluded service level agreements with NSFAS.
13. Shortly after the award of the tender, the Special Investigating Unit was tasked on 26 August 2022, in terms of a Proclamation under the hand of the Minister of Justice, to investigate any alleged serious maladministration in connection with the affairs of NSFAS, improper or unlawful conduct by the employees or officials of NSFAS, unlawful appropriation or expenditure of public money or property, unlawful, irregular or unapproved acquisitive act, transaction and so forth, which

² The first tender fell away as it was considered non-responsive

took place between 1 April 2016 and 26 August 2022 (the date of publication of the proclamation). This arose from widely published allegations levelled against Mr Nongogo in the press.

14. On 14 March 2023 NSFAS issued notices of non-performance to eZaga and the three other service providers, invoking clause 14.1.5 of the service level agreements, affording eZaga and the others seven days to rectify matters, and reserving the right to cancel same.
15. In April 2023 the Special Investigating Unit informed the Standing Committee at Parliament that prior to the implementation of the direct payment solution over 40,000 undeserving students benefited irregularly, funding amounting to over Rand 5 billion was allocated to undeserving students and that institutions were unable to identify fraudulent applications. Several departmental officials have been investigated for fraud.
16. On 10 July 2023 the Stellenbosch Student Representative Council filed a complaint with the Public Protector, which complaint pertained to the direct payment solution.
17. The board of NSFAS had commissioned³ its own investigation pursuant to which a preliminary report by attorneys Werksmans led by Mr Ngcukaitobi was produced on 15 October 2023. This report galvanised the NSFAS board into action and it convened a media briefing on 18 October 2023.
18. At the media briefing held on 18 October 2023 Mr Ernest Khosa, the chairman of NSFAS, informed the media of the investigation into the allegations of bid irregularities and that the board had appointed Werksmans Attorneys and Mr Ngcukaitobi to investigate the alleged irregularities relating to the third tender. The allegations related to the conflict of interest of Mr Nongogo in the appointment of the four service providers. A number of defects in the procurement process were identified – such as the lack of a feasibility study, the amendments to the bid specifications which favoured the fin-tech companies, and the failure to conduct a thorough due diligence of the service providers. It also referenced Dr Chirwa's association with eZaga Remit and a possible relationship between Mr Nongogo and, *inter alia*, eZaga Holdings. It was conveyed that the board had resolved to implement the recommendations of the Werksmans report, and, *inter alia*, to terminate the service level agreements with the four service providers.

³ It is not apparent from the papers when this was commissioned.

19. It was recorded that the report had been furnished to Mr Nongogo and was granted an opportunity to advise why his contract should not be terminated. The report was only made available to the service providers and the Court on the second day of the hearing.
20. It was recorded that notwithstanding the current challenges the board affirmed its commitment to implement the **“direct payment solution”**. The media briefing recorded the view of the board, namely that the direct payment solution is a necessary measure to reduce instances of unauthorised access to beneficiaries’ allowances, payment of go students, inconsistencies, and the late payment of allowances.
21. It will be recalled that the Request for Proposal was for the **“provision of direct payments of allowances to NSFAS students for a period of 5 years, renewable”**.
22. The recommendations were expressly predicated upon the irregularities expounded in the media briefing, which was explicated on in the answering affidavit. All of those reasons advanced pertain to irregularities in the tender process and the award of the tender. It relates to non-compliance with the NSFAS Supply Chain Management Policy, shortfalls therein, changes in the tender requirements as between the second and third tenders, and so forth.
23. On 18 October 2023 an urgent meeting was convened with the four service providers, chaired by Mr Ernest Khosa, the present chairman of NSFAS. It is in dispute whether Mr Khosa advised the four service providers at that meeting that NSFAS had decided to cancel the decision to award the tender to them, and furthermore to terminate the service level agreements on the strength of the Werksmans’ report.
24. Subsequently, in early 2024, it was conveyed to the universities and colleges in a circular which recorded that the service providers **“remain enlisted by NSFAS to fulfil the crucial task of disbursing allowances to students until such time that NSFAS communicates otherwise.”** The circular was the result of a board resolution of 31 January 2024 which resolved for the continuation of the service level agreements with the four service providers. Mr Ngcukaitobi termed this a bizarre resolution – no doubt because it flies in the face of what was conveyed on 18 October 2023.
25. On 12 April 2024 NSFAS took the decision to extend the payment of allowances to the beneficiaries through the universities instead of through the direct payment solution provided by the service providers (the 12 April 2024 diversion decision).⁴

⁴ I follow the terminology in the notice of motion and in the affidavits for the impugned decisions which eZaga is challenging

26. On 24 April 2024 NSFAS took a decision to stop issuing payment instructions to the service providers (the 24 April diversion decision) and on 26 April 2024 NSFAS implemented a payment mechanism to distribute the allowances directly to students (the 26 April diversion decision).
27. The 26 April diversion decision led to the present application being launched on 5 May 2024.
28. On 24 May 2024 proceedings were instituted before the Special Tribunal, established in terms of section 2(1) of the Special Investigating Unit and Special Tribunals Act, 74 of 1996, wherein an urgent interdict against the continued implementation of the service level agreements and a review of the award of the tender and the service level agreements are sought. Both the SIU and NSFAS are applicants in those proceedings. This was done to give effect to the decision to terminate the service level agreements.
29. Mr Ngcukaitobi explained that a fundamental change took place in April and May of this year. The board of NSFAS was dissolved. It was only upon the appointment on 12 April 2024 of the present administrator, Mr Nomvalo, the deponent to the answering affidavit, that the 12 April 2024 diversion decision was taken and shortly thereafter the 26 April 2024 diversion decision.

The Court proceedings

30. The urgent part of the composite application (Part A) was allocated to me to be heard on 8 and 9 July 2024 during Court recess. The date was arranged by agreement between the parties in conjunction with the office of the Acting Deputy Judge President of this Court.
31. The relief sought by applicant is predicated on the communication of 18 October 2023 and the subsequent steps taken by NSFAS. It is appropriate to set out in full the relief sought – an urgent interdict and just and equitable relief under section 172(1)(b) of the Constitution,⁵ as follows

⁵ Section 172(1)(b) provides that a court may make a just and equitable order to accommodate potentially harsh effects of the operation of the doctrine of objective constitutional invalidity. Section 172(1) reads:

'When deciding a constitutional matter within its power, a court—

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including —

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any

conditions, to allow the competent authority to correct the defect.'

- (a) First, an order restraining NSFAS from taking any steps to implement its decision:
- (i) on or about 18 October 2023 to terminate its service level agreement with the applicant ("the October 2023 termination decision") in relation to tender number SCMNO22 ("the tender") for the provision of direct payment of allowances to NSFAS students for a period of five years, renewable, which agreement came into effect on 12 of July 2022;
 - (ii) on or about 18 October 2023 to cancel the decision it made on 12 July 2022 to award the tender to the applicant;
 - (iii) on or about 12 April 2024 to extend the payment of allowances to NSFAS-funded students and beneficiaries through the universities themselves instead of through the direct payment solution provided by the applicant;
 - (iv) on or about 24 April 2024 to stop issuing payment instructions and making associated payments to the applicant for the direct disbursement of allowances into the bank accounts of the NSFAS-funded students and beneficiaries which the applicant has onboarded; and
 - (v) on or about 26 April 2024 to implement a payment mechanism with the assistance of its banker to distribute allowances directly to student's bank accounts.
- (b) Second, an order directing NSFAS to implement the service level agreement, issue payment instructions and make the associated payments to the applicant for the direct disbursement of allowances into the bank accounts of the NSFAS-funded students and beneficiaries which the applicant has onboarded.

32. eZaga cited as second to fourth respondents the other three successful bidders who had also entered into service level agreements with NSFAS. These respondents filed affidavits in support of the application. The fifth respondent, the Minister of Higher Education and Technology abides the decision of the Court. The Special Investigating Unit made an application to intervene.

33. The urgent interdictory relief sought by NSFAS and the SIU in the self-review application before the Special Tribunal directly contrasts the relief sought by eZaga in this court.
34. The application, initially set down for Tuesday, 28 May, was removed by agreement and then re-enrolled for 30 and 31 May.
35. On 30 May 2024 Van Leeve AJ, postponed the application to 10 and 11 June 2024.
36. On 31 May 2024 the third respondent, Norraco Corporation Limited, gave notice of its counter application, mirroring similar relief to that as sought by the eZaga.
37. On 6 June 2024 the second respondent, Coinvest Africa, gave notice of its counter application, seeking similar relief to that claimed by eZaga.
38. The matter came before Ms Justice Ndita on 10 and 11 June. In terms of the order issued by Ndita J, she
- (a) struck out the second, third and fourth respondents' affidavits;
 - (b) dismissed the third respondent's counter application; (the other intervention application, by the second respondent, was withdrawn);
 - (c) granted the intervening party, the SIU leave to intervene; and
 - (d) struck the application from the roll for want of urgency, ordering the applicant to pay the costs of the first and sixth respondents, including the costs of two counsel.

Interdictory relief

39. An applicant for an interim interdict must establish (a) a *prima facie* right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if the interdict is not granted; (c) that the balance of convenience favours the grant of the interdict; and (d) that there is no other remedy available.⁶ In addition, where the interdict, if granted, will restrain the exercise of a statutory power, there must be both exceptional circumstances and a strong case made out for the relief.⁷

⁶ *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) at para [41], referring to *Setlogelo v Setlogelo* 1914 AD 221 and *Webster v Mitchell* 1948 (1) SA 1186 (W)

⁷ *OUTA* (supra) at paras [43] to [45], referring to *Gool v Minister of Justice and Another* 1955 (2) SA 683 (C)

40. The accepted test for a *prima facie* right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, she cannot succeed.⁸ The question is whether, having regard to the facts and the inherent probabilities, the applicant should obtain final relief when the main case is heard.⁹ It is not necessary for an urgent court to make a final determination on the legal issues.¹⁰
41. Mr Ngcukaitobi predicated his argument that eZaga had made out no *prima facie* case for an interdict, and that such an interdict would only be granted in the clearest of cases. In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC). Outa explicated as follows

“[43] A little less than 40 years before the advent of our Constitution, in *Gool*,¹¹ a full bench of the Cape Provincial Division was called upon to grant an interdict restraining the minister pendente lite from exercising certain powers vested in him by a statute. Ogilvie-Thompson J, writing for a unanimous court, considered the requirements for an interim restraining order announced in *Setlogelo*, and said the following:

'The present is however not an ordinary application for an interdict. In the first place, we are in the present case concerned with an application for an interdict restraining the exercise of statutory powers. In the absence of any allegation of *mala fides*, the court does not readily grant such an interdict. . . .'¹²

And later the learned judge observed:

'The various considerations which I have mentioned lead, in my opinion, irresistibly to the conclusion that the Court should only grant an interdict such as that sought by the applicant in the present instance upon a strong case being made out for that relief. I have already held that the Court has jurisdiction to entertain an application such as the present, but in my judgment that jurisdiction will, for the reasons I have indicated, only be exercised in exceptional

⁸ *Spur Steak Ranches Ltd and Others v Saddles Steak Ranch, Claremont and Another* 1996 (3) SA 706 (C) at 714E-H; See also *Gool v Minister of Justice and another* 1955 (2) SA 682 (C) at 688 (E)

⁹ *ibid*

¹⁰ *Zulu v Minister of Defence and Others* 2005 (6) SA 446 (T) paras 41 - 42

¹¹ *Gool* above. See also *Molteno Brothers and Others v South African Railways and Others* 1936 AD 321 at 329 and 331.

¹² *Gool* id at 688F.

circumstances and when a strong case is made out for relief.¹³
[Emphasis added.]

[44] The common-law annotation to the *Setlogelo* test is that courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out. Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the executive and the legislative branches of government unless the intrusion is mandated by the Constitution itself.

[45] It seems to me that it is unnecessary to fashion a new test for the grant of an interim interdict. The *Setlogelo* test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy magistrates' courts and high courts. However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution."

A prima facie right?

42. Does eZaga meet the test set in *Outa*? The parties are worlds apart –
43. eZaga's case is that the impugned decisions are unlawful in at least four independent respects –
 - (a) NSFAS had resorted to unconstitutional self-help, and that it ignored the binding legal effect of the legal consequences of the award of the tender, and service level agreement, which have not been set aside or reviewed. The sole power to pronounce on the legal validity of the award lies with the courts. NSFAS has no power to invalidate or ignore them. The award and the service level agreement remain legally effective until successfully challenged by the right actor in the right proceedings. For rule-of-law reasons, the award and the service level

¹³ Id at 689B – C

agreement stand. Reliance is placed on a number of cases, in particular *Kirland*,¹⁴ *Merafong*¹⁵ and *Tasima*.¹⁶

- (b) The impugned decisions materially and adversely affect the rights and legitimate expectations of eZaga. In violation of its fundamental rights to a fair procedure, NSFAS failed to provide eZaga with any notice of the impugned decisions, or with an opportunity to make representations about the impugned decisions, before they were made.
- (c) The procedure adopted by NSFAS leading up to the impugned decisions is irrational (in order for the exercise of public power to be valid, it must be rationally connected to the purpose for which the power was granted). Irrational not to consult eZaga and irrational to make the decisions to terminate the service level agreement and cancel the award solely based on the recommendation in a report by Werksmans
- (d) Violation of eZaga's constitutional right to administrative justice and rights under the award and the service level agreement, as well as the rights of tens of thousands of affected students to further education to section 29(1) of the Constitution and to their fundamental statutory rights to receive funds for loans and bursaries from NSFAS.

44. eZaga further contends

- (a) The impugned decisions are, at least, *prima facie*, irregular and a unlawful. NSFAS has acted in flagrant violation of the law by making the impugned decisions, which ignore the binding and operative for award and service level agreement. In the face of the award and service level agreement, NSFAS unilaterally decided to make the impugned decisions without giving any notice to eZaga or affording it an opportunity to make representations.
- (b) eZaga also has the fundamental right to administrative action that is lawful, reasonable and procedurally fair. It has the right under the award and service level agreement to render services, including the disbursement of funds to the NSFAS students and to conduct by NSFAS

¹⁴ *Kirland MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC)

¹⁵ *Merafong City Local Municipality v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC)

¹⁶ *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC).

and persons controlled by NSFAS that enables it to comply with its obligation to provide the services in terms of the service level agreement.

- (c) The students also have the right to receive the funds timeously as well as the fundamental right to further protection under section 29(b) of the Constitution.

45. Messrs Cook and Sive, submitted that NSFAS had exercised its statutory power to make allocations of funds, and the impugned decisions amounted to administrative acts which were subject to PAJA, and which were nothing else than unconstitutional self-help, which fell foul of *Oudekraal*,¹⁷ *Kirland* and *Merafong*.
46. NSFAS contends that it is a contractual right which eZaga has impermissibly framed to pursue administrative law remedies. In addition, the impugned decisions do not constitute administrative acts. It contends that eZaga, had contractual remedies available to it when NSFAS admittedly repudiated the service level agreement.
47. eZaga points to the fundamental tension in the NSFAS answering affidavit – on the one hand NSFAS confirms that it is allowing eZaga to continue to implement the service level agreement in respect of TVET students, and on the other hand NSFAS claims that it is justified in ignoring the service level agreement in respect of the universities. This, eZaga contends violates and negates its rights under the service level agreement and also violates the fundamental rights of the students.
48. It is far from easy to grapple with this nettle.

Do the impugned decisions constitute administrative action?

49. Whether the impugned decisions indeed constitute administrative action is complicated. As Binns-Ward J remarked in *Ma-Afrika Hotels (Pty) Ltd v Cape Peninsula University of Technology* 2023 (3) SA 621 (WCC) at [12]

“It is well recognised that distinguishing what falls within the ambit of 'administrative action' from what does not can often be a difficult undertaking. It has been remarked more than once that there can be

¹⁷ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA)

no all-embracing test¹⁸, and the question is one that the courts have to decide on a case-by-case basis.¹⁹

50. eZaga contends that the impugned decisions were indeed administrative action. NSFAS never purported to rely on any of the contractual provisions when it took and implemented the impugned decisions. Its contentions regarding the invalidity of the award of the tender and the service level agreements are firmly rooted in the findings of the Werksmans report and are founded on principles of administrative law. It is on that very basis that it has brought the self-review application before the Special Tribunal.
51. Mr Ngcukaitobi contended that consequent upon the conclusion of the service level agreement, the relationship between the parties is regulated by the law of contract, and that administrative law principles found no application. eZaga was compelled to exercise its contractual remedies. He relied upon *Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd* 2009 (1) SA 163 (SCA) at par [18] where Brand JA held as follows

“[18] ... I do not believe that the principles of administrative law have any role to play in the outcome of the dispute. After the tender had been awarded, the relationship between the parties in this case was governed by the principles of contract law (see eg *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA) (2001 (10) BCLR 1026) at para 18; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) ([2006] 1 All SA 478) at paras 11 and 12). The fact that the tender board relied on authority derived from a statutory provision (ie s 4(1)(eA) of the State Tender Board Act) to cancel the contract on behalf of the government, does not detract from this principle. Nor does the fact that the grounds of cancellation on which the tender

¹⁸ Cf eg *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another* 2010 (5) SA 457 (SCA) ([2010] 4 All SA 561; [2010] ZASCA 94) para 40 and the observations of Lord Nicholls of Birkenhead in *Parochial Church Council of the Parish of Aston Cantlow & Wilmcote with Billesley, Warwickshire v Wallbank* [2004] 1 AC 546 ([2003] UKHL 37; [2003] 3 All ER 1213) (a matter in which it was accepted that a distinction might be drawn between a 'core public authority' and a 'hybrid public authority', the latter exercising both public and non-public functions). Lord Nicholls said, in para 12, that there could not be a single test for determining whether a function was a public one. He proceeded: 'There cannot be, given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.'

¹⁹ See, for example, *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) (1999 (10) BCLR 1059; [1999] ZACC 11) para 143 and *Minister of Defence and Military Veterans v Motau* above n2 para 113. In *President, RSA v SARFU* loc cit it was held that '[the] boundaries [...] will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration'

board relied were, inter alia, reflected in a regulation. All that happened, in my view, is that the provisions of the regulations - like the provisions of ST36 - became part of the contract through incorporation by reference."

52. In his further note, filed after the hearing he amplified with reference to *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited*,²⁰ where the Constitutional Court held that

"[75] Second, the Supreme Court of Appeal did not value the distinction between public and private law. The decision to award a tender is a matter of public law. It is governed by the Constitution, the Public Finance Management Act, the Procurement Act and the Procurement Regulations. Although there may be interplay between public and private law, the distinction must not be collapsed. Ordinarily, an issue like contract price adjustment that is subject to negotiation after the procurement process has taken place, ought to fall squarely within the domain of private law. It is subject to ordinary contractual negotiations between enterprising parties. Importantly, the parties agreed during oral argument that this distinction is applicable." (emphasis by Mr Ngcukaitobi)

53. He submitted that eZaga had abandoned their contractual remedies, and had utterly failed to show that the four impugned decisions were of an administrative nature. They do not meet the requirements of an administrative act as defined under PAJA, nor do they fell foul of the principles of legality. On that basis the application did not get out of the starting blocks.
54. As already stated, it remains a vexed question whether and when administrative law should apply where the parties had entered into a contract.
55. The service providers in response relied on *Logbro Properties CC v Bedderson NO & Others* 2003 (2) SA 460 (SCA) where Cameron JA, as he then was, held

"[7] . . . Even if the conditions constituted a contract (a finding not in issue before us, and on which I express no opinion), its provisions did not exhaust the province's duties toward the tenderers. Principles of administrative justice continued to govern that relationship, and the province in exercising its contractual rights in the tender process was obliged to act lawfully, procedurally and fairly. In consequence, some of its contractual rights — such as the entitlement to give no reasons — would necessarily yield before its public duties under the Constitution and any applicable legislation.

²⁰ 2015 (5) SA 245 (CC) at para 75

[8] . . . The principles of administrative justice nevertheless framed the parties' contractual relationship, and continued in particular to govern the province's exercise of the rights it derived from the contract.

...

[10] The case²¹ is thus not authority for the general proposition that a public authority empowered by statute to contract may exercise its contractual rights without regard to public duties of fairness. On the contrary: the case establishes the proposition that a public authority's invocation of a power of cancellation in a contract concluded on equal terms with a major commercial undertaking, without any element of superiority or authority deriving from its public position, does not amount to an exercise of public power.²²

[11] In the present case, it is evident that the province itself dictated the tender conditions, which McLaren J held constituted a contract once the tenderers had agreed to them. The province was thus undoubtedly, in the words of Streicher JA in *Cape Metropolitan*, acting from a position of superiority or authority by virtue of its being a public authority in specifying those terms. The province was therefore burdened with its public duties of fairness in exercising the powers it derived from the terms of the contract."

56. In *South African National Parks v MTO Forestry (Pty) Ltd & Another* 2018 (5) SA 177 (SCA) the majority per Dambaza JA found that there was a legitimate expectation to be consulted before the terms of a lease was to be varied.²³ The Court held as follows at paragraphs 23 – 26 and 32 and 37

"[23] The submission on behalf of SanParks, that the exercise by an organ of state of rights under a contract attracts no public-law obligation, was considered by this court in *Logbro Properties CC v Bedderson NO and Others*.²⁴ As in this case, the appellant in *Logbro* relied on *Cape Metro Council v Metro Inspection Services (Western Cape) CC and Others*²⁵ for the contention that public-law responsibilities had no place in a contract concluded by a state organ. [24] In *Logbro* the contention was that conditions stipulated in a tender gave the Western Cape Province a contractual right to withdraw a tender

²¹ *Cape Metro Council v Metro Inspection Services* (WC) CC 2001 (3) SA 1013 (SCA).

²² The importance to the decision of the parties' equality of bargaining power is rightly emphasised by Iain Currie and Jonathan Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001) at 72, 74

²³ at par [32]

²⁴ *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA)

²⁵ *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA)

'without having to pass the scrutiny of lawful administrative action'²⁶.

In paras 7 – 8 of the judgment Cameron JA held as follows:

'Even if the conditions constituted a contract (a finding not in issue before us, and on which I express no opinion), its provisions did not exhaust the province's duties towards the tenderers. Principles of administrative justice continued to govern that relationship, and the province in exercising its contractual rights in the tender process was obliged to act lawfully, procedurally and fairly. In consequence, some of its contractual rights — such as the entitlement to give no reasons — would necessarily yield before its public duties under the Constitution and any applicable legislation.

This is not to say that the conditions for which the province stipulated in putting out the tender were irrelevant to its subsequent powers. As will appear, such stipulations might bear on the exact ambit of the ever-flexible duty to act fairly that rested on the province. The principles of administrative justice nevertheless framed the parties' contractual relationship, and continued in particular to govern the province's exercise of the rights it derived from the contract.'

[Footnotes omitted.]

[25] *Logbro* highlighted that *Cape Metropolitan Council* is no authority for a general principle that a public authority empowered by statute to contract may always exercise its contractual rights without regard to public duties of fairness. More importantly, the court in *Logbro* stressed the distinguishing factors in that case that underpinned the court's decision. It noted that the tender²⁷ and employment²⁸ cases were not relevant to the facts in *Cape Metropolitan Council* because of the equal power of the contracting parties in that case.

[26] The reliance by the appellant on *Government of the Republic of South Africa v Thabiso Chemicals*²⁹ does not take the matter any

²⁶ *Logbro* above para 5.

²⁷ For example, *Umfolosi Transport (Edms) Bpk v Minister van Vervoer* [1997] 2 All SA 548 (SCA)

²⁸ See *Administrator, Transvaal, and Others v Zenzile and Others* 1991 (1) SA 21 (A) ((1991) 12 ILJ 259; [1990] ZASCA 108) where a contract of employment was summarily terminated as a result of the employees having engaged in work stoppage. The contractor in *Cape Metro* had relied on *Zenzile* in asserting a right to procedural fairness prior to cancellation of its contract to collect outstanding levies on behalf of the municipality. See also *Administrator, Natal, and Another v Sibiba and Another* 1992 (4) SA 532 (A).

²⁹ *Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd* 2009 (1) SA 163 (SCA)

further. Unlike in this case, the dispute in *Thabiso*, as well as in *Cape Metropolitan Council*, turned on the contract entered into between the two parties. The pivotal issue in *Thabiso* was the limited factual determination into whether the facts relied on by the government in cancelling a tender could sustain the cancellation under the relevant clause in the contract. *Thabiso* did not concern the effect that the exercise of a power sourced in a contract would have on the public and its interests.

[27] Already in the pre-constitutional era this court acknowledged that in a contractual context circumstances may be such as to compel notions of fairness and the application of the principle of legitimate expectation. In this regard, see *Lunt v University of Cape Town and Another*.³⁰ Professor Hoexter warns against the dangers of formalism in that an exclusive focus on the concept of a contract might distract from the reasons why fairness ought to be observed in a particular case, whether it be of a private or of a public nature.³¹

...

[32] Having regard to the factual background set out above, considering SanParks' statutory obligations and the principles set out in case law referred to above, it is clear in my view that Parkscape and its members had a legitimate expectation to be consulted before the decision to vary the lease was made. The court below was correct in holding in favour of Parkscape.

...

[36] The ambit of *Cape Metro*, confirmed in *Logbro*, was as follows: the Metropolitan Council cancelled a contract with a private contractor. The main issue was whether the cancellation in terms prescribed by the contract involved administrative-law principles. On the facts of that case, this court held that the cancellation did not constitute administrative action. It was this distinction that *Logbro* sought to make."

57. In *Polokwane Local Municipality v Granor Passi (Pty) Ltd* 2019 JDR 0346 (SCA) Wallis JA simply pointed out that

"a decision regarding the implementation of a contract to which the municipality is a party is an act of administration. It was taken by an organ of state, exercising a public power or function in relation to the enforcement of a contract concluded in terms of the empowering

³⁰ *Lunt v University of Cape Town and Another* 1989 (2) SA 438 (C)

³¹ C Hoexter *Administrative Law in South Africa* 2 ed (2012) at 446.

provisions governing transactions of this character.³² It had a direct external legal effect and adversely affected Granor's rights. It did not fall within any of the statutory exceptions. Accordingly, it was administrative action and reviewable under PAJA.³³³⁴

58. Wallis JA in *Granor* referred with approval to what Navsa JA and Davis JA held in *Sanparks*, namely

"[37] There is no bright-line test for determining whether administrative principles intrude in relation to a contract involving an organ of state and a private party. However, there are indicators. One might rightly ask whether coercive state power can be brought to bear by a state organ on the private party. Further, one will be constrained to consider whether the public interest is affected by the exercise of the contractual right. ...

The contractual terms, seen contextually, will also be scrutinised to determine how the parties envisaged disputes in relation to their agreement being dealt with prospectively.

[38] Having regard to the authorities referred to by Dambuza JA,³⁵ ... a court should be concerned with whether, in the circumstances of the case, the state can be said to be acting fairly, which includes, but is not limited to, questions of procedural propriety. It does not necessarily follow, where there is an equality of arms in relation to the conclusion of a contract and where the public interest is not directly involved, that the private party will be able to resort to administrative-law principles. Each case has to be decided on its own merits and courts will exercise a value judgment.

[39] Proportionality is a constitutional watchword, the exercise of which can be employed in adjudicating whether to import administrative-law principles into cases involving an organ of state and a private party. ..."

³² The disposal of publicly owned land by a municipality has always been regulated by legislation and it is not disputed in this case that provisions of the Local Government Ordinance 17 of 1939 had governed the initial sale and that post-democracy legislation governing such transactions may have been applicable to the actual transfer that Granor desired.

³³ *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) para [33]

³⁴ at [11]

³⁵ The majority judgement in relation to which Navsa and Davis was a concurrence

59. NSFAS' response is that the rights upon which eZaga relies is sourced in service level agreement and where NSFAS has repudiated that agreement the remedy which eZaga had, but chose not to exercise was to be found in the agreement itself, it was a contractual remedy and not a public law remedy.
60. NSFAS did not seek to rely on any contractual remedy – in fact, its case in the answering affidavit was that it had not cancelled the service level agreement.³⁶
61. A contractual notice was sent to eZaga on 14 March 2023, but NSFAS did not follow it up with any further steps. eZaga in its answering affidavit dealt with the steps it took to remedy the complaints levelled. The second and addendum to the service level agreement were entered into in mid-June 2023. It is fair to assume, that if there had been any serious malperformance by eZaga, this would not have been concluded.
62. NSFAS never (save for the notice given on 12 March 2023) purported to enforce its rights in terms of the service level agreement, nor did it seek cancellation under the provisions of the service level agreement. In the answering affidavit it was contended that there was no cancellation at all. The facts do not bear this contention out. The intention to terminate the service level agreements was announced on 18 October 2023. It was justified on the recommendations of the Werksmans report – none of which were rooted in contract.
63. Accordingly, when NSFAS seeks to exercise a power extraneous to the contract, in order to terminate it, it is not exercising a contractual right and it cannot, in turn, insist that the other party is confined to its contractual remedies. That creates and uneven playing field where there is no equality of arms.
64. Mr Ngcukaitobi reiterated this in argument, and again in the further note which was handed in post the hearing. He stated that there was no evidence of any decision to cancel the service level agreement.
65. The board decision as reflected in the NSFAS media briefing of 18 October 2023 records

“As a result of the finds, the Board has therefore decided to do the following

..

3. Advise all four direct payment service providers that their contracts will be terminated. The Board will ensure that this termination does not affect the students negatively. In this regard the Board is mindful of the universities they may have made and expectations they had

³⁶ For the moment I deal only with the eZaga application, but this, of course, applies to all the other service level agreements.

over the next step will take into account both the law and the implications of service delivery.”

66. On the same day a meeting was held with the four service providers where this was conveyed to them.
67. NSFAS also never sought, in these proceedings, to justify, any cancellation founded in contract. It never contended that it was exercising any contractual rights in respect of any of the impugned decisions. Instead, it denies that there was any cancellation, despite Mr Ngcukaitobi having submitted that NSFAS had repudiated the service level agreement.
68. It is therefore plain that NSFAS had taken a decision to terminate the service level agreements. And perhaps “**terminate**” is the correct terminology, as opposed to “**cancellation**”. Cancellation implies a contractual right to terminate – and clearly this was not what was exercised by NSFAS. It stepped outside of the confines of the contract when the board resolved to terminate the service level agreement.
69. In addition, it is clear that NSFAS is acting from a position of superiority.
70. For the reasons set out above I am of the view that this constituted administrative action and I hold accordingly. In the premises I conclude that both the termination decision and the diversion decisions, accordingly, were taken in the exercise of a public power, and not the enforcement of contractual rights.
71. Mr Ngcukaitobi submitted that the decision taken on 12 April 2024 to extend the payment of allowances to the beneficiaries through the universities instead of through the direct payment solution provided by eZaga was a policy-laden poly-centric decision and that it was not open to the Court to second guess the exercise of such power.
72. The Constitutional Court in *Outa* held

“[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 project resides in the exclusive domain of the National Executive subject to budget 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. “

73. I should be mindful of the deference required as described by the SCA in *Logbro* at paras 21 – 22 as follows:

“(A) judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law with due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for — and the consequences of — judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.”

74. The retort from eZaga was the policy-laden body-centric decision was the decision to implement the direct payment solution, consequent upon which the tender was awarded and the service level agreement entered into. It was no longer open to NSFAS to apply self-help and invalidate the award and the service level agreements - that only a court could do.

75. In response to the contention by Mr Ngcukaitobi that eZaga may not rely on public law rights Mr Sive submitted that eZaga indeed could rely on PAJA to make out a *prima facie* case. He referred to the *Eskom Vaal River* judgement at paragraph [280] where the court held as follows

“[280] ... On first principles, the nature of the right envisaged by the definition of “administrative action” in section 1, read with section 4 (1), of PAJA is not restricted. All that it need be is a right. It may take whatever form based on what we know of that concept in common law, statutory law or in respect of constitutionally protected rights.³⁷ The only question is whether the decision in issue has adversely (section 1) or has materially and adversely (section 4 (1)) affected (or

³⁷ I repeat that for my purposes I am not concerned with the debate whether 'right' includes something more than what we know to be a right. It is not necessary to engage in that debate because here we are concerned with what are unquestionably rights. The debate between the first and my judgments is about what right or rights can properly be asserted for purposes of the interim interdict and intended PAJA review.

has the capacity so to affect (*Greys Marine*³⁸) that right, whatever its nature. It is unsurprising that Quinot and Maree say that –

“the impact element of the definition of an administrative action should not be narrowly interpreted to refer only to private-law or common-law rights or to fundamental rights in the Bill of Rights, but also includes so-called “public-law rights”, which emerge from broad constitutional and statutory obligations placed on organs of state.³⁹”

76. eZaga, in addition, submitted that once public or administrative decisions have been communicated by an organ of state such as NSFAS, they are final and operative and may be subject to judicial review. Contrary to NSFAS’ bald assertions to the contrary, the impugned decisions are final and reviewable.
77. In my view the impugned decisions were not rooted in contract, nor did NSFAS contend that they do. Rather, the decisions involved “**the exercise of a public power**” or “**a public function**”, namely on the administration of funds and manner in which they are disbursed to students, which is the mandate under which NSFAS operates in terms of section 4 of the NSFAS Act, and therefore was administrative in nature.
78. It is also no answer to say that they amounted to a polycentric decision which the Courts should refrain from interfering with. This is not the issue at stake – the question rather is whether the impugned decisions amounted to impermissible self-help. An aspect which falls to be considered below.

The students

79. Reliance was also placed in the founding affidavit upon the rights of the students to timeously receive the funds that have been allocated to them under section 4 of the NSFAS Act and that they have the fundamental right to further indication in terms of section 29(b) of the Constitution. *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) where O’Regan J held as follows

“[16] In her judgment in *Ferreira v Levin*⁴⁰ O’Regan J advocated the following approach to determine the reach of the provision in the

³⁸ *Grey’s Marine Hout Bay (Pty) Ltd v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) at para 23.

³⁹ Quinot & Maree ‘Administrative Action’ in Quinot et al *Administrative Justice in South Africa: An Introduction* 2 ed (Oxford University Press, Cape Town 2020) at 93

⁴⁰ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) (1996 (1) BCLR 1).

interim Constitution equivalent to s 38(d) of the Constitution as well as whether and when a person or organisation could be said to have been acting in the public interest in a particular case:

'This Court will be circumspect in affording applicants standing by way of s 7(4)(b)(v) and will require an applicant to show that he or she is genuinely acting in the public interest. Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court. These factors will need to be considered in the light of the facts and circumstances of each case.'⁴¹

80. eZaga submitted that eZaga was entitled to bring the application on behalf of the students and public interest demands that it be allowed to do so. I was referred to the affidavits by the students filed in amplification. NSFAS had not given any explanation as to why those were not valid concerns.
81. In support of the application, as part of the eZaga replying, affidavits by students were filed in which they confirmed that
 - (a) they had not received NSFAS allowances since the implementation of the diverted payment system;
 - (b) the implementation of the impugned decisions had compromised the academic progress, let to frustration, and inhibited them from obtaining the basic daily goods they required, including food;
 - (c) as a consequence of the impugned decisions, they are being charged personal banking fees to access to funds they receive directly, which exceed those they had been charged by eZaga;
 - (d) that are being deprived of the opportunity to benefit from eZaga's on-campus services.
82. Mr Ngcukaitobi objected to these affidavits, they were impermissibly introduced in reply, and, in any event, were from only six students out of one million. In the further note which was submitted post the hearing he referred to *Mostert v*

⁴¹ Id at para [234]

FirstRand Bank t/a RMB Private Bank and another,⁴² *SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation (SOC) Ltd*⁴³ and *Gelyke Kanse and Others v Chairperson of the Senate of the University of Stellenbosch*.⁴⁴

83. I tend to agree with Mr Ngcukaitobi and do not propose take these affidavits into account.
84. I am, however concerned with the plight of the students. It is abundantly clear that their rights require protection. It is they who suffer the most as a result of the failures in the system.

Self-help?

85. As the interim relief is sought pending the finalisation of the review, I must also be satisfied that the applicant has good prospects of success in the review. In *Economic Freedom Fighters v Gordhan and Others and a related matter* 2020 (6) SA 325 (CC) at para 42, the Constitutional Court explained the applicable test and approach as follows:

"The claim for review must be based on strong grounds which are likely to succeed. This requires the court adjudicating the interdict application to peek into the grounds of review raised in the main review application and assess their strength. It is only if a court is convinced that the review is likely to succeed that it may appropriately grant the interdict."

86. A cornerstone of eZaga's application is the application of the principle that NSFAS must treat the award and service level agreement as valid and binding unless and until they are reviewed and set aside by a competent court. In this regard it is pointed out that NSFAS had not sought to utilise the contractual remedies available to it and, instead, has ignored the binding legal effect and legal consequences of the award and the service level agreement. This was no less than unconstitutional self-help.
87. The award of the tender, on the face of it, was effected in compliance with the requirements of section 217 of the Constitution. I am aware, of course, of the pending application before the Special Investigations Tribunal at the instance of the SIU and NSFAS with in interdictory and declaratory relief is sought, impugning

⁴² 2018(4) SA 443 (SCA) at para 13

⁴³ 2019 (1) SA 370 (CC) at para 77

⁴⁴ 2020 (1) SA 368 (CC) at paras 18 and 19

the award of the tender and the conclusion of the service level agreement. No relief is sought in this Court, declaring the award of the tender invalid and consequently also the conclusion of the service level agreement. I deal separately further below with the reactive challenge.

88. eZage relied extensively on a line of judgments culminating in *Tasima*.

89. In *Kirland* Cameron J held as follows at [82] – [83]

'PAJA requires that the government respondents should have applied to set aside the approval, by way of formal counter-application. They must do the same even if PAJA does not apply. To demand this of government is not to stymie it by forcing upon it a senseless formality. It is to insist on due process, from which there is no reason to exempt government. On the contrary, there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly.

Counsel for the department told this court, as he told the Supreme Court of Appeal, that, if the department had to bring a counter-application under PAJA, it would face the PAJA 180-day rule. Well, precisely. An explanation for the delay is a strong reason for requiring a counter-application'."

90. In *Tasima*⁴⁵, Khampepe J held that it was for a court to make any declaration regarding in validity. It is apposite to set out in full what Khampepe J writing for the majority held in *Tasima*

"[145] The first judgment's approach resuscitates an argument advanced by the minority in *Kirland*, and extended by the minority in *Merafong*. After noting that the conduct of a government official was inconsistent with ss 33 and 195 of the Constitution, the minority in *Kirland* argued for the proposition that '(a) decision flowing from [conduct violating ss 33 and 195(1)] must not be allowed to remain in existence on the technical basis that there was no application to have it reviewed and set aside';⁴⁶ and further that '(u)nder our Constitution

⁴⁵ *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC)

⁴⁶ *Kirland MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) para 43.

the courts do not have the power to make valid administrative conduct that is unconstitutional'.⁴⁷

[146] But these sentiments did not prevail in those cases. The majority judgment in *Kirland* held that the court should not decide the validity of the decision because 'the government respondents should have applied to set aside the approval, by way of formal counter-application'.⁴⁸ In the absence of that challenge — reactive or otherwise — the decision has legal consequences on the basis of its factual existence. One of the central benefits of this approach was said to be that requiring a counter-application would require the state organ to explain why it did not bring a timeous challenge.⁴⁹ The same was required of the municipality in *Merafong*.⁵⁰

[147] This position does not derogate from the principles expounded in cases like *Affordable Medicines Trust* and *Pharmaceutical Manufacturers*.⁵¹ These decisions make patent that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency. This includes the exercise of public power. Moreover, when confronted with unconstitutionality, courts are bound by the Constitution to make a declaration of invalidity. No constitutional principle allows an unlawful administrative decision to 'morph into a valid act'.⁵² However, for the reasons developed through a long string of this court's judgments, that declaration must be made by a court.⁵³ It is not open to any other party, public or private, to annex this function. Our Constitution confers on the courts the role of arbiter of legality. Therefore, until a court is appropriately approached and an allegedly unlawful exercise of public power is adjudicated upon, it has binding effect merely because of its factual existence.

⁴⁷ Id para 60

⁴⁸ Id para 82.

⁴⁹ Id para 83.

⁵⁰ *Merafong City Local Municipality v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC) ([2016] ZACC 35) para 40

⁵¹ *Affordable Medicines Trust v Minister of Health and Others* 2006 (3) SA 247 (CC) paras 45 – 50; *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) paras 8 – 9.

⁵² *Kirland* para 103.

⁵³ *Merafong* para 42; *Kirland* paras 101 – 103; *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) (2011 (2) BCLR 121; [2010] ZACC 19) para 62; *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) (2011 (3) BCLR 229; [2010] ZACC 26) para 85. For this principle's application in the context of school-admission policies, see *MEC for Education, Gauteng Province, and Others v Governing Body, Rivonia Primary School and Others* 2013 (6) SA 582 (CC) (2013 (12) BCLR 1365; [2013] ZACC 34); *Head of Department, Department of Education, Free State Province v Welkom High School and Others* 2014 (2) SA 228 (CC) (2013 (9) BCLR 989; [2013] ZACC 25) (*Welkom*); *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo* 2010 (2) SA 415 (CC) (2010 (3) BCLR 177; [2009] ZACC 32).

[148] This important principle does not undermine the supremacy of the Constitution or the doctrine of objective invalidity.⁵⁴ In the interests of certainty and the rule of law, it merely preserves the fascia of legal authority until the decision is set aside by a court: the administrative act remains legally effective, despite the fact that it may be objectively invalid.

[149] This approach was endorsed and explained by a unanimous court in *Economic Freedom Fighters*.⁵⁵ There, Mogoeng CJ concluded that our constitutional order hinges on the rule of law:

'No decision grounded on the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would amount to a licence to self-help. Whether the Public Protector's decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it, amounts to taking the law into their own hands and is illegal. No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of court would have to be obtained.'⁵⁶

[150] An organ of state, like any other party, must therefore challenge an administrative decision to escape its effects. This it can do reactively, provided its reasons for doing so are sound, and there is no unwarranted delay."

91. It is clear the NSFAS requires the Court's imprimatur for declaring the award and the service level agreement invalid and why it instituted the proceedings before the Special Tribunal. As I have already found it, the contention that no decision had as yet been taken to cancel the service level agreement is not borne out by the facts.
92. It follows that eZaga had established at least *prima facie* a clear right arising from the unconstitutional self-help by NSFAS.
93. This is, however not the end of road. There remains the collateral or reactive challenge to the validity of the tender and the service level agreements. I deal with this aspect further below.

⁵⁴ See the discussion of the minority in paras 134 – 136.

⁵⁵ *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC) (2016 (5) BCLR 618; [2016] ZACC 11)

⁵⁶ *Id* para 74

Procedural fairness and *audi*

94. It was submitted that before administrative action is taken, an organ of state such as NSFAS must give the affected party an opportunity to be heard. It is common cause that no notice was given to the service providers nor were they afforded an opportunity to make representations.
95. Section 3(1) of PAJA requires procedural fairness not only in the event of a “breach” of a right, but whenever administrative action “**materially and adversely affects**” a right or legitimate expectation of any person.⁵⁷
96. eZaga’s case is that its rights, as well as those of the students, have been materially and adversely affected and that it had a legitimate expectation to be heard before the decision was taken.
97. Mr Ngcukaitobi contended that there was no obligation to afford eZaga an opportunity to be heard as the preparation of the Werksmans report did not qualify as a hearing and accordingly that *audi* did not apply.
98. Mr Ngcukaitobi submitted in his further note, that it is settled law that executive decisions do not attract a duty to be heard. In *Masetlha v President of the RSA*⁵⁸ the Constitutional Court held that

“[78] This does not, however, mean that there are no constitutional constraints on the exercise of executive authority. The authority conferred must be exercised lawfully, rationally and in a manner consistent with the Constitution.⁵⁹ Procedural fairness is not a requirement. The authority in s 85(2)(e) of the Constitution is conferred in order to provide room for the President to fulfil executive functions and should not be constrained any more than through the principle of legality and rationality.

[79] It is appropriate to recall what this court had occasion to observe in SARFU:

(T)he exercise of the powers must not infringe any provision of the Bill of Rights; the exercise of the powers is also clearly constrained by the principle of legality and, as is implicit in the Constitution, the

⁵⁷ Joseph at [31]

⁵⁸ 2008 (1) SA 566 (CC).

⁵⁹ See *Pharmaceutical Manufacturers* para 85; and *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) (1997 (6) BCLR 759) para 25

President must act in good faith and must not misconstrue the powers. These are significant constraints upon the exercise of the President's power.”⁶⁰

99. Whether the decision was executive or administrative it must meet the requirements of legality and, as set out above, self-help does not meet that requirement.
100. In addition, when it is decided to implement the report, the situation changes. NSFAS deemed it appropriate to furnish the report to Mr Nongogo and afford him the opportunity to make representations. This is in accordance with the notion that this is also an opportunity for NSFAS to acquire information which may be pertinent to the just and proper exercise of the power.⁶¹ Why would it not be required to afford eZaga the same opportunity? Especially as eZaga in these papers have advanced a multitude of reasons why it would be detrimental to terminate the service level agreements and ostensibly revert to previous system which resulted in enormous losses and was the very reason for the implementation of the direct payment solution?
101. Mr Sive submitted that the decision to terminate the service level agreements, communicated on 18 October 2023 was final. eZaga had a right to be heard. In *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC), the question was whether the applicants were entitled to procedural fairness under section 3 of PAJA before the electricity supply was terminated. If section 3 found application three secondary issues arose, one of which was the content of procedural fairness required in the circumstances of that case.
102. Mr Sive relied on *Psychological Society of South Africa v Qwelane and Others* [2016] ZACC 16, at [33] – [34] for the trite proposition that at common law and in terms of the tenets of natural justice, *audi alteram partem* is an indispensable condition of fair proceedings. The principle is underpinned by two important considerations of legal policy. The first is recognising the subject’s dignity and sense of worth. Second there is the more pragmatic consideration that *audi alteram partem* inherently conduces to better justice. In *Qwelane* the Court referred to *South African Roads Board v Johannesburg City Council*⁶² where Milne J said that the application of the *audi alteram partem* principle

“has a two-fold effect. It satisfies the individual’s desire to be heard before he is adversely affected; and it provides an opportunity for the

⁶⁰ SARFU para 148

⁶¹ *South African Roads Board v Johannesburg City Council* [1991] ZASCA 63; 1991 (4) SA 1 (A) at 13 B – C

⁶² 1991 (4) SA 1 (A) at 13B-C

repository of the power to acquire information which may be pertinent to the just and proper exercise of the power.”

103. Emphasising the importance of the procedural requirements I was referred to *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* [2022] ZACC 44 where Madlanga J held as follows at [210]

“there is always something that informs administrator action. At times, just like Eskom says is the case here, the administrative action may be meant to avert grave consequences. But however grave the consequences, the functionary must follow the fair process applicable to administrative action affecting the rights of the public set out in section 4 of PAJA. The greatness of the consequences sought to be averted alone can never be a licence for the functionary to act as if our law does not impose of rights to just administrative action. Of course, the form and extent of the fair process depends on the nature and circumstances of what is at issue.”

104. In the premises I am of the view that eZaga has established, at least on a *prima facie* basis, a right to have been heard, at least in sense that it should have been afforded an opportunity to make representations as to why the Werksmans report’s recommendations should not be implemented.

Rationality

105. eZaga contended that from a rational procedure point of view it could never be rational to have ignored the service level agreement. Reliance was placed on *Minister of Water & Sanitation v Sembcorp Siza Water (Pty) Ltd* 2023 (1) SA 1 (CC) at [45] Jafta J held as follows

“[45] However, the concept of rationality encompasses the procedure followed in reaching a decision. Our law requires that the procedure followed should itself be rationally connected to the purpose for which the power was exercised. In other words, the procedure followed must reasonably be capable of leading to the attainment of the purpose for which the power was conferred. The leading cases on this point are *Albutt*⁶³ and *Democratic Alliance*,⁶⁴

⁶³ *Albutt v Centre for the Study of Violence and Reconciliation, and Others* 2010 (3) SA 293 (CC)

⁶⁴ *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC)

both of which were referred to by the High Court. The High Court quoted the following statements from Democratic Alliance:

'The means for achieving the purpose for which the power was conferred must include everything that is done to achieve that purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred.'⁶⁵

106. Given the conclusion I arrived in respect of the earlier two review grounds it is unnecessary in these interdict proceedings to also deal with this ground and the further ground as the infringement of any constitutional right to administrative justice and rights under the award of the tender and the service level agreement.

The reactive challenge in principle?

107. A collateral or reactive challenge is commonly understood as a challenge to the validity and enforcement of an administrative act or decision, which is raised in proceedings that are not designed or aimed at impeaching, directly, the validity of such act or decision. The challenge is one raised incidentally, in response to an attempt to enforce the act or decision.
108. The further question which accordingly arises in this application is whether I am to decide the validity of the award of the tender or, consequentially, the conclusion of the service level agreement. Those are already the subject matter of the pending application before the Special Investigations Tribunal, and there is no formal counter-application before me.
109. eZaga submitted that it would be invidious of me to add this interim stage, make findings regarding the validity or invalidity of the tender.
110. It seems to me, however, that I have to give consideration to the reactive challenge, first as to whether it is to be entertained, and second, as to its merits.
111. A number of defects in the award of the tender is referred to in the answering affidavit. In brief summary they are
- (a) A requirement of the tender submission was the proof of entity professional indemnity of at least twenty million Rand. This was a mandatory requirement, failure of which would immediately

⁶⁵ *Sembcorp Siza Water (Pty) Ltd v Umgeni Water* KZD 11908/2015 (13 September 2017) (High Court judgment) para 35

disqualify the bid. eGaza's tender document contains a letter from insurance brokers recording: **"We confirm that a Quotation for Professional Indemnity cover is in place for the above company with our Underwriters. The Quotation is for 25 million Rand and will be activated should the said tender be awarded to the above company."**

- (b) The impermissible interference by Mr Nongogo;
- (c) The undisclosed interest in eZaga Remit which Dr Chirwa had.
- (d) The reduction in the requirements as between the second and third tenders.

- 112. I deal with these later.
- 113. eZaga and the other service providers objected to the manner in which it was sought to introduce the collateral challenges.
- 114. Despite the pending application before this Court, and after it was launched, the proceedings were instituted before the Special Tribunal. It remains unclear why the proceedings were brought before the Special Tribunal. It was submitted that justice demanded that the Court should not countenance self-help and that a reflective challenge should be raised appropriately and formally.
- 115. Mr Ngcukaitobi relied upon *Gobela Consulting v Makhado Municipality* [2020] ZASCA 180; *Kunene Rampala Inc v Northwest Province Department of Education and Sport Development*. [2023] ZASCA 120 and *Thabzo Security Services CC v The Musunduzi Municipality and Others*, KZN 2682/23P for the proposition that a formal counter application was not required to raise a reactive challenge.
- 116. In *Gobela* the Supreme Court of Appeal found that justice required the High Court to have declared the impugned contract invalid and unlawful despite the absence of a frontal challenge in the form of a counter-application, as the validity and lawfulness of the contract had been squarely raised in the pleadings. It held that if the court had not entertained the municipality's reactive challenge **"the untenable result would be that the court would be giving legal sanction to the very evil which section 216 of the Constitution and all other procurement-related policies kept sought to prevent"**⁶⁶.
- 117. In *Kunene*, as in *Gobela*, an action was instituted to claim monies for work invoiced but not actually done, which the provincial Department refused to pay as the addendum agreement was concluded without complying with the procurement prescripts and as such, it sought that the contract be declared unlawful and

⁶⁶ par [21].

invalid. The crisp question on appeal was whether the High Court was correct in finding that the contract was invalid, unlawful and in breach of the applicable procedure prescripts, in the absence of a counter application seeking a review and setting aside of the addendum.⁶⁷

118. Molemela JA held as follows in *Gobela*

“[18] The law relating to collateral challenges was settled by the Constitutional Court in *Merafong City Local Municipality v AngloGold Ashanti Limited* (Merafong). Having surveyed the pre-constitutional case-law, the majority judgment found that South African law has always allowed a degree of flexibility in reactive challenges to administrative action. Having considered the impact of the Constitution on that body of law, it re-asserted that the import of *Oudekraal* was that the government institution cannot simply ignore an apparently binding ruling or decision on the basis that it was patently unlawful, as that would undermine the rule of law; rather, it has to test the validity of that decision in appropriate proceedings. The decision remains binding until set aside. That court expressed some guidelines for assessing the competence of a collateral challenge. With specific reference to *Kirland*, it stated as follows:

‘But it is important to note what *Kirland* did not do. It did not fossilise possibly unlawful – and constitutionally invalid – administrative action as indefinitely effective. It expressly recognised that the *Oudekraal* principle puts a provisional brake on determining invalidity. The brake is imposed for rule of law reasons and for good administration. It does not bring the process to an irreversible halt. What it requires is that the allegedly unlawful action be challenged by the right actor in the right proceedings. Until that happens, for rule of law reasons, the decision stands.

Oudekraal and *Kirland* did not impose an absolute obligation on private citizens to take the initiative to strike down invalid administrative decisions affecting them. Both decisions recognised that there may be occasions where an administrative decision or ruling should be treated as invalid even though no action has been taken to strike it down. Neither decision expressly circumscribed the circumstances in which an administrative decision could be attacked reactively as invalid. As important, they did not imply or entail that, unless they bring court proceedings to challenge an administrative

⁶⁷ par [14]

decision, public authorities are obliged to accept it as valid. And neither imposed an absolute duty of proactivity on public authorities. It all depends on the circumstances.

....

Against this background, the question is whether, when AngloGold sought an order enforcing the Minister's decision, Merafong was entitled to react by raising the invalidity of her ruling as a defence.

....

A reactive challenge should be available where justice requires it to be. That will depend, in each case, on the facts.' (Emphasis added.)"

119. Molemela JA concluded

"[22] Notably, despite the fact that the appointment letter pertinently stated that there would be an assessment after finalisation of every phase and that Gobela had not gone beyond the preparatory steps for its performance of its obligations in terms of the contract, it impermissibly claimed the full contract fee. Allowing the claim would thus be tantamount to enforcing an unperformed obligation. For all these reasons, I conclude that justice required that the court a quo declare the impugned contract invalid and unlawful despite the municipality not having counter-applied for it to be reviewed and set aside. There is no question here of impermissible self-help. The decision that the contract was unlawful and invalid was a decision by a court. It follows that the appeal has to fail. ..."

120. *Gobela* and *Kunene* were both actions instituted and presumably this was the last opportunity to prevent fossilising an invalid administrative act.

121. Mr Ngcukaitobi did not rely on *Thabzo* in his oral argument. In *Thabzo*, in interim interdict proceedings, the Court referred to *Gobela*. The Court, however, also relied upon the minority judgement in *Tasima*, for the proposition that it could not be correct for a court to follow an approach that leads to a party being entitled to an interim order preserving rights until final determination even with those rights flow from an illegal or fraudulent act.⁶⁸

122. *Kirland*, perhaps summarises the position best

⁶⁸ para [65] read with par [42] of *Tasima*

"[106] In summary: having failed to counter-apply during these proceedings, the department must bring a review application to challenge the approval granted to Kirland, which remains valid until set aside. In those proceedings, the department will no doubt explain its dilly-dallying by accounting for the long months before it acted. As respondent, Kirland will in turn be entitled to defend the decision, whether on the ground of its validity, or on the ground that it should not be set aside, even if it is invalid."

123. *Merafong* explicated par 106 of Kirland at par [41]

"[41] The import of *Oudekraal* and *Kirland* was that government cannot simply ignore an apparently binding ruling or decision on the basis that it is invalid. The validity of the decision has to be tested in appropriate proceedings. And the sole power to pronounce that the decision is defective, and therefore invalid, lies with the courts. Government itself has no authority to invalidate or ignore the decision. It remains legally effective until properly set aside."

124. The footnote to this paragraph states

"Where Kirland ... para 106 says that a decision not properly set aside 'remains valid', it means that it remains legally effective. Absence of challenge by the right litigant in the right forum at the right time doesn't magically heal the administrative-law flaws in the decision. It means that the decision continues to have effect in law until properly set aside."

125. In *Tasima*, in the interdict proceedings, a formal counter-application, setting aside the unlawfully extended contract, as a collateral challenge was in fact brought.

126. This Court in *Executive Council of the Western Cape Province and Others v Kannaland Local Municipality and Others* (229/2021) [2021] ZAWCH 51, in interim interdict proceedings, gave consideration to the raising of a co-lateral challenge, and ultimately refrained from entertaining the challenge. Mangcu-Lockwood AJ, as she then was, held as follows

"49. ... The law relating to collateral challenges was set out by the Constitutional Court in *Merafong City Local Municipality v AngloGold Ashanti Limited* ('Merafong'). The majority judgment found that our

courts have always allowed a degree of flexibility in collateral (or reactive challenges) to administrative action, even before our Constitutional era. However, the Constitutional Court re-asserted that the import of *Oudekraal Estates (Pty) Ltd v City of Cape Town* and *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* was that a government institution cannot simply ignore an apparently binding ruling or decision on the basis that it is invalid, as that would undermine the rule of law; rather, it has to test the validity of that decision in appropriate proceedings. The decision remains binding until set aside. Referring to *Kirland*, the Constitutional Court stated that it did not fossilise possibly unlawful – and constitutionally invalid – administrative action as indefinitely effective. It expressly recognised that the *Oudekraal* principle puts a provisional brake on determining invalidity. The brake is imposed for rule of law reasons and for good administration. It does not bring the process to an irreversible halt. What it requires is that the allegedly unlawful action be challenged by the right actor in the right proceedings. Until that happens, for rule of law reasons, the decision stands.’

50. The Constitutional Court pointed out that neither *Oudekraal* nor *Kirland* expressly circumscribed the circumstances in which an administrative decision could be attacked reactively as invalid. It all depends on the circumstances. A collateral challenge should be available where justice requires it to be; and that will depend, in each case, on the facts. As the Court stated, the permissibility of a collateral challenge by an organ of state must depend on a variety of factors, invoked with a 'pragmatic blend of logic and experience', and it would be imprudent to pronounce any inflexible rule.”

127. Munchu-Lockwood AJ, found that it was inappropriate at the interim interdict stage to entertain reactive challenge which would best be dealt with at the Part B stage.⁶⁹ The more so in the present case where there is already a pending review application before the Special Tribunal. Munchu-Lockwood also was also of the view that upholding the reactive challenge would, in effect lend support to the self-help.⁷⁰
128. Mr Ngcukaitobi cited examples of the sympathetic view adopted by the courts towards self-review applications.
129. In *Siyangena Technologies (Pty) Ltd v Passenger Rail Agency of South Africa and Others* 2023(2) SA 51 (SCA) Prasa brought a legality review, seeking the review and setting aside of its own decisions to conclude procurement contracts. The High Court had found that the previous management of Prasa had placed obstacles in

⁶⁹ At par [52]

⁷⁰ At par [55]

the way of a newly constituted board to an earth the true state of affairs by frustrating the flow of information. The new board was constituted in August 20, 2014 but the obstacles remained until July 2015 when the erstwhile group chief executive officer Mr Lucky Montana resigned. The High Court condoned the delay of 10 months, the review application having been only instituted in early February 2016.⁷¹ The Supreme Court of Appeal found that in the context of a litany of breaches of the procurement system, condonation was to be granted in the interests of justice.⁷²

130. The Supreme Court of Appeal referred to its earlier judgement in *Swifambo Rail Leasing (Pty) Ltd v Passenger Rail Agency of South Africa* 2020(1) SA 76 (SCA) at [34]. This was also a self-review application. There the court held, in condoning a delay of June half years for the review of the decision in terms of section 1 of the constitution, as follows

'In my view state institutions should not be discouraged from ferreting out and prosecuting corruption because of delay, particularly not where there has been obfuscation and interference by individuals within the institution.'

131. Mr Ngcukaitobi also referred to another self-review application namely *Eskom Holdings SOC Ltd v McKinsey and Company Africa (Pty) Ltd and Others* (22877/2018) [2019] ZAGPPHC 185. A Full Bench referred to Tasima where the Constitutional Court held

"... That state functionaries are entitled to challenge exercises of public power, including their own, was recognised by the Supreme Court of Appeal in *Pepcor*, and endorsed by this Court in *Khumalo*. There it was noted that 'state functionaries are enjoined to uphold and protect [The Constitution]'. And that a court should be slow to allow procedural obstacles to prevent it from lodging and challenge into the lawfulness of an exercise of public power. "

132. In *McKinsey* the new board of Eskom took office in January 2018. It immediately investigated the unlawful conduct of the previous board and its decisions and all payments made by it. After securing the necessary evidence, and 29 March 2018, it launched its application. The Court had no difficulty in condoning the delay.

⁷¹ It appears that *Siyangena* had earlier obtained an interdict preventing Prasa from refusing it access to various sites.

⁷² Prasa had launched an earlier review application in February 2016, which was dismissed for want of an application for condonation for the delay in bringing the application under PAJA. After the Constitutional Court judgement in *Gijima*, a legality review application was launched. (*State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC))

133. Mr Sive emphasised that those cases all dealt with self-review applications, and that there were no collateral challenge raised by NSFAS - all the service providers contended that the co-lateral challenge was first raised when Mr Ngcukaitobi filed his heads of argument in the early hours of 10 June 2024 when the application was set down for using before Miss Justice Ndita.
134. The response by both Mr Ngcukaitobi and Mr Mokoena, who appeared for the SIU, was that there was a pending application before the Special Tribunal where an interdict against the implementation of the service level agreements and a preview of the award and service level agreements were sought. It was submitted that this court should not, in view of those spending applications, grant interim relief. It was not suggested that this court did not have jurisdiction to grant such an interdict but it was argued that the grant of an interdict would render the pending interim relief application before the Special Tribunal moot, and, possibly also, depending on the terms of any interim relief that may be granted by this court, also the self-review application.
135. In *Tasima* a purportedly extended agreement was implemented. The Auditor General declared the extension of the contract to be irregular as it was done without following procurement requirements such as tendering. The Department of Transport then sort to terminate the agreement. In June 2012 the Department stopped making payments. *Tasima* turned to the High Court to enforce the purportedly extended contract. It is sought interim relief directing the Department to effect payment and perform all its obligations under the agreement, pending the finalisation of the arbitration proceedings to be instituted. The Department of Transport contended that the decision to extend was impugned on the ground that it was not in compliance with section 217 of the Constitution, section 38 of the PFMA and the Treasury Regulations. *Tasima* nonetheless successfully obtained interim relief.
136. In subsequent contempt proceedings the Department also lodged a counter application for the review and setting aside of the extension and raised a co-lateral challenge against the extension.
137. Should I proceed to entertain, and make a finding with regard to the reactive challenge, I would do so without having had the benefit of a proper explanation for the delay, bearing in mind that the SIU who had also been mandated to investigate the irregularities on a 26 August 2022, and who had completed those investigations by 23 April 2023, without explaining the delay on its part to Institute the interdict and review proceedings before the Special Tribunal. I would also do so without NSFAS having met the requirements for such an application, such as explaining not only the delay, but also why it would be in the interests of justice to allow the challenge.

138. In *Kirland* the Constitutional Court emphasised that —

“there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline.”⁷³

139. Neither a procedural nor a substantive lifeline would be justified in this instance.

140. Accordingly, I refrain from entertaining the reactive challenge for the reasons set out above. This issue will require resolution either in the proceedings before the Special Tribunal or in the part B proceedings of the present application.

The merits of the reactive challenge

141. To the extent that I may be wrong in coming to this conclusion I turn to consider the prospects of such a challenge being successful. There are two aspects, the first is the issue of delay, and the second is the prospects of success on the merits.

142. Mr Ngcukaitobi explained in detail the malfeasance in the run-up to the invitation for the third tender. Mr Nongogo had immediately upon his appointment as chief executive officer cancelled the award of the second tender, which he had considered as being exclusionary, on the publicly proclaimed basis that the reason for the service specified had fallen away. This was not true. Mr Nongogo had also pared down the bid specifications, and did away with the requirement of a banking licence, which had the effect of benefitting the fin-tech companies who were ultimately successful bidders.

143. Though it does not appear from the affidavits filed that the board of NSFAS was dissolved when the second administrator was appointed, I assume that this is indeed so. There is no explanation why the board had failed to act upon the complaints in the public domain regarding the involvement of Mr Nongogo in the award of the tenders. The board would have been well aware of the proclamation and the investigation into NSFAS. No allegations are made that, like Mr Lucky Montana in the PRASA decisions, Mr Nongogo dominated the NSFAS board.

144. The delay in question is not only that of NSFAS, but also of the Special Investigating Unit.

145. The investigation mandating the SIU into maladministration in the affairs of NSFAS was proclaimed on 26 August 2022 and in his affidavit Mr Williams, the Chief Forensic Investigator states that as a result of this proclamation and allegations

⁷³ Par 82

regarding the conduct of Mr Nongogo, the SIU conducted an investigation into the present tender award. That investigation was concluded on the 23 April 2023 with the last interview was conducted. The annexures reflect that Dr Chirwa was interviewed on the 23 April 2024 and I assume that the deponent erred in stating the year 2023. None the less there is no explanation for why it took from 26 August 2022 to 23 April 2024 to conclude the investigation.

146. The attorneys of record were briefed on 6 May 2024 and consultations on the approach to bringing civil litigation and prospects of the intended cause of action were held on 11 and 15 May 2024. The review application was filed and 24 May 2024. There is no explanation for the delay neither between August 2020 and April 2023, nor for the in order and a delay from 23 April 2023 to 15 May 2024.
147. The issue of delay may therefore very well feature prominently when the reactive challenge is before a court.
148. The factual complaints in support of the invalidity of the tender award are as follows.
149. The fact that Mr Nongogo had been intricately involved in the specification, evaluation and price negotiation in relation to the tender. The Bid Adjudication Committee approval would be submitted to him for his support **“for onward approval by the NSFAS board.”** Here it is submitted that he had found himself in conflict in the relation to his functions as the chief executive officer.
150. eZaga submitted that Mr Nongogo’s conduct was not precluded by the then applicable Supply Chain Management Policy. Moreover the fact that Mr Nongogo would ultimately facilitate the approval of the recommendation implies that it was proper for him to act as an observer and is questioned to enhance his ability to perform his oversight role. He is appointment of himself as the chairperson of the negotiating committee under clause 2.5 of the Supply Chain Management Policy was not prohibited nor could it be suggested that it would be irrational for him to be involved.
151. NSFAS submitted that in breach of a rudimentary requirement that each bid should have been evaluated by the members acting together the Bid Evaluation Committee members acted individually in evaluating the bids instead of considering or evaluating the bids collectively. This was required so that they would be fairness and transparency in the evaluation by the various committee members.
152. The 2021 Supply Chain Management Policy the required under the rubric **“evaluation of functionality” “each panel member must, after thorough**

evaluation, independently award his/her own value to each individual criterion...."⁷⁴

153. Though perhaps not precluded on a literal reading of the Supply Chain Management Policy document, it may not have been in compliance with what was required of the Bid Evaluation Committee. Whether that results in the invalidity of the bid process is not clear and I expressed no view there on.
154. A requirement of the tender submission was the proof of entity professional indemnity of at least twenty million Rand. This was a mandatory requirement, failure of which would immediately disqualify the bid.
155. The requirement was formulated as follows – **“the bidder must provide adequate evidence of the reimbursement in the case of theft/fraud. The proof of entity professional indemnity of at least 20 million Rand must be submitted”**
156. eGaza’s tender document contains a letter from insurance brokers recording: **“We confirm that a Quotation for Professional Indemnity cover is in place for the above company with our Underwriters. The Quotation is for 25 million Rand and will be activated should the said tender be awarded to the above company.”**
157. Upon a proper reading of the letter it seems to me that the requirement has been met. There was no need for the insurance to be in place at the tender state already as it is clear that the risk would only arise upon the award of the tender and proof of that cover being in place in that eventuality was what was required. To require otherwise would entail that all bidders would have to put in place insurance policies, and pay the premiums in respect of thereof, irrespective of whether they are successful in the bids or not. That would not be a businesslike interpretation of the requirement.
158. A further complaint is that the bid evaluation committee did not evaluate the bidders on the pricing that they attended for the cost to students. The pricing for the cost to students, which is where the competitiveness of the tender could have been evaluated, was only negotiated after the decision to recommend the tenderers had been made by the Bid Approval Committee. Pricing was, therefore, not used to evaluate the competitiveness and cost effectiveness of the bid proposals.
159. eZaga’s answer was that the successful bidders were also required to negotiate and standardise the pricing and value-added benefits for the student. This ensured

⁷⁴ Clause 10.112.2(d)

competitiveness and cost-effectiveness and, so it was submitted, is consistent with section 217 of the Constitution.

160. eZaga contended that, beyond bald allegations, NSFAS had failed to demonstrate that the bid Evaluation Committee did not use pricing to evaluate the competitiveness and cost effectiveness of the bids. The pricing that was advanced by the respective bidders for the cost to students varied greatly. What happened was that, at a meeting held after the award of the tenders, on 23 June 2022 a meeting took place where at the four service providers were provided an opportunity to discuss the proposed costing amongst themselves and had agreed on a proposed consistent pricing. NSFAS subsequently agreed to the proposed R89.00 bundled cost to students.
161. It may be that there was a failure to comply with section 217 of the Constitution, the PPPFA and the SCMP in this respect. Whether this will lead to invalidity will depend on a consideration of all the facts, and full argument.
162. The complaint was also levelled against the appointment of one Dr Chirwa as an expert to the Bid Evaluation Committee. It was contended that it was highly irregular that another person, other than Mr George the senior manager in the supply chain management unit, be appointed as an expert to provide advice on the interpretation of mandated are requirements, which is a supply chain management function. The expertise that Dr Chirwa could provide, so it was submitted, was more appropriately required at the bid specifications level, and not at the bid evaluation level. Dr Chirwa's involvement is tainted by the fact that he was also a director of and 20 % shareholder in eZaga Remit. His failure to declare his interest in eZaga tainted the evaluation process with unfairness.
163. eZaga submitted that eZaga holds no shares in eZaga Remit. There was no evidence that eZaga would benefit from the award of the tender-it was apparently a vehicle for a venture which had not yet materialised.
164. eZaga contended that the tender did not contain irregularities that tainted its legality or constitutionality. It was submitted that even if a court reviewed the award and service level agreement, eZaga would demonstrate to the Court that, in the circumstances, it would not be just and equitable to set them aside.
165. The facts set out above and the disputes in relation thereto are not readily resolved and may or may not result in a declaration on invalidity. I make no firm pronouncement on it, as it is, in my view better decided at the hearing of Part B, or in the review application before the Special Tribunal.

166. But even if it results in a declaration of invalidity, that will not be the end of the matter as section 172 of the Constitution then comes into play.
167. If the coming into effect of an order invalidating an administrative action would result in an injustice, section 8 of PAJA, read with section 172 of the Constitution empowers a Court to prevent the injustice by making a just and equitable order. This power enables our Courts to regulate consequences flowing from a declaration of constitutional invalidity. This suggests that the need to exercise this power arises when there is a declaration of invalidity or an administrative action is set aside. If there is no declaration of invalidity, generally the exercise of the power may not be triggered.
168. In terms of this section, once a court has made a pronouncement that conduct was unlawful, unconstitutional, and invalid, it remains for the court to decide on a “**just and equitable relief**” to be made.
169. For all of these reasons I would not entertain the reactive challenge and leave that for consideration by the Court hearing part B, or the Special Tribunal when it hears the self-review application.

Irreparable harm

170. eZaga has to show a reasonable apprehension of irreparable harm if the interim relief is not granted.
171. Irreparable harm in the context of an interim interdict means that the effects or consequences of the conduct the interdict seeks to restrain cannot be reversed or undone.⁷⁵
172. Here eZaga relies principally on the fact that the “**direct payment solution**” was devised precisely to avoid what had happened previously when over 40,000 undeserving students benefited irregularly, funding amounting to over Rand 5 billion was allocated to undeserving students and that institutions were unable to identify fraudulent applications and fraud was rife.
173. It is common cause that this was the reason for introducing the “**direct payment solution**” was to mitigate these risks.
174. NSFAS offered no explanation of the systems that it was putting into place to avoid a recurrence. Instead, it still communicated the direct payments solution was the preferred method.

⁷⁵ *Economic Freedom Fighters* at [66] –[67]

175. eZaga submits that it is likely that the public funds distributed to NSFAS to universities and colleges will be mismanaged and misappropriated. Many of these losses will be irrecoverable. As a consequence both it and the students will suffer irreparable harm.
176. It is therefore appropriate that the status quo ante be restored until the determination of Part B of the proceedings.

Balance of convenience

177. A court must be satisfied that the balance of convenience favours the granting of a temporary interdict. It must first weigh the harm to be endured by an applicant, if interim relief is not granted, as against the harm a respondent will bear, if the interdict is granted. Thus a court must assess all relevant factors carefully in order to decide where the balance of convenience rests.
178. *Outa*, again, set the point of departure

[47] The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define 'clearest of cases'. However, one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights. This is not such a case.

...

[63] There is yet another and very important consideration when the balance of convenience is struck. It relates to separation of powers. In *ITAC* we followed earlier statements in *Doctors for Life*⁷⁶ and warned that —

'(w)here the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of

⁷⁶ *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) (2006) (12) BCLR 1399; [2006] ZACC 11)

government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.⁷⁷

[64] In a dispute as the present one, this does not mean that an organ of state is immunised from judicial review only on account of separation of powers. The exercise of all public power is subject to constitutional control.⁷⁸ In an appropriate case an interdict may be granted against it. For instance, if the review court in due course were to find that SANRAL acted outside the law then it is entitled to grant effective interdictory relief. That would be so because the decisions of SANRAL would in effect be contrary to the law and thus void.

[65] When it evaluates where the balance of convenience rests, a court must recognise that it is invited to restrain the exercise of statutory power within the exclusive terrain of the executive or legislative branches of government. It must assess carefully how and to what extent its interdict will disrupt executive or legislative functions conferred by the law and thus whether its restraining order will implicate the tenet of division of powers. While a court has the power to grant a restraining order of that kind, it does not readily do so, except when a proper and strong case has been made out for the relief and, even so, only in the clearest of cases.

[66] A court must carefully consider whether the grant of the temporary restraining order pending a review will cut across or prevent the proper exercise of a power or duty that the law has vested in the authority to be interdicted. Thus courts are obliged to recognise and assess the impact of temporary restraining orders when dealing with those matters pertaining to the best application, operation and dissemination of public resources. What this means is that a court is obliged to ask itself not whether an interim interdict against an authorised state functionary is competent but rather whether it is constitutionally appropriate to grant the interdict.⁷⁹

[67] The harm and inconvenience to motorists, which the high court relies on, result from a national executive decision about the ordering of public resources, over which the executive government disposes and for which it, and it alone, has the public responsibility. Thus, the duty of determining how public resources are to be drawn upon and reordered 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 the prerogative to formulate and implement policy on how to finance

⁷⁷ *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) (2010 (5) BCLR 457; [2010] ZACC 6) at para 95

⁷⁸ *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) (2000 (3) BCLR 241; [2000] ZACC 1) in para 20.

⁷⁹ *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) (2010 (5) BCLR 457; [2010] ZACC 6) (ITAC) in paras 47 – 55 at para 69

public projects reside 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 call for policy-laden and polycentric decision-making. Courts are not always well suited to make decisions of that order. It bears repetition that a court considering the grant of an interim interdict against the exercise of power within the camp of government must have the separation-of-powers consideration at the very forefront."

179. it was submitted that eZaga had measures in place which were effective and had been utilised since the inception of the tender in June 2022. NSFAS itself was still allowing eZaga to administer the payments to the students at the colleges and had until April 2024 permitted eZaga to administer all payments to all of the students.
180. eZaga made much of the well publicised deficiencies in the manner in which NSFAS had previously managed payments to the students which led to many millions of Rands being lost.
181. NSFAS submitted that to revert to the direct payment solution, utilising eZaga would create confusion amongst the students.
182. It was pointed out that students are now being forced to open bank accounts at cost to them without any evidence as to whether they were better off doing so.
183. Mr Ngcukaitobi emphasised the allowing eZaga to continue will result in wasteful expenditure and that such expenditure will probably not be recovered from eZaga if the review is successful. Mr Mokoena voiced similar concerns.
184. I am not sure to what extent wasteful expenditure is being incurred where eZaga is performing its functions in terms of the agreed amended schedule. It may turn out to be wasteful to the extent that there may have been an "overcharge", but no clear evidence of that has been tabled. Certainly, no allegations of fraud, corruption or mismanagement of funds have been levelled against eZaga.
185. In the premises, I am of the view that that the balance of convenience favours the grant of the interdict.
186. In my view NSFAS will suffer no harm or prejudice if the interdict is granted.

The alternative remedy

187. Mr Ngcukaitobi accepted that conduct by NSFAS constituted a repudiation of the service level agreement. He submitted that eZaga was compelled to pursue their private law contractual remedies whether for specific performance or damages utilising the arbitration provision in the service level agreement.
188. It was suggested that Ezaga or to have invoked the arbitration provisions in the service level agreement and that, through arbitration, it had a quick and efficient remedy.
189. I am doubtful whether arbitration is a viable option. In the first instance where NSFAS contends that the agreement itself is invalid, ordinarily, and unless expressly otherwise provided for, the arbitration clause is equally invalid.
190. The second reason is that, in terms of *Airports Company South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd* 2011 (4) SA 642 (GSJ) it is not permissible to bestow jurisdiction upon a private arbitrator to decide a claim brought in terms of PAJA.⁸⁰
191. In *Novare Investments (Pty) Ltd and Another v Des Heuyer* [2020] ZAWCHC 37 Wille J referred with approval to the Airports matter.
192. For all these reasons I am not persuaded that the applicants have alternative remedy other than to approach this Court.
193. It is implicit in granting this Order, that I am persuaded that the matter is urgent, and warrants urgent intervention by this Court. No-one suggested otherwise in argument.
194. In the circumstances, I grant an order in the following terms

ORDER

1. Pending the final determination of Part B of this application:

- 1.1. the first respondent is interdicted from taking any steps to implement its decision on or about 18 October 2023 to terminate ("**the October 2023 termination decision**") its service level agreement with the applicant in relation to tender number SCMN022 for the provision of direct payment of allowances to NSFAS students for a period of five years, renewable, which agreement came into effect on 12 of July 2022 ("**the service level agreement**");

⁸⁰ at [68]; *Council for the Advancement of the SA Constitution and Others v Ingonyama Trust and Others* 2022 (1) SA 251 (KZP)

- 1.2. the October 2023 termination decision is suspended;
 - 1.3. the first respondent is interdicted from taking any steps to implement its decision on or about 18 October 2023 to cancel the decision it made on 12 July 2022 to award the tender to applicant ("the cancellation decision");
 - 1.4. the cancellation decision is suspended;
 - 1.5. the first respondent is interdicted from taking any steps to implement its decision on or about 12 April 2024 to extend the payment of allowances to NSFAS-funded students and beneficiaries through the universities themselves instead of through the direct payment solution provided by the applicant ("the 12 April 2024 diversion decision");
 - 1.6. the 12 April 2024 diversion decision is suspended;
 - 1.7. the first respondent is interdicted from taking any steps to implement its decision on or about 24 April 2024 to stop issuing payment instructions and making associated payments to the applicant for the direct disbursement of allowances into the bank accounts of the NSFAS-funded students and beneficiaries which the applicant has onboarded ("the 24 April 2024 diversion decision");
 - 1.8. the 24 April 2024 diversion decision is suspended;
 - 1.9. the first respondent is interdicted from taking any steps to implement its decision on or about 26 April 2024 to implement a payment mechanism with the assistance of its banker to distribute allowances directly to students' bank accounts ("the 26 April 2024 diversion decision");
 - 1.10. the 26 April 2024 diversion decision is suspended;
 - 1.11. the first respondent is directed to implement the service level agreement, issue payment instructions and make the associated payments to the applicant for the direct disbursement of allowances into the bank accounts of the NSFAS-funded students and beneficiaries which the applicant has onboarded.
2. The costs of Part A of this application, including the costs of two counsel on scale C are to be paid jointly and severally by first and sixth respondents.
 3. The costs of the third and fourth respondents stand over for determination at Part B of this application.
 4. The Orders made in terms of paragraph 1.1 to 1.11 above shall remain in effect until such time as either this Court or the Special Tribunal constituted in terms of section 2 of the Special Investigating Units and Special Tribunal Act 74 of 1964, should make a final order,

that the Service Level Agreement concluded between the Applicant and the First Respondent not be given effect to.


Sven Olivier S
Acting Judge
15 June 2024