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Abstract

The Skills Development Act 97 of 1998 aims to develop labour force skills through a skills levy on employers. Under the Department of Labour, employers received a proportion of the levy as a mandatory training grant. This proportion decreased substantially in 2009 when the Department of Higher Education and Training (DHET) took charge of skills development. It leveraged the funds for projects primarily in the post schooling/tertiary sector, negatively affecting labour force skills development. The DHET ignored a Labour Appeal Court decision in 2019 declaring the relevant regulations invalid and irrational. This note argues that the skills development levy has been impermissibly appropriated by the DHET for a purpose outside the parameters originally established by the legislature.

1 Introduction**1.1 Overview**

Improving the skills of South Africa's workforce is the underlying purpose of the Skills Development Act 97 of 1998 (SDA). Employers pay a skills development levy of 1% of their wage bill to the South African Revenue Service (SARS) and then recover part of that cost from their Sector Education and Training Authority (SETA), in the form of a grant, to pay for the training of their employees. Initially skills development fell under the political authority of the Minister of Labour with the administrative arm being the Department of Labour (DOL). Employers were eligible for between 50% and 65% of their levy in the form of a mandatory grant for purposes of training their own employees. In 2009 the responsibility for skills development was transferred to the Minister of Higher Education and Training. Three years later the Minister initiated new funding regulations¹ which saw the mandatory grant for employers drop to 20%. More funds consequently became available for discretionary grants for SETA programmes and projects,

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which were regulated by service level agreements concluded with the Department of Higher Education and Training (DHET).

This note will explore the changes to the grants over time, litigation initiated by Business Unity South Africa (BUSA) to challenge the reduction in the mandatory grant for employers for workplace training, and the DHET's response. It will also consider whether there has been a shift in focus away from workplace training to the post-schooling and tertiary education sphere, and whether the use of the levy reasonably accords with the legislative intention of the SDA.

1.2 The Skills Development Act

President Mandela assented to the SDA on 2 November 1998, and this legislation came into effect in September 1999. The SDA followed a set of new progressive labour laws seeking to redress the discriminatory effects of apartheid on the labour force.² The SDA was a legislative response to concerns about low levels of technical skills in the workplace, the lack of upward vocational mobility for employees, and uncompetitive industries facing a new modern century.

Section 2 of the SDA sets out the purpose of the Act that, in summary, is to develop the skills of the South African workforce, improve productivity, improve the delivery of social services, encourage workers to participate in learning programmes, increase the levels of investment in education and training, provide opportunities for new entrants to the labour market, assist work seekers in finding employment, and assist employers in finding qualified employees.

The SDA established new institutions and mechanisms to achieve these purposes, the most notable being the National Skills Authority (NSA),³ National Skills Fund (NSF),⁴ and Sector Education and Training Authorities (SETAs).⁵

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1.3 The Skills Development Levies Act

The financing of skills development comes from a skills development levy-grant scheme as set out in the Skills Development Levies Act 9 of 1999 (SDLA). The SDLA commenced on 1 September 1999. In a nutshell it works as follows: employers pay the levy, and then recover part of that payment through grants allocated to them for conducting skills training for employees and unemployed work seekers. It was envisaged that the payment of the grants would incentivise employers to train their workforces.

As from 1 April 2000 every employer (unless exempted) was required to pay 0.5% of the amount⁶ (basically remuneration) subjected to the levy and a year later 1% of that amount to SARS on a monthly basis.⁷ The NSF retains 20% of that amount for education and training-related national priorities and 80% is paid to the relevant SETA.⁸ The SETAs then make payment of grants in their respective economic sectors for skills development training.

1.4 The values of the levies

The value of the skills development levies has grown over the years from approximately R1.7 billion in 2000 to around R18.5 billion in 2019-2020. The value of the levies over the preceding five years is set out in the chart below.⁹

	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020
SETAs	12 126 685 355	12 199 864 589	12 987 679 239	13 987 917 000	14 861 044 000
NSF	3 044 212 000	3 046 235 000	3 246 920 000	3 496 140 000	3 715 261 000
Total	15 170 897 355	15 246 099 589	16 234 599 239	17 484 057 000	18 576 305 000

Given that the levies constitute a significant amount of money,¹⁰ it is not surprising that there is contestation over these funds.

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2 Grants over Time

2.1 The Minister of Labour (2000-2009)

In February 2000, the Minister of Labour, MMS Mdladlana, issued regulations regarding the funding of SETAs. ¹¹ SETAs were entitled to use 20% of the grants for administration and operational costs ¹² and 10% on exceptional SETA set-up costs, with the grants available for employers being set at a minimum of 50% of the levy payment. ¹³ The prescribed amount to be transferred to the NSF was 20%. ¹⁴

The regulations set out the eligibility criteria for employers to access grants. There were essentially two: employers had to be registered with SARS and to be up to date with their levy payment.

Four types of grants were available:

- Grant A of 15% for the appointment of a skills development facilitator;
- Grant B of 10% for the submission of a workplace skills plan;
- Grant C of 20% for the implementation of training specified in the workplace skills plan; and
- Grant D of 5% for specific skills initiatives in the sector.

In June 2001 the DOL published new grant regulations. ¹⁵ The Minister specified two main types of grants — mandatory and discretionary. The mandatory grants available to employers for the 2001-2002 financial year amounted to 65% of total levies paid (15% for submission of a workplace skills plan and 50% for submission of a workplace skills report.) ¹⁶ In the 2002-2003 financial year mandatory grants would constitute 60% of the total levies paid. ¹⁷

Employers were also entitled to apply for a discretionary grant, as were education and training providers and workers. These discretionary grants were to support learnerships, skills programmes, apprenticeships and sector skills plans. ¹⁸

In June 2004, the Minister amended the funding regulations. ¹⁹ Employers could now submit an application for a discretionary grant for specifically identified national skills priority areas such as adult basic

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education and training, HIV-Aids awareness, learnerships, achieving equity targets and scarce skills.

In July 2005 the Minister of Labour made further regulations regarding SETA finances. ²⁰ The mandatory grant was set at 50%. Additional criteria ²¹ for payment of grants to employers were imposed, ²² namely the timeous submission of a workplace skills plan (WSP) and, with effect from the 2006-2007 financial year, the submission of a training report in respect of the previous year's WSP which had to be verified by the relevant SETA board. ²³ Failure to comply would disqualify an employer from consideration for a mandatory grant.

2.2 The Minister of Higher Education and Training (2009 onwards)

In November 2009, the DHET took over responsibility for skills development from the Department of Labour. The new Minister motivated the shift in this function by pointing to poor performing SETAs, the small numbers of artisans and technicians in training, and the need for a restructuring of the SETA landscape. In essence the Minister sought to achieve better coherence between workplace training and formal education in the post-schooling system of colleges — further education and training colleges, community colleges, Technical Vocational Education and Training (TVET colleges) and universities (including universities of technology). ²⁴

In April 2011, the new Minister amended the 2005 grant regulations to include a definition of PIVOTAL programmes which meant

'professional, vocational, technical and academic learning programmes that result in occupational qualifications and may include a knowledge component that is normally delivered in a further education and training college or a university as well as structured learning in an accredited training centre or an approved workplace'. ²⁵

Discretionary grants could be spent on PIVOTAL programmes. ²⁶ Mandatory grants for employers dropped to 40%. ²⁷ Employers were

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eligible for an additional 10% provided they funded unemployed learners on PIVOTAL programmes. ²⁸

The following year in December 2012 the Minister published new SETA grant regulations ²⁹ which compelled SETAs to spend 80% of their discretionary grants on PIVOTAL programmes. ³⁰ He made two further key amendments. Firstly, he reduced the mandatory grant available to employers to 20%. ³¹ Secondly, he decreed that any surplus discretionary funds must be paid into the NSF by 1 October each year. ³²

It was these regulations which triggered the litigation between BUSA and the Minister.

3 Litigation over Mandatory Grants

3.1 BUSA in the Labour Court

On 30 May 2013 BUSA applied to the Labour Court for the setting aside of the 2012 grant regulations with respect to regulation 3(12), which dealt with the surplus funds to be paid to the NSF, and regulation 4(4), which reduced the mandatory grant to 20%. The first payment of the grants was due on 30 September 2013. The case was argued before Coetzee AJ on 24 June 2015. BUSA contended that proper processes had not been followed in bringing the regulations into effect and they were irrational, unreasonable and ultra vires the SDA. The Minister was required to consult the NSA about the proposed regulations as contemplated in s 36 of the SDA, but had not done so. There were thus both procedural and substantive challenges to the regulations.

The Labour Court, handing down judgment on 7 August 2015 in the matter of *Business Unity SA v Minister of Higher Education & Training & others*, ³³ agreed with BUSA. The court reasoned that the reduced mandatory grant would frustrate the purposes of the Act. Coetzee AJ said that

'regulation 4(4) is not rationally related to the primary objects of the SDA but would in fact serve to frustrate those objects. It is submitted that the reduction will reduce — rather than increase — the funds available to employers to invest in education and training and will discourage — rather than encourage — employers to pursue the training and education objectives listed in ... the SDA'. ³⁴

The court held further that requiring SETAs to pay surplus money to the NSF was not a purpose authorised by s 14(3) of the SDA. The

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court found in addition that Parliament had credited the fund with 20% of the skills development levies, on the assumption that 80% of those levies would be allocated to the SETAs. The Minister's regulations contravened these proportions. ³⁵ The Labour Court declared regulations 3(12) and 4(4) invalid and set them aside. The order was suspended until 31 March 2016 to afford the Minister an opportunity to correct the impugned regulations. ³⁶

3.2 The Minister of Higher Education and Training's response

The director general of DHET issued a circular on 2 September 2015 ³⁷ (about a month after the judgment was received) which stated that mandatory and discretionary grants should be implemented according to the 3 December 2012 grant regulations. This was curious as the court had pronounced on their invalidity (with respect to the two disputed clauses), but presumably because the court order was suspended until 31 March 2016, the director general was of the view that the 2012 grant regulations could be implemented until that time.

Noting the criticism from the court that the Minister had not properly consulted the NSA, the Minister then proceeded to do so on three occasions during the months of September, October and November 2015. ³⁸ The NSA supported the reduction of the mandatory grant from 50% to 20%. ³⁹ On the strength of that the Minister re-promulgated regulation 4(4) in January 2016. ⁴⁰ The re-promulgated regulation confirmed that mandatory grants were to be set at 20% and the SETAs were advised as per a circular issued on 5 April 2016 ⁴¹ to continue working based

on the 2012 grant regulations.

BUSA again contested the matter and initially lost in the Labour Court in August 2018. ⁴²

3.3 BUSA in the Labour Appeal Court

BUSA took the decision on appeal to the Labour Appeal Court (LAC) and succeeded. ⁴³ Davis JA summarised the issue for determination as follows:

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'The crisp question therefore for determination in the present case is whether the re-promulgation of regulation 4(4) constitutes irrational or arbitrary action or whether the minister has, in his papers in this case, presented sufficient argument to show that there was a different context which prompted him to re-promulgate the regulations and hence that he was justified in his apparent circumvention of the order of Coetzee AJ.' ⁴⁴

The LAC agreed that the promulgation of regulations is an exercise of public power which may not be carried out arbitrarily or irrationally. ⁴⁵ The question before the court was whether or not the re-promulgation of regulation 4(4) was done arbitrarily and irrationally or if the Minister had in fact provided sufficient evidence to demonstrate that there were different circumstances that prompted him to re-promulgate the regulations which would justify his deviating from the court a quo's order. ⁴⁶

The court found that the Minister had failed to provide evidence to suggest that there was a clear reason for his decision to re-promulgate the same regulation that had been held to be unlawful, arbitrary and irrational by the court a quo. It held that in the absence of any new context being provided by the Minister as a justification for the re-promulgation, regulation 4(4) was irrational and lacked any legal justification. ⁴⁷

The LAC found that:

'no clear justification was offered for the decision by the minister which flew in the face of a court order. For this reason the only conclusion that the court could reach was that the decision to re-promulgate regulation 4(4) was irrational and lacking in any legal justification'. ⁴⁸

The LAC thus set aside the re-promulgated regulation 4(4) on 16 October 2019. ⁴⁹

3.4 The Minister's response

In January 2020 the director general issued a circular ⁵⁰ informing the SETAs that the LAC had set aside regulation 4(4) as follows:

'Regulation 4(4) simply falls to the wayside and that [sic] the 2012 Regulations must forthwith be interpreted and applied as if there is no such Regulation 4(4) in place... The Department is of the view, in line with Regulation 4(1), [sic] it would be within the power of a SETA to decide what percentage of the levies would be paid back to the employer as a Mandatory Grant.'

Clearly the circular was at odds with the LAC decision as, on a plain reading, the SETA was given the power to decide on the quantum of

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the mandatory grant, which could include a percentage from 1%-20%, and would obviously contravene the court order. It was also not a power which the SETAs could exercise — that power rests with the Minister after consultation with the NSA. Confusion in the SETAs reigned. Some two weeks later the director general rescinded the circular. ⁵¹

Approximately two years after the LAC set aside regulation 4(4), the SETAs, inexplicably and contrary to the court's order, continue to allocate 20% for mandatory grants to employers. Perhaps part of the reason lies in the Minister's control over the governance of the SETAs. Since amendments he introduced to the SDA in 2011, ⁵² the Minister appoints both the chairpersons of the accounting authority and the chief executive officers of the SETAs. ⁵³

The Minister issued two directives in 2020 ⁵⁴ relating to the extension of dates for submission of mandatory grants. No reference was made to the quantum of the grant. It has become practice to set the limit for mandatory grants at 20% of the levies paid by employers.

It is arguable that the change in the allocation of levy funding may be explained by the changing priorities over time as the political oversight for skills development was transferred from the Minister of Labour to the Minister of Higher Education and Training and their respective government departments.

4 The Evolving Priorities and Purposes Regarding the Use of the SDL over Two Decades

The motivation for the SDA at inception was largely to improve the skills of the South African labour force. The SDA and implementing structures (SETAs, NSA, and NSF) fell appropriately under the Department of Labour. Employers were seen as catalysts to organise training for their employees, and the type of training was largely at their discretion. Paying the SDL was a cost (like tax) which could be recovered if skills development was planned and implemented for employees. The first National Skills Development Strategy (2000-2005) focused on the training of employed workers. One of the goals during this time was to increase the number of workers who had a level 1 National Qualifications Framework (NQF) qualification to 70%. ⁵⁵ There was therefore an emphasis on adult basic education, literacy and numeracy training. The percentage of the mandatory grant (between 50% and 60%) available to employers reflected this priority. The second National Skills Development Strategy (2005-2010) sought to maximise the number

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of unemployed people in learnerships and artisan training, and the mandatory grant was set at 50%. Employers organised training in adult basic education, skills programmes, apprenticeships and learnerships. ⁵⁶

In November 2009, the DHET (under Minister Nzimande) assumed the responsibility for skills development, and this change of political oversight profoundly impacted on the priorities of programmes and initiatives to be funded. Increases in the SDL were used to support what is termed the post-schooling sector (being universities, universities of technology, community colleges, and TVET colleges). The mandatory grant to employers as a result dropped to 40% in 2011 and to 20% in 2012. ⁵⁷

The National Skills Development Strategy 111 (2011-2016) focused on the training of artisans, access to universities, developing research capacity, supporting further education and training colleges, and building capacity in the public sector. The funds allocated for discretionary grants under the control of the SETAs and the funds in the NSF were therefore largely orientated towards national priorities in the post-schooling sector. For example in the 2013-2014 financial years the SETAs paid just over R1 billion for the construction of 16 new TVET colleges. ⁵⁸ In 2016-2017 R6.56 billion was paid to the National Student Financial Aid Scheme (NSFAS) for universities and TVET colleges to fund the 'no fees increase' campaign. ⁵⁹ Between 2014 and 2016 approximately R451 million was spent on post graduate bursaries for 4 759 students. Funds were also allocated to universities for expanding various faculties. ⁶⁰

Clearly there has been a shift in focus and priorities away from workplace training for employees organised by employers to national projects in the post-schooling sector and funding for learners and students in PIVOTAL programmes in pursuit of certificates, diplomas, degrees and post-graduate qualifications.

There is no dispute that funding the post-schooling sector is a public good, and in the interest of education in South Africa. However, that argument needs to be weighed against the unlawful erosion of funds

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available for the training of employees through mandatory grants, and the concern that the financing of the post-school sector from the skills development levy may not accord with the primary purposes of the SDA.

5 Conclusion

The original motivation for the SDA was to support the training of workers and unemployed persons to enable them to enter the labour market. This was the priority during the period that skills development fell within the legislative mandate of the Minister (and Department) of Labour. The levies available to employers to organise and implement the training ranged from 50%–65% in the form of mandatory grants between 2000 and 2010. When the Minister (and Department) of Higher Education became responsible for skills development in 2009, the mandatory grant dropped to 40% and then 20% where it has remained despite the LAC finding that the decrease was irrational, unlawful and invalid.

The corresponding increase available for discretionary grants and the levies at the disposal of the NSF have been used for projects and priorities primarily in the post-schooling/tertiary sector. Of course these are objectives well within the spectrum of the public good, but they erode the underlying purpose of the SDA which prioritised workers in employment and those seeking employment. The financing of skills development comes from employers, but the amount of the grants available to them for purposes of training their own workforce has declined over time, according to our courts, impermissibly. It would appear in conclusion that the skills development levy has been appropriated by DHET for a wider purpose, far outside the parameters of what the legislature intended some 23 years ago.

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1 Sector Education and Training Authorities (SETAs) Grant Regulations GN R990 GG 35940 of 3 December 2012.

2 The Labour Relations Act 66 of 1995 deals with the regulation of collective bargaining, the establishment of the Commission for Conciliation, Mediation and Arbitration and labour courts, and sets out the principles informing unfair dismissals and unfair labour practices. The Basic Conditions of Employment Act 75 of 1997 provides for a minimum threshold of rights for employees, whilst the Employment Equity Act 55 of 1998 prohibits unfair discrimination, and promotes affirmative action in the workplace.

3 The NSA is a stakeholder body of representatives from labour, organised business and communities appointed by the Minister to advise on national skills development policies, strategies and regulations — see ss 5 and 6 of the SDA.

4 The NSF is funded from 20% of the skills levy and supports national projects related to the SDA — see ss 27 and 28 of the SDA.

5 SETAs are stakeholder bodies with representatives from labour, business, and professional bodies, organised according to economic sectors. SETAs have various functions including developing sector skills plans, allocating grants, and promoting learning programmes — see ss 10 and 11 of the SDA.

6 Total amount of remuneration payable for income tax purposes (see s 3(3) and (4) of the SDLA). It includes salaries, overtime payments, commissions and bonuses.

7 The levy is not payable by an employer in the national or provincial sphere of government; a national or provincial public entity if 80% of its expenditure is defrayed from funds voted from Parliament; municipalities which are granted exemptions; employers whose total remuneration is less than R500 000 per annum; and public benefit organisations — see s 4 of the SDLA.

8 s 8(3) of the SDLA.

9 Figures obtained from the audited sections of the NSF annual reports.

10 It is interesting to note by comparison that in 2015–2016 the DHET allocated R30,3 billion to universities; R8.4 billion to Technical Vocational Education and Training (TVET) colleges, and R1.8 billion to community colleges — DHET Skills Levy System Overview Presentation to the Fees Commission (10 February 2017) slide 9.

11 Regulations Regarding Levies and Related Issues GN 104 GG 20865 of 7 February 2000. See too Regulations for the Period 1 April 2000 to 31 March 2001 regarding funding and related issues GN 103 GG 20865 of 7 February 2000.

12 Relating for example, to rent, salaries, stationery, insurance, audit fees etc.

13 Regulations for the Period 1 April 2000 to 31 March 2001 regarding funding and related issues GN 103 GG 20865 of 7 February 2000 reg 2(1)(b), (c) and (d).

14 *ibid* reg 2(1)(a).

15 Skills Development Regulations R571 GG 22398 of 22 June 2001.

16 *ibid* reg 6(1)(a) and (b), and reg 6(2).

17 *ibid* reg 6(2)(b).

18 See Skills Development Regulations Guidelines R571 GG 22398 of 22 June 2001 paras 23–32.

19 Amendment to the Skills Development Regulations GN 729 GG 26464 of 11 June 2004.

20 Sector Education and Training Authorities (SETAs) Grant Regulations regarding Monies Received by a SETA and Related Matters GN 713 GG 27801 of 18 July 2005.

21 *ibid* reg 10(2)(d) and (e).

22 Apart from registration with SARS, and timeous payment of levies.

23 Amendments to Sector Education and Training Authorities (SETAs) Grant Regulations regarding monies received by a SETA and related matters GN 68 GG 29584 of 2 February 2007 reg 9(e).

24 Media statement by Minister Blade Nzimande on the transfer of the skills development and training sector to the Department of Higher Education and Training (4 November 2009).

25 Amendment to the Sector Education and Training Authorities (SETAs) Grant Regulations regarding monies received by a SETA and related matters published in Government Notice No. R713 in Government Gazette No. 27801 of 19 July 2005 published in GN 271 GG 34252 of 29 April 2011 reg 7(1)(e) amending the grant regulations n 19 above.

26 The PIVOTAL programme in the Energy SETA (EWSETA) for example included electrical engineers (Bachelor's Degree), project administrators (Advanced Diploma), water inspectors (Learnership); and in the Fibre Processing and Manufacturing SETA, it included boilermakers and mechanics (Apprenticeships).

27 n 25 above reg 6(3)(a).

28 *ibid* reg 6(3)(b).

29 Sector Education and Training Authorities (SETAs) Grant Regulations GN 990 GG 35940 of 3 December 2012.

30 *ibid* reg 6(12).

31 *ibid* reg 4(4).

32 *ibid* reg 3(12).

33 (2015) 36 *ILJ* 3057 (LC).

34 *ibid* para 113.1.

35 *ibid* para 131.3.

36 *ibid* para 127 read with para 131.4.

37 Circular no 16/2015.

38 *Business Unity SA v Minister of Higher Education & Training & others* (2020) 41 *ILJ* 137 (LAC) paras 17 and 18.

39 Discussion with BUSA representative to NSA, Stella Carthy April 2021.

40 The Sector Education and Training Authorities (SETA) Grant Regulations regarding monies received by a SETA and related matters GN 23 GG 39592 of 13 January 2016.

41 Circular no 04/2016.

42 *BUSA v Minister of Higher Education & Training & others* LC 31 August 2018 case no JR 1040 (unreported).

43 n 38 above.

44 *ibid* para 16.

45 *ibid* para 15.

46 *ibid* para 16.

47 *ibid* paras 21–24.

48 *ibid* para 24.

49 *ibid* para 25.2.1 read with the date of judgment: 16 October 2019.

50 Circular no 1/2020.

51 Circular no 4/2020.

52 Act 26 of 2011.

53 See s 11(1)(a) and 13B of the SDA.

54 GN 501 GG 43278 of 5 May 2020 and GN 752 GG 43508 of 6 July 2020.

55 Department of Labour, National Skills Development Strategy Implementation Report 1 April 2003–31 March 2004 at 3 and 11.

56 'Ministerial Task Team on SETA Performance: Report for the Minister of Higher Education and Training' cited in Call for Comments on Report by Ministerial Task Team on Performance of SETAs 2013, GN 848 GG 36747 of 20 August 2013 at 55–6.

57 See reg 6(3)(a) of GN 271 GG 34252 of 29 April 2011: Amendment to the Sector Education and Training Authorities (SETAs) Grant Regulations regarding monies received by a SETA and related matters published in Government Gazette No. R713 in Government Gazette No. 27801 of 18 July 2005; and reg 4(4) of GNR 990 GG 35940 of 3 Dec 2012: The Sector Education and Training Authorities (SETAs) Grant Regulations regarding monies received by a SETA and related matters.

58 DHET Skills Levy System Overview Presentation to the Fees Commission 10 February 2017 slide 86.

59 *ibid* slide 129.

60 For example R311 million to the Faculty of Health Sciences at the University of Pretoria; R212 million to the University of Johannesburg for learning facilities for engineering students; R105 million to the Cape Peninsula University of Technology for a renewable energy training centre.