REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: **007566/2022**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

19 JULY 2023

DATE SIGNATURE

TELKOM SA (SOC) LTD	**APPLICANT**
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**FIRST RESPONDENT**
THE SPECIAL INVESTIGATING UNIT	**SECOND RESPONDENT**
THE MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES	**THIRD RESPONDENT**

DR EDWARD GEORGE SCOTT **FOURTH RESPONDENT**

JUDGMENT

TLHAPI J

INTRODUCTION

[1] The applicant seeks to review and set aside a decision by the first respondent, Mr Matamela Cyril Ramaphosa ("the President), to issue a proclamation published on 25 January 2022, giving effect to Proclamation 49 of 2022 ("the Proclamation"), issued under Government Notice No. 45809. The Proclamation was issued in terms of section 2 of the Special Investigating Units and Specia Tribunal Act 74 of 1995 ("the SIU Act"). The second respondent, the Special Investigating Unit ("the SIU") was authorised to investigate certain allegations made against the applicant ("Telkom"). Telkom further seeks to set aside the investigation by the SIU which had already commenced. The application is opposed by the first, second and third respondents.

[2] The preamble[1] to the SIU Act empowers the SIU to investigate malfeasance in state institutions, state assets and public money and improper conduct by any person that may seriously harm the interests of the public. The President in terms of section 2 (1) of the SIU Act 'may whenever he or she deems necessary establish special investigating units or special tribunals on account of any of the grounds mention in subsection (2).

[1] "To provide for the establishment of Special Investigating Units for the purpose of investigating serious malpractices or maladministration in connection with the administration of State institutions, State Assets and public money as well as any conduct which may seriously harm the interests of the public, and for the establishment of Special Tribunals so as to adjudicate upon civil matters emanating from investigations by Special Investigating Units; and to provide for matters incidental thereto."

[3] The Proclamation[2] mirrored sections 2(2) (a-g) of the SIU Act 74 of 1996 by substituting where 'state institution' is stated, with the word Telkom and, by empowering the SIU to investigate alleged:

"2.1 serious maladministration in connection with Telkom; (section 2(2)(a))

2.2 Improper or unlawful conduct of employees, officials or agents of Telkom; (section2(2)(b))

2.3 unlawful appropriation or expenditure of public money or public property;(section 2 (2)(c))

2.4 unlawful irregular or unapproved acquisition act; transaction; measure or practice having a bearing of the State property; (section 2(2)(d)

2.5 intentional or negligent loss of public money or damage to public property; (section 2(2((e))

2.6 offence referred to in parts 1 to 4, or sections 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combatting of Corruption Activities Act 12 of 2004 and which were committed in connection with the affairs of Telkom; (section 2(2)(f)), or

2.8 unlawful or improper conduct by any person, which has caused or may cause serious harm to the interests of the public or any category thereof; (2(2)(g)

The timeframe was between 1 June 2006 to date of publication of the Proclamation, or prior to 1 June 2006, or after the date of publication of the Proclamation." The schedule[3] to the Proclamation identified the matters to be investigated.

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[2] The Proclamation states: "WHEREAS allegations as contemplated in section 2(2) of the SIU have been made in respect of Telkom"

[3] "1. The contracting of or procurement of –

(a) Telegraphic services (telex and telegram); and

[4] In the parties joint practice note the following issues for determination were identified:

"2.1 Whether the President's decision to issue the Proclamation constitutes administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA")

2.2 Whether Telkom is a state institution as defined in the Special Investigating Unit and Special Tribunal Act 74 of 1996 ("the SIU Act").

2.2.1 Whether Telkom is a public entity as defined in the Public Finance Management Act 1 of 1999 ("PFMA").

2.2.2 Whether the State has a material financial interest in Telkom

2.3 Whether the jurisdictional requirement to rely on section 2(2)(g) of the SIU Act have been met.

2.4 Whether the President provided ex post facto rationalisations for his decision to issue the Proclamation.

2.5 Whether the President abdicated his duties under the SIU Act

2.6 Whether the Proclamation is overbroad and vague.

2.7 Whether the President had sufficient facts before him that enabled him to deem it necessary to refer the allegations for investigation.

2.8 Whether the President acted in a procedurally fair or procedurally

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(b) Advisory services in respect of the broadband and mobile strategy of Telkom, by or on behalf of Telkom, and payments made in respect thereof in a manner that was-
(i)not fair, equitable, transparent, competitive or cost effective; or
(ii)contrary to applicable-
(aa)legislation;
(bb)manuals, guidelines, circulars, practice notes or other instructions issued by the National Treasury; or
(cc)manuals, polies, procedures, prescripts, instructions or practices of or applicable to Telkom,
And any related unauthorised, irregular or fruitless and wasteful expenditure incurred by Telkom or the State.
2.Malaadministration in the affairs of Telkom in relation to the sale or disposal of-
(a)iWayAfrica and Africa Online Mauritius; and
(b)Multi-Links Telecommunications Limited;
And any losses or prejudice suffered by Telkom or the State as a result of such maladministration.
3. Any unlawful, improper or irregular conduct by-
(a)employees, officials or agents of Telkom; or
(b)any other person or entity,
In relation to the allegations referred to paragraphs 1 and 2 to the schedule."

rational manner.

2.9 Whether, even if there was an irregularity in the process leading up to or in the President's decision to issue the Proclamation, the matter should be remitted to the President to be decided afresh and pending his decision, whether any declaration that the investigation conducted by the SIU is invalid or otherwise unlawful should be suspended."

[5] Prior to this application being opposed, Telkom launched an urgent application seeking an order to declare a notice issued by the SIU on 3 August 2022, in terms of sections 5(2)(b) and (c) of the SIU Act, unconstitutional alternatively, that it be suspended pending the outcome of this application. A consent order was granted doing away with Part A, and among the orders on how the matter was to proceed further, was an order providing that if this application favours Telkom then, the SIU shall return all documents obtained from Telkom.

Part B of the application

[6] Before this court is Part B of the application. Telkom contends:

(i) that the Proclamation is *ultra vires* because the allegations 'contained in the Proclamation fall outside the purview of section 2(2) of the SIU Act;

(ii) that Telkom did not fall 'under any of the grounds in section 2(2)(a) to(f) of the SIU Act;

(iii) the allegations referred by the President to the SIU lack the particulars which are mandatory in terms of section 2(2)(g) of the SIU Act;

(iv) that the President acted without any grounds. The President acted irrationally and arbitrarily by authorising vague allegations formulated in the widest possible terms, covering a period of some 15 years and, he

failed to take into consideration that some of the allegations had been fully investigated. There was no rational purpose to a fresh investigation.

(v) that item 1(b) of the Schedule to the Proclamation is overly broad and lacks sufficient particularity. There being no limitations set to the authority of the President to instruct an investigation, the statute has to be narrowly interpreted to avoid abuse and to ensure that the President acts within the confines of the Constitution.

(vi) that the decision of the President taken in terms of national legislation constitutes administrative action in terms PAJA. The decision has an external legal effect. The consequences of subjecting a JSE listed entity to such a publicised investigation wiped out a significant value for Telkom which caused billions of rands in shareholder value.

(vii) that the President failed to invite representations from Telkom as he was bound to do under PAJA, that is, to call for representations before instructing an investigation into the affairs of Telkom.

(viii) that procedural fairness was an 'important constitutional safety valve to ensure that the President acts lawfully and rationally' when deciding to subject a party to an investigation.

[7] Telkom contended that it was not a public institution as incorrectly believed by the respondents for the following reasons:

(i) When posts and telecommunications were separated in 1991 Telkom was established as a commercialised entity in terms of the Post Office Act of

1958 with Telecommunications residing under Telkom. It remained a wholly state -owned enterprise till 1997 when it sold 30% of its equity interest to Thintana Consortium.

(ii) On 30 March 2001 the government sold another 3% of its equity trust to a South African company Ucingo Investments (Pty) Ltd. After Telkom's public offering of its shares on the JSE and New Your Stock Exchange, the government still retained control over Telkom as a class A shareholder, which status persisted for the duration of the initial public offering.

(iii) The class A shareholder rights expired in May 2011 and all shareholders, government included 'hold ordinary shares with corresponding rights attached thereto.' Presently the Government is not the majority shareholder; it has 40.5% ordinary shareholding in Telkom.

(iv) The nomenclature of being a state-owned-company ("SOC") was meant to comply with the Companies Act. In the material sense it is not a state owned company. Telkom is listed as a public entity in Schedule 2 of the PFMA because it was listed as such when it was a public company. The PFMA has not been updated.

(v) Telkom a 'pure commercial entity' has over the years applied for and has been granted exemptions from the PFMA and from all Treasury Regulations, for periods 9 November 2001 to 8 November 2004; 5 November 2004 to 4 November 2007; 26 October 2007 to 25 October 2013, followed by two further exemptions in 2013 and 2016 'which are valid for as long as government does not exercise ownership control over

the business of Telkom or Telkom listed on the JSE.'

(vi) Telkom has applied for numerous exemptions from the provisions of the PFMA which apply to state institutions, which exemptions allow Telkom to 'act and trade as a commercial entity, it is without any governmental oversight, financing and control.'

Facts Preceding the Proclamation

[8] The issue of the Proclamation was preceded by varied complaints against Telkom by the fourth respondent ("Dr Scott"), a director of Phuthuma Networks (Pty) Ltd ("Phuthuma") and Phuthuma. The complaints related to the following:

8.1 The 2005 Tender: The tender was published on 23 September 2005 for the replacement of telex switches. Phuthuma and another company were the two bidders. The tender was cancelled on 19 October 2010 after Telkom's Procurement Review Council instructed that a more modern and cost – effective solution should be sourced. The two bidders were notified of the cancellation on 21 November 2005. Phuthuma requested a debriefing which was acceded to by Telkom. This was followed by a complaint by Phuthuma that Telkom had approached an overseas supplier Network Telex. Telkom confirmed that this had occurred but only after cancellation of the tender.

During 2007 Telkom approached Network Telex on an urgent basis to provide shore-to- ship services after British Telkom, which provided satellite links to ships cancelled its agreement with Telkom. The services engaged were not related to the 2005 tender and the value of the contract is in the region of R60 000.00.

8.2 The 2007 Tender: This tender was published on 30 November 2007 and was for outsourcing of telex infrastructure. Only two bidders had responded at

closure of the bid on 6 January 2008 being, Network Telex and Phuthuma. On 9 July 2009 the bid evaluation team recommended that the tender be awarded to Network Telex. The tender was not awarded at all and the entire process was put on hold after Phuthuma and Dr Scott lodged a complaint on 23 January 2009. Telkom commissioned an internal forensic investigation relating to allegations of unfair practices in the tenders of 2005 and 2007 which were looked into. What was established was that there was approval for the emergency procurement of the shore-to-ship services by Network Telex. Telkom had not entered into any contract with Network Telex for the providing of telex or telegram services. Dr Scott was availed with a copy of the report.

8.3 The 2009 Phuthuma Action: Phuthuma instituted action in this court claiming around R5.5 billion for damages allegedly suffered as a result of the award by Telkom to Network Telex for the provision of telex and Gentex services. The action is pending and has not proceeded to trial to date.

8.4 The 2010 Phuthuma Complaint: This was lodged with the Competition Commission. It was alleged that Telkom had abused its 'dominance and engaged in anti-competitive conduct in the telegraphic and telex maritime services market by unilaterally awarding services to Network Telex'. The complaint was dismissed by the Competition Appeal Court.

8.5 The Independent Communications Authority ("ICASA") Complaint: Telkom was alleged to have transferred parts of its licence network to Network Telex without prior approval. Dr Scott withdrew this complaint on 25 September 2014.

8.6 The 2012 and 2014 Complaint with the Johannesburg Stock Exchange ("JSE"): In 2012 the complaint was about the failure to disclose in Telkom's financial statements Phuthuma's complaint to ICASA. The complaint was withdrawn on the basis that no disclosure was necessary. Dr Scott's complaint

in 2014 was that the 2012 complaint to ICASA had been incorrectly resolved. This complaint was resolved 'on the basis that Telkom had not breached the JSE Listing Requirements in relation to this disclosure'

8.7 Phuthuma's 2011 Complaint filed with the South African Police Services Directorate for Priority Crime Investigations and the Public Protector: With the police Telkom's conduct relating to the telex tender had to be investigated. This investigation was not pursued. The Public Protector had to investigate irregular outsourcing of telex services by Telkom and nothing has come out of this complaint.

8.8 Dr Scott's 2013 letter to Minister of Communications Yusuf Carrim: Various allegations relating to the two tenders were levelled against Telkom. After the then Group CEO's feedback to the Minister no action was taken.

8.9 Dr Scott's 2014 Complaint with the Competition Commission on behalf of Datagenetics: Telkom was alleged to have committed several breaches of the Competition Act 89 of 1998, which included the alleged irregular tender process regarding Network Telex. A certificate of non-referral was issued and the complaint was dismissed by the Commission.

[9] Between 2013 and 2018 Dr Scott made about ten requests to Telkom for information in terms of the Promotion of Access to Information Act 2 of 2000 ("PAIA") relating to the two tenders and other matters, some were rejected because the requested documents did not exist or because the information fell within the protections afforded by PAIA.

[10] On 16 September 2014 Dr Scott addressed a letter of complaint against Telkom to the President (President Jacob Zuma). The letter was referred to the Department of Justice and Constitutional Development ("DoJ") and forwarded to the SIU. The

complaints included allegations pertaining to (i) the 2005 and 2007 tenders; (ii)that Bain & Co were appointed to provide advisory services without following proper procurement processes; (iii) that Telkom sold iWayAfrica and Africa Online Mauritius for a nominal consideration;(iv) that Telkom had squandered billions with the purchase and sale of Multi-Links Telecommunications Limited.

The SIU applied to the then President (President Zuma) on 15 January 2015 for a proclamation to be issued, to empower it to investigate the complaints against Telkom. This request was declined.

[11] On 21 August 2019, the SIU, in seeking support for its proposed investigation, addressed a letter to the then Minister of Telecommunications and Postal Services. The Minister was informed of the SIU's intentions to request the President to issue a proclamation to empower it to investigate the allegations of Dr Scot against Telkom. A copy of the letter is annexed as "FA2" and accompanying it was a "motivation for proclamation" document expanding on various Telkom's business dealings which, on allegations by Dr Scott needed to be investigated. Telkom was not invited by the SIU for its views on the intended investigation. On 12 November 2020 the Minister informed the Chairperson of the Board of Telkom ("the Chairperson") Mr M S Moloko, that she supported the SIU's request and her letter is annexed as "FA3".

[12] The preliminary view in the "motivation for proclamation" document by the SIU was that Telkom was a state institution for purposes of the SIU Act, (was an organ of state in the national, provincial or local sphere of government), that:

(i) notwithstanding the cancellation of the 2007 tender, there was concern that an irregular relationship existed between Telkom and Network Telex, where public money was used to benefit a private company instead of being channelled to the South African Post Office (SAPO). The records of Telkom and Network Telex had to be examined for irregular payments.

(ii) in as far as public sector procurement was concerned, the award of a contract of R91 million to Bain & Co was to be tested against section 217(1) of the Constitution;

(iii) also of concern was whether the following companies had been sold for a proper consideration being Telkom's private sale of iWayAfrica and Africa Online Mauritius to Gondwana International Networks for a consideration of just $1 and Telkom's purchase and sale of Multi-Links Telecommunications ("Multi-Links").

[13] Telkom contended that subsequently, concerning the proposed investigation, a meeting was held between itself, the Ministry of Communications, the Office of the Presidency and the SIU, however, this meeting was not called to enable Telkom to give input to the President on whether he should issue the proclamation and, at no stage was Telkom "under the impression that the President was minded to issue the proclamation sought." At such meeting Telkom undertook to provide more information on the issues which were later addressed in a letter to the Chief Director: Legal Services, Department of Communications and Digital Technologies. The letter dated 19 February 2021 is annexed as "FA4".

[14] The Department of Communications sought legal opinion on whether Telkom was a public entity for purposes of the Public Finance Management Act 1 of 1999 ("PFMA"). The Chief Law Advisor opined that Telkom fell under the scope of investigation by the SIU as a listed company which fell under Schedule 2 of the PFMA, the opinion is attached as "FA5". The Minister's view was that the opinion from the Chief Law Advisor was erroneous. Telkom 'was not a national public entity as it was not substantially funded from the National Revenue or by way of tax, levy or other money imposed in terms of national legislation nor is it a national government business enterprise as the national executive no longer has ownership control over it. Her letter is annexed as "FA6.

[15] The SIU sought further legal opinion from Advocate Motepe SC who opined that Telkom could be investigated irrespective of whether it was a state institution as defined in the SIU Act. His opinion is annexed as "FA7". Telkom contends that there was no referral of the issue to Telkom and that it does not possess 'better evidence" that the matter was decided under section 2 of the SIU Act.

[16] Telkom contended that for purposes of this application it does not meet the description of a state institution as defined[4] in the SIU Act, which provided that a state institution was an institution in which the state had a financial interest. Telkom contended that 'the definition of a state institution in the SIU Act incorporates the definition of a public entity in section 1 of the Reporting by Public Entities Act 93 of 1992,' ("RPEA"). It was the definition of what a public entity was in the PFMA which prevailed because the RPEA was repealed by section 94 of the PFMA.

[17] Telkom contended that it is not a juristic person or 'under the control and ownership of the national executive' and it is not 'funded by government national business nor does it receive monies from government in terms of national legislation' as defined in the PFMA[5]. Even though Telkom was established in terms of national legislation, it is fully privatised and it is not the majority or controlling shareholder. Although listed in Schedule 2 of the PFMA it does not meet the 'substantive definition of a national public entity' in terms of the PFMA.

[18] Telkom contended that unlike the repealed RPEA which defined what 'a

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[4] "**State institution** means any national or provincial department, any local government. Any institution in which the State is a majority or controlling shareholder or in which the State has a material financial interest, or any public entity in section 1 of the Reporting by Public Entities Act 3 of 1992"

[5] "**national public entity** means:-

(a) A national government business enterprise; or
(b) Board, commission, company, corporation, fund or other entity (other than national government business enterprise) which is –
    (i) established in terms of national legislation;
    (ii) fully funded either from the National Revenue Fund or by way of a tax, levy or other money imposed in terms of national legislation; and
    (iii) accountable to Parliament

material interest' was, the SIU Act did not define such interest. 'A financial interest meant more than a significant shareholding; required significant shareholding together with the power to appoint directors; and significant expenditure of government funding towards the entity and control by government'.

Legality and PAJA Grounds

[19] Telkom contended that the Presidents failure to refer investigation allegations as contemplated in terms of section 2(2) of the SIU Act was reviewable under PAJA[6] and/or the principle of legality in that it was *ultra vires,* not authorised by the empowering legislation; was reviewable because it was materially influenced by an error of law or fact[7]; reviewable under PAJA[8] and or the principle of legality in that it was taken for reasons not authorised by the empowering statute; reviewable in terms of PAJA[9] and or the principle of legality there being no rational connection between the decision and the purpose for which the decision was taken; reviewable under PAJA[10] in that it was not procedurally fair and or the principle of legality in that it was procedurally irrational.

[20] Telkom contended that the terms of reference in terms of section 2(3) of the SIU Act were unduly wide, oppressive and almost impossible to comply with. 'Item 1(b) of the schedule which required an investigation into the broadband and mobile strategy is widened by item 3.

[21] A key part of Telkom's commercial business over a period of 15 years, where it has engaged advisors has been referred for investigation. This is set out in paragraphs 1 and 2 of the Schedule, which permits an investigation into the unlawful conduct of employees and any officials of Telkom or any other person or entity. Item 1 of the

[6] section 6(2)(f)(i);
[7] PAJA section 6(2)(d)
[8] PAJA section 6(2)(e)(i)
[9] PAJA section 6(2)(f) (ii) (aa)and (bb)
[10] PAJA section (2)(c)

schedule entails contracting and procurement into two broad themes for investigations in telegraph and advisory services in Telkom's mobile and broadband strategy. No reasons for such a wide investigation are foreshadowed in the Proclamation.

Supplementary Affidavit

[22] Telkom filed a supplementary founding affidavit after receipt of the record provided by the President in terms of Rule 53 of the Uninform Rules of Court. Having reviewed the record Telkom contended that there were new grounds upon which the Proclamation should be set aside. The President had abdicated his statutory role and did not 'apply himself to the necessity for the investigation and relied on the unauthorised advice of the SIU and simply endorsed its decision. In doing so he acted arbitrarily in authorising the investigation.

[23] Telkom contended that there was insufficient information in the record upon which the President could reasonably and rationally have authorized an investigation in terms of section 2(2) of the SIU Act. The record does not reflect specifically which section of section 2(2) the President is relying on. There is no evidence to show how the SIU determined that issues raised in Dr Scott's complaint required an investigation. There was no information on the record that justified an investigation in terms of section 2(2)(g) of the SIU Act. Furthermore, the record does not reflect that Telkom was given the opportunity to make representations to the President regarding the true state of affairs. The Proclamation was issued on the incorrect belief that Telkom was a state institution.

The SIU

[24] The SIU contended that the issue of the Proclamation was preceded by a motivation it presented to the President regarding information received from Dr Scott. It relied on the legal opinions advanced by the State Law Advisor and senior counsel

that Telkom was a state institution. The SIU contended that such status as defined in the SIU Act was accorded to Telkom, it being an institution in which the State had a material financial interest and, where the state was a majority shareholder during the period where some of the conduct complained about occurred.

[25] The SIU contended that despite Telkom disavowing on various grounds as stated in the founding papers, its characterisation as a state institution, the President may under section 2(2)(g) of the SIU Act authorise an investigation into 'unlawful or improper conduct of any person which caused serious harm to the public or category thereof. The motivation to the President explained in detail with credible allegations how Telkom had paid out millions of rand which ought to have been paid to SAPO, without following proper procurement process, this was allegedly backed by reams and reams of supporting evidence' that Telkom had paid out significant amount without following proper procurement process.

[26] Although Dr Scott had furnished information, only three matters were proposed by the SIU to be investigated. It was wrong in 'law and logic' to suggest that the SIU should play no part in the President's decision. In its preparation towards the motivation, the SIU investigated the complaint, it scrutinized and sifted out those complaints that merited investigation and it did so as it would be the entity ultimately authorised to undertake the investigation. It was therefore, incorrect for Telkom to assert that the President did not have before him the necessary information to decide that the requirements of section 2(2)(g) had been satisfied, because, the President had before him a detailed SAPO report, the Ministers of Justice's submissions, the updated motivation from the SIU and the legal opinion furnished by Motepe SC.

[27] The updated motivation also stated that after its application to the President in 2015 was declined, Dr Scott had provided further information and named a source who was interviewed by the SIU. The source indicated that he/she was prepared to cooperate with the SIU if a proclamation is issued. It was therefore incorrect for Telkom

to assert that the SIU 'applied' for the proclamation. The Minister recommended to the President, supported by the motivation from the SIU.

[28] The updated motivation was identical to the 22 August 2019 version except, that the updated motivation contained a complaint by Telkom, that it was not given an opportunity to make representations before the President issued the Proclamation. The SIU contended that Telkom was given an opportunity to meet with the Presidency on 9 February 2021 to make representations in response to the 2019 motivation. This occurred after Telkom had undertaken to engage with the SIU and the Minister.

[29] The SIU contended that when the President gave authorisation for the publication of the Proclamation, he was exercising executive power as envisaged in section 85(2)(e) of the Constitution and not implementing national legislation as envisaged in terms of section 85(2(a) of the Constitution. The President was not exercising administrative power, therefore, PAJA was not applicable. The SIU contended further that Telkom failed to explain and set out facts why it had to be treated differently and be given an opportunity to make representations.

[30] Telkom has in some matters confirmed that it was a state institution and the courts have described it as 'state owned' or an 'organ of state'.[11] Furthermore, the SIU contended that Telkom conceded that it was a PFMA-listed public entity, but seeks to extricate itself from the PFMA placing reliance on the various exemptions granted in its favour.

The President

[31] The President was presented with a view by the SIU and opinion of senior counsel and the Minister that Telkom was a state institution. The President contended

[11] Telkom SA SOC Ltd v City of Cape Town and Another 2020(1) SA 514 (SCA); MultiLinks Telecommunications Ltd v Africa Prepaid Services Ngeria Ltd; Telkom SA SOC Limited and another v Blue Label Telecoms Limited and Others [2013] 4 All SA 346 (GNP)

that he considered both memoranda of the SIU and the Minister and he deemed it necessary to issue the Proclamation as provided for in section 2(1) of the SIU Act, to investigate the allegations identified by the Minister which he recommended were serious and fell within the ambit of section 2(2). The President denied that the Proclamation was *ultra vires* and that the allegations therein contained fell outside the purview of section 2(2) of the SIU Act. The issues to be investigated were delineated in the terms of the reference annexed as a schedule to the Proclamation.

[32] The President contended that the Schedule to the Proclamation allows the SIU to investigate Telkom as a state institution (defined in the Act) in terms of sections 2(2)(a)-(f) of the SIU Act. The Proclamation included the investigation for the periods prior to 2006 or after date of publication, concerning the same persons, entities or contracts. As a state institution Telkom had a 'monopoly over specified telecommunications services which were in the public interest till 2005. Furthermore, as contended in the founding papers, the state had a financial interest in Telkom till May 2011.

[33] The President contended that the Proclamation specifically mentioned 2(2)(g) of the SIU Act and that Telkom can be investigated under the section. The state has a 40.5% shareholding in Telkom. The SIU would investigate the serious harm that was identified or investigate where there was a reasonable likelihood that serious harm may impact upon the interests of the public, which would arise as a result of improper contracting or procurement of telegraph services, including how public money was lost. Consequently, the SIU required a broad scope to investigate allegations of malfeasance. The SIU Act gave the President a wide discretion to determine what was necessary to be investigated.

[34] The President denied that the Proclamation was too wide, vague, irrational, arbitrary and lacked sufficient particularity on what was required to be investigated. At the time that the Proclamation was issued there was insufficient detail on the issues

complained about and to require more facts would frustrate the purpose for which the SIU Act was promulgated. However, the Proclamation identified with sufficient clarity, being the procurement of telegraphic and advisory services, and the sale of three entities.

[35] The President contended that the SIU memorandum which formed part of the record gave more particularity regarding each of the instances of improper conduct.[12] It was therefore incorrect to suggest that the Proclamation was not supported by alleged facts.

Procedural Fairness / Rationality

[36] The President denied that the alleged failure to afford Telkom opportunity to make representations was procedurally unfair and that it amounted to administrative action to be governed under PAJA. The decision to issue the Proclamation did not involve a determination of culpability and this did not have a direct or external legal

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[12] 53.1 Improper procurement of telegraph service from Network Telex:
"53.1.1 Telkom's Review Council approved a tender for the outsourcing of telegraphic services in November 2007.
53.1.2 The tender was worth R120 million per year for 13 years.
53.1.3 Bids received from Phuthuma and Network Telex.
53.1.4 Telkom subsequently cancelled the bid.
53.1.5 Notwithstanding the cancellation, Network Telex was rendering the services to Telkom, without having been awarded through a proper tender.
53.1.6 If these allegations are correct, Telkom would have irregularly paid millions of rand to Network Telex.
53.2 Allegation that Telkom acted improperly in procuring advisory services:
53.2.1 Telkom appointed Bain & Co to advise Telkom on its broadband and mobile strategy.
53.2.2 There was no published tender in respect of the process of Bain's appointment.
53.2.3 The contract was for R91 million.
53.2.4 The appointment needs to be investigated to ascertain whether it was in accordance with section 217 (1) 0f the Constitution.
53.3 Allegation of maladministration in relation to the various sales:
53.3.1 Telkom sold iWayAfrica and Africa Online Mauritius to Gondwana International Networks for $.
53.3.2 Telkom squandered R14 billion with the purchase and subsequently sale of Multi-Links.
53.3.3 There is no indication or explanation of how the mechanism used to dispose of these assets was Determined, or whether it was fair, cost-effective or transparent.
53.3.4 Telkom appointed a person(the second source) as a chartered accountant and instructed him to Liquidate iWayAfrika and Multi-Links.
53.3.5 The source was unable to liquidate these entities as there was no bais for liquidation.
53.3.5 The source was then instructed by Telkom to find an immediate purchaser.
53.3.7 A purchase agreement was subsequently concluded for $1.

effect on the rights of any person as contemplated in the definition of 'administrative act' in PAJA.

[37] Pertaining to the rationality of his decision the President contended that there was nothing procedurally irrational about the procedure he undertook. The Rule 53 record revealed that he was informed by the memoranda of the SIU and the Minister of past investigations and that what remained was a dispute as to whether the investigations were adequate. He was informed that Dr Scott had directed the SIU to a source who had further information and who was willing to cooperate with the SIU. He was not in a position to make a determination of the merits of the matter.

Abdication and Content of Rule 53 Record

[38] The President contended that section 2(1) of the SIU Act empowered him to take advice from SIU and the Minister and, to rely on the facts provided in the memorandum of the SIU and the submissions of the Minister. He denied that the SIU directed which matters to investigate.

[39] According to the President a complaint was 'submitted to the Presidency which was ultimately referred to the SIU. The SIU considered the matter, formed an opinion that an investigation and referral was necessary, a memorandum was compiled giving reasons for its views. The memorandum was referred to the Minister who made submissions and advised him that he refer the matter to the SIU for an investigation. He considered the information and advice and he was persuaded that he refer the matter to the SIU for investigation in terms of the Act. The Rule 53 record contains information placed before him and upon which he concluded that it was necessary to refer the matter to the SIU for investigation.

[40] The President conceded that reference to 'public entity' in the SIU Act is now to be read as reference to a public entity in the PFMA, however he does not agree that

Telkom is not a 'public entity' as defined in the PFMA because the Proclamation covers a period where the state was the majority shareholder in Telkom, and was a state institution till at least 2011.

The Minister of Communication and Digital Technologies

[41] The main contention was that Telkom was a state institution. It was contended by the Director General on behalf of the Minister that it was important to distinguish between what constituted the Government and what constituted the state and not to conflate the two; that in terms of the Constitution the South African State had three arms, the government, parliament and the judiciary. Under government was an array of institutions which included 'ministries, departments, agencies, commercial entities or public entities' each governed by national legislation.

[42] The Public Investment Corporation ("the PIC") was a public entity which formed part of the state and which fell under the oversight of the Minister of Finance. The PIC had invested government employee pension funds which represented the 15.3%shareholding in Telkom. The latter shareholding added to the 40.51% shareholding held by the Government of the Republic in Telkom, meant that the Government had more than 50% shareholding in Telkom. Telkom was therefore a state institution as defined in the SIU Act. It was contended further, that the fact that Telkom had been exempted from the provisions of the PFMA did not detract from the legal reality that it was a public entity and that it would remain so until the legislation is amended.

Analysis of the Evidence

[43] Telkom submits that the SIU Act gives the President wide invasive powers of

the rights of individuals, hence the call for a narrow,[13] rather than a broad interpretation of the SIU Act. The SIU Act in terms of section 2(1) provides that the President may whenever he deems it necessary on any of the grounds in subsection 2(2) establish a Special Investigating Unit and Tribunal. Telkom relies on a narrow interpretation[14] which it says outlines the grounds of review on *ultra vires* and will determine whether the President acted lawfully when authorising the issuing of the Proclamation.

[44] It was also submitted that the call for a broader interpretation when construing the powers of the President in terms section 2 of the SIU Act had no merit. Neither the President in authorising an investigation into maladministration or the SIU in conducting the investigation so authorised would be constrained by a narrow interpretation. It was contended that the president was required to satisfy the jurisdictional requirements set out in sections 2(1) and the categories 2(2) (a) to (f) because these were dealing with state institutions, state assets and public money and the last category 2(2)(g) which was the catch-all category empowered the SIU to investigate any person, including Telkom, for unlawful or improper conduct which may cause serious harm to the interests of the public.

[45] The long title of the SIU Act identified the SIU's primary purpose and functions which is to investigate maladministration and that the emphasis is on 'State institutions; 'State assets' and 'public money' and any conduct that seriously harms the 'interests of the public'.[15] Corruption and maladministration were inconsistent with

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[13] Special Investigating Unit v Nasden [2002] 2 ALL SA 170(A) at para 5:"A unit such as the appellant is similar to a commission of enquiry. It is well to be reminded, in the words of Corbett JA in S v Naude ….. of the invasive nature of commissions, how they can easily make inroads upon basic rights of individuals and that it is important that an exercise of powers by non-judicial tribunal should be strictly in accordance with statutory or other authority whereby they are created….this accords with the Constitutional Court in ……Heath and others para 52. Appellants reliance upon a liberal construction …..is therefore misplaced
Heath (below) para 52: ……"the broader the reach the greater the invasion of privacy"

[14] Heath para 52" " the broader the reach of the Act the greater the invasion of privacy…….The spirit objects and purport of the Bill of Rights, here the protection of privacy will better be met in this case by giving a narrow rather that a broad interpretation of these provisions".

[15] South African Association of Personal Injury Lawyers v Heath and Others 2002(1)SA 883(CC) at para 58: "The primary purpose of the Act is to enable the state to recover money that it has lost as a result of unlawful or corrupt action by its employees or other persons. The public money contemplated by the Act, is the money of a state institution that has been paid out or expended and which the state institution is entitled to recover" and

the rule of law and fundamental values of the Constitution which cannot be left unchecked. Telkom contended that the SIU's wide investigative powers[16] must be confined to the SIU Act, that is, 'kept in bounds,[17] and the President is obliged to strictly comply with the provisions of the SIU Act.

[46] Telkom relying on 2 judgements of the Constitutional Court[18] and SCA[19] contended that a narrow interpretation be given to the public power conferred on the President by section 2(1) as, he is required to satisfy himself that the allegations against Telkom are such that it was rational and necessary to investigate them. It was submitted for the President that in as far as the interpretation of 'necessary' was concerned reliance by Telkom on 'Heath'[20], 'Afribusiness', and 'British Tobacco' was

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para 4: -corruption and maladministration were inconsistent with the rule of law….if allowed to go unchecked and unpunished they will pose a serious threat to our democratic state,
Glenister v The President of the Republic of South Africa and Others 2011 (3) SA 347 (CC) para 57

[16] In terms of section 5(2) and (3)-an order to appear before the SIU to be interrogated and to produce specified books, documents or objects in possession of the individual -search and seizure against Telkom, employees and officials - section 12(1) which provides for a punishable offence on failure to obey- possibility of criminal charges being instituted.

[17] Masuku v Special Investigating Unit 2021 JDR 0720

[18] Minister of Finance v Afribusiness 2022 (4) SA 362 (CC) at para [39]"The ultra vires doctrine, which is a subset of the principle of legality, is central to the determination of lawfulness of the exercise of that power for by the applicable and the Constitution." (I have included the following para [112] to understand better para [114] relied upon) [112] I do give meaning to "necessary or expedient. So for me the starting point is whether the impugned regulations meet the requirements of section 5: are they necessary or expedient to achieve the objects of the Procurement Act." [114]" Logically, that must mean the determination of a preferential procurement policy by a person or entity other than each organ of state is not *necessary* for the simple reason that there already is section 2(1) for the determination of such policy by each organ of state. Therefore, rather than being necessary any determination of policy by the Minister would be superfluous and not at all within the ambit of what is *necessary* as envisaged in section 5. According to the Compact Oxford English Dictionary "necessary" means"1. Needing to be done, achieved or present…2, that must be done; unavoidable. If there already is provision in the Procurement Act for each organ of state to determine and implement its preferential procurement policy, how can it be necessary for the Minister to make a provision by regulation for the same thing."

[19] Minister of Cooperative Governance and Traditional Affairs and Another v British Tobacco South Africa (Pty) Ltd and Others 2022 (3) All SA 332 (SCA) [102] "In Minister of Finance v Afribusiness NPC [2022] ZACC ….Madlanga J writing for the majority held that the word necessary in that context means "needing to be done" or "that must be done. [103] Applied to the present case, necessary in s27(3) must be narrowly construed to mean 'strictly necessary' or essential to assist and protect the public or to deal with the destructive effects of COVID-19. ((1, the lawgiver would have stated if the power in 27(3) should be exercised to the extent reasonably necessary. 2,it is a settled rule of interpretation that word in a stature bear the same meaning …3….necessary cannot depend on the mature of the matter in 27(2).4 …. The power of the Minster conferred …by s27(3) cuts across and effectively and temporarily suspends various statues dealing with matters listed in s27 (2)(a)-(m) 5… this construction is reinforced by the purpose of the Act and the fact that the declared national state of disaster is of short duration…)

[20] Heath paras [51] and [52] section 2(2) 'impacts upon entrenched Constitutional rights to the privacy to the affected person….protection to privacy would be met by a narrow rather than a broad interpretation'.

misplaced because they were distinguishable. It was the interpretation of the full phrase which had an express subjective connotation "whenever [the President] deems it necessary" that had to be given meaning to.

[47] Furthermore, it was contended for the President that Heath postulated for a narrow interpretation only in respect of section 2(2) of the SIU Act and that in Afribusiness and British Tobacco, the power by the decision maker had to be exercised 'where necessary'[21]. It was contended further the SIU Act gave the President 'very wide power' as expressed in Municipal Employees Pension Fund V Natal Joint Municipal Pension Fund (Superannuation)[22] which was not overturned by the court in Afribusiness. It was contended that the exercise of the power of the President to issue the Proclamation was inferred from the SIU Act and was to advance the purpose for which the Act was promulgated. It is submitted that this power should not be conflated with the power given to the SIU, which had the potential to directly interfere with the right to privacy; the powers of the President were said to be a step ahead and removed from the investigative process.

[48] As I see it, in addition to the ordinary dictionary meaning of the words "the President may, whenever necessary" (necessary), is first to consider how the issue of the Proclamation was authorised. This is done in order to determine whether on the facts of this application a narrow or wider interpretation should be given to the words 'when necessary'. The simple reason being that we must look beyond, to the broader purpose for which the SIU Act was promulgated and to give meaning to the powers extended to the President by section 2 of the said Act. However, in my view, the President in the exercise of his powers under the SIU Act is still obliged to observe the entrenched rights of persons in the Constitution and that it is possible that in exercising the powers so conferred there was potential of Constitutional rights being

[21] My view is that Heath did not only broadly concentrate on section 2(2) it extended the interpretation to the subsections 2(2)(c) and 2(2)(g)
[22][2017]ZACC 43; (2018) para [33] "The power given to the MEC under section 4 is indeed very wide. It includes the power to make regulations providing for matters considered necessary or expedient to purposes of the fund.

invaded, which he had to guard against.

[49] Heath had to deal with the interpretation of section 2(2) when sections 2(2)(c) and 2(2)(g)[23] were being considered, and where there was a potential of privacy being invaded, thereby impacting on the entrenched Constitutional rights of the individuals who were being investigated. The narrow interpretation was construed and adopted, having regard to the facts of that case.

[50] *Afribusiness* and British Tobacco are in themselves distinguishable as to the meaning of the words 'where necessary'. In *Afribusiness* the court had to deal with section 5 of the Preferential Procurement Policy Framework Act 5/2000 (PPPFA)and the promulgation of the 2017 regulations by the Minister, whether the regulations were 'necessary to achieve the objectives of the Act'. It was superfluous or not necessary for the Minister to have promulgated regulations where provision was made in section 2(1) of the PPPFA. The Minister's regulations were *ultra vires*. The meaning given to 'necessary' by Madlanga J was 'essential, needed to be done, must be done, unavoidable'; not only did he interpret the ordinary meaning of the word but he applied it in relation to the purpose of the Act. In British Tobacco the power given was very wide and the word necessary, had to be given a narrow meaning, 'strictly' interpreted for various reasons. There the Minister had to discharge the onus of proving by means of objective scientific facts, not on subjective beliefs, why it was necessary/justified to infringe the publics' fundamental rights by the continued ban on the sale of tobacco products. There was no scientific data made available to show that 'the quitting of smoking will reduce diseases severity in relation to COVID 19'.

[51] It is contended for the SIU that it was not calling for an interpretation of the Act or a broader interpretation of 'where necessary', that the authorities relied upon by Telkom for a narrow interpretation were misplaced. Furthermore, that Telkom's instance on a narrow interpretation was nothing more than an attempt to prevent an

[23] Heath para 55 - 54 and 60-65.

investigation into serious allegations of malfeasance[24] which neither the President or the SIU knew about and the seriousness of malfeasance which impacted on the rights of the public, which had to be verified first by an investigation.

[52] In my view, whether there should be the narrow or wider meaning given to the exercise of the power by President to authorise a Proclamation to investigate should be tested against the applicable law, that is, the purpose for which the Act was promulgated, and also in this instance, the fulfilment of the jurisdictional requirements before the issue of a Proclamation to investigate by the SIU is authorised. The jurisdictional requirements are there to be complied with and not overlooked when dealing with the wide investigative powers of the SIU.

[53] It was contended for Telkom that the President was informed that the complaints had previously been investigated by a number of institutions. What was found to be lacking from the record was information which reflected that despite such past investigations, the issue of the Proclamation had satisfied the jurisdictional requirements in section 2 of the SIU Act. As far as the issue of the Proclamation was necessary it had to be 'essential', or must be done or 'needed to be done' or was 'unavoidable' and, in view of the invasive nature of the powers given to the SIU 'necessary' had to be narrowly interpreted. In my view rather than wait for the entrenched rights to be invaded first, it is better to prevent such possibility by giving protection which can only be exercised by a narrow interpretation.

***Ex Post Facto* Rationalisations**

[54] In addressing the President's answering affidavit, where reasons[25] were given after the decision was taken to issue a Proclamation and authorise investigation by

[24] Moran v Lloyd's (A Statutory Body) [1981] Lloyds Reports 423(CA) at 427 "We often find that a man(who fears the worst) turns around and accuses those -who hold the preliminary enquiry of misconduct or unfairness or bias or want of natural justice. He seeks to stop the impending charges against him…To my mind the law should not permit any such tactics. They should be stopped at the outset."
[25] As contended by Telkom from paras 34-44 of the President's answering affidavit.

the SIU, Telkom contended that such reasons were an afterthought as they did not reflect in the Rule 53 record, and should not be allowed 'to render a decision rational, reasonable and lawful'.[26]The record of the decision was said to provide a backdrop against *ex post facto* justifications.[27]

[55] It was contended for the President's that reasons were expressly set out in the Proclamation. The President was entitled to rely on the opinion of senior counsel on a complex legal question and the matter of Chang relied upon by Telkom was distinguishable. There the Minister went against the first decision made on advice of his legal advisors that Chang was immune to prosecution in Mozambique. Later going against the advice the Minister ordered Chang's extradition relying of *post hoc* reasons which were not apparent from the record. It was contended that in this case the President continued to rely on the opinion he was given and the question was whether there were allegations on one or more grounds in section 2(2) and whether he deemed it necessary to refer the allegations for an investigation. The President did not change his mind except that in the answering affidavit he elucidated his reasons which was permitted as indicated in the authority relied upon also dealt with in Chang.[28] As I see it and, as stated in Chang, it is not a wholesale permission to elucidate, what is stated is that "the court in appropriate cases should admit evidence to elucidate or exceptionally correct or add to the reasons" but courts were warned to be cautious when allowing it.[29] This has continued to be the view of our courts "that reasons formulated after the decision has been made cannot be relied upon to render a

[26] Forum De Monitoria Do Orcramento v Chang and Others [2-22] 2 ALL SA 157(GJ) para 82
[27] Magistrates Commission and Others v Lawrence 2022 (4)107 (SCA) para 97 ; Turnbull Jacksons v Hibiscuse Court Municipality and Others 2014 (6)SA 592 (CC) at para 37
[28] R v Westminister City Council ex parte Ermakow [1966]2 All ER 302 (CA) at 315-316 "function of such evidence should generally be elucidation not fundamental alteration, confirmation or contradiction"
[29] Also in the above matter at 315-316 as relied upon in Chang para[81] "The court can and in appropriate cases, should admit evidence to elucidate, or exceptionally correct or add to the reasons; but …be very cautious about doing so…Certainly there seems to be no warrant for receiving and relying as validating the decision evidence-as in this case-which indicates that the real reasons were wholly different from the stated reasons. The cases emphasize that the purpose of reasons is to inform the parties why they have won or lost and enable them to assess whether they have ground for challenging sloppy approach by the decision-maker, but this gives rise to practical difficulties.[82] It is clear that the reason cannot be contrived *post hoc* the decision. Otherwise, this would provide an opportunity to justify a decision after the fact, preventing a court from scrutinising the actual reason behind the decision when it was made."

decision rational, reasonable and lawful.[30]"

[56] It was contended that the President authorised the issue of the Proclamation on the advise of the SIU and the Minister, which he agreed with that Telkom was a State Institution, thereby limiting the investigation as stated in the terms of reference to sub-sections 2(2)(a) to (f). Furthermore, the President relied on Senior Counsels opinion that Telkom may be investigated under subsection 2(2)(g).

Is Telkom a State Institution in terms of subsections 2(2)(a) to (f)

[57] The issue of whether Telkom is a 'State Institution', having regard to the submissions of the parties herein, is a complex one, especially when it has to be considered in relation to this application, which primarily has to deal with the application of the PFMA to Telkom's contracting and procurement processes and, the application of the SIU Act and to the investigation by the SIU as authorised by the President in the Proclamation. Telkom's contention is that it is run as a private commercial company and as a JSE listed company where the government plays no role.

[58] The SIU Act defines a 'state institution' as an institution in which the 'State is a majority or controlling shareholder or in which the State has a material interest in any public entity as defined in section 1 of the Reporting by Public Entities Act 93 of 1992 Act (RPEA). The RPEA was wholly repealed by section 94 as stated in Schedule 6 of the PFMA, which came into operation on 1 April 2000. Whether the state was not a state institution and or a public entity having a material interest as defined in the SIU Act when the Proclamation was applied for or issued must be determined in this application. The President contended that the Proclamation covered a period when the state was the majority and controlling shareholder 2006 to 2011.

[30] National Energy Regulator of South Africa v PG (Pty) [2019] ZACC 28: 2020(1) SA 450 (CC).

[59] Telkom is listed in Schedule 2 of the PFMA as a major public entity to which the PFMA was applicable in terms of section 3(1)(b). A public entity is defined as a national public entity which meant (i) a national business enterprise; or (ii) a board, commission, company, corporation, fund or any other entity which is established in terms (a) of national legislation, (b) which is fully or substantially funded either from the national revenue, or by way of a tax, levy or other money imposed in terms of national legislation (c) accountable to parliament.

[60] Telkom argued that the State was not a state institution as defined in the SIU Act when opinions were sought regarding its status, when the President was advised and according to reasons advanced in the SIU's motivation that it was a state institution, and when the Proclamation was published on 25 January 2022. While Telkom was established by national legislation, the state did not have a material financial interest in Telkom and Telkom it did not report to Parliament. Therefore, in as far as Telkom was concerned it did not meet the requirements of a national public entity as defined in the PFMA.

[61] The President did not deny that Telkom was not a state institution, having regard to the components of a state institution as alluded to by the SIU in the definition in the SIU Act and, the President conceded that Telkom was not a public entity in terms of the PFMA. However, it is submitted for the President that it is in his power in terms of the Act to refer for investigation serious maladministration or malpractices of a state institution for investigation under the SIU Act and that Telkom was a state institution from 2006 to May 2011.

[62] It is argued for the SIU that in terms of the SIU Act there were four ways in which the state could be a state institution. The word 'or' in the definition which also was provided for where the State held a material financial interest, or any public entity

in terms of the RPEA had to be read 'disjunctively[31]', since "or" is a classically a disjunctive word". Furthermore, that the fourth category contained something different from a majority or controlling shareholding on the one hand or a public entity as defined under the RPEA. The empowering provisions in terms of section 2(2) authorised an investigation of an institution in which the State had a material financial interest. It was submitted that reverting to the RPEA for meaning of 'material financial interest', as Telkom argued was incorrect. Telkom submits that the definition of 'material financial interest' in the RPEA before it was repealed was instructive.[32]

[63] In my view, the SIU Act only defines what a 'state institution is' but it does not go further to define the other component parts alluded to on behalf of the SIU. It is correct that the phrase "material financial interest" in section 1 of the SIU Act has not been defined or considered by the courts. It is contended for the President that the principles of interpretation demand that a wide definition be given to 'state institution' together with the 'overarching context in the purpose of the SIU Act which dictates which entities would be subject to investigation being institutions 'in which the State has a material financial interest'. It is submitted for the SIU that 'material' would equate to "appreciable, important and of some consequence', when the court had to consider meaning of "material damage" when used in the Rents Act.[33]

[64] While it is correct to consider the ordinary grammatical meaning of the word "material" it would not be correct to ignore and look for meaning of the word only outside the context of the interests of the shareholders in a limited listed company. Since the state is an ordinary shareholder in a private commercial company listed on the JSE, the State's 'material financial interest' should be considered in that context and one cannot ignore the fact that government does not expend funds in any form to

[31] Ngcobo and Others v Salimba CC; Ngcobo v Van Rensburg 199(2) SA 1057 SCA
[32] "material financial interest had three component part (a) it is more than just a significant shareholding; (b) requires significant shareholding together with the power to appoint directors; (c) requires that there should be a significant expenditure of government funds towards the entity and control by the government"
[33] In Arendse v Badroodien 1971(2) SA 16 (c) -the court considered the ordinary grammatical meaning of the word 'material- 'of serious or substantial import; of much consequence, important and appreciable and worthy of consideration'

Telkom and does not control it. The RPEA though repealed would indeed be instructive in attaching meaning to the words

[65] It is argued for the Director General that the 40.5% Government shares in Telkom and the 15,3% of Government Shares in the GEPF must be lumped together and that these combined give the Government a 55,81% shareholding in Telkom and for that reason, Telkom is an organ of state or state institution. The Director General persists with the view that the PIC was an agency acting on behalf of the GEPF.

[66] The Government having diluted hold on its majority controlling shareholding in Telkom in 2011, Telkom is still listed as a major public entity in the PFMA, with Government now holding only 40,5% in ordinary shares. Government is not a majority or controlling shareholder in Telkom. The words majority and controlling are not synonymous and the meaning below should prevail.[34] In my view Government remained a major/substantial ordinary shareholder which was still obliged to compete with other shareholders in as far as the business of Telkom was concerned and on the JSE. The PIC, although state owned is basically a fund manager and is included in the count of ordinary shareholders in Telkom as an institutional shareholder and not the GEPF. For example, the position of government as an ordinary shareholder puts it on equal standing with other ordinary shareholders when exercising the right to vote, for example, voting on the appointment of directors / members of the board at a general shareholders meeting.

[67] The government retains its share of voting rights as an ordinary shareholder

[34] (i)A shareholder who owns more than 50% of the outstanding of a company is referred to as a majority shareholder (outstanding shares refer to all the shares issued by a company and currently held by ordinary shareholders, institutional investors ….(https//sashares.co.za rights and responsibilities of shareholders) (ii) (JSE Listing requirements defines a controlling shareholder as "any shareholder that together with (1) his or its associates; or (2_ any other party with whom such shareholder has an agreement or arrangement or understanding, whether formal or informal, relating to any voting rights attaching to securities of the relevant company can exercise or cause to be exercised the specified percentage as defined in the Takeover Regulations or more of the voting rights at general/annual general meetings of the relevant company or can appoint or remove or cause to be appointed or removed directors exercising the specified percentage or more of the voting rights at directors meetings of the relevant company……."

independently of the PIC and the latter exercises its own independence when exercising its rights as an ordinary shareholder. Government owns a big chunk of ordinary shares in Telkom but it does not occupy or exercise a position as a majority 55.81% ordinary shareholder in Telkom on the JSE. It is my view that the Director General's view is misplaced on the position of the GEPF. It disregards the role of the PIC (the fund manager for GEPF) as holder of ordinary shares in Telkom, when considering what it means to be a state institution in terms of the SIU Act when the Proclamation was sought and issued.

[68] The Minister of Finance as a result of the nature of business of Telkom in Telecommunications, has from time to time granted to Telkom, its subsidiaries and entities under its ownership and control exemptions from the provisions of the PFMA from the years 2001, the most recent exemption published in Government Gazette No.824 of 11 July 2016, the period as stated in the gazette being of importance[35]; in my view these exemptions cannot be ignored as they impact upon the contractual and procurement processes engaged by Telkom and, they do play a significant role in determining the identification and status of Telkom as at the time the Proclamation was issued. Having considered the submissions of counsels on this subject, in my view, all that the above illustrates is that Telkom was not a state institution as defined by the SIU Act.

Sub-section 2(2)(g)

[69] Telkom contended that the President had not satisfied the jurisdictional requirements in the above subsection and, that it was therefore required and relying on Heath that 2(2)(g) be delineated (i) who is the person (ii) what the conduct is (iii) what the serious harm was and (iv) the harm must be to the interest of the public or a

[35] Period of Exemption: "With effect from the date of this notice until:-
(a) the date immediately before the date Telkom SA Soc Limited comes under the ownership control of the national executive as defined in section 1 of the Act; or
(b) Telkom SA SOC limited is delisted from the Johannesburg Securities Exchange;

particular category of the public.[36]

[70] The allegations must show how each of the jurisdictional requirements in 2(2)(g) are implicated and this would avoid the 'impermissible sanctioning of fishing expedition by the SIU into the affairs of any person who is not the state. The record specifically indicated that Telkom is to be investigated as a state institution, it is said lacked specificity and this questioned whether the President applied his mind to what was before him before determining that the investigation by the SIU was necessary. The President relied solely on Senior Counsels opinion that Telkom could be investigated under 2(2)(g). While reliance on legal advice is allowed this did not absolve that President to test of his own accord whether the jurisdictional requirements had been fulfilled.

[71] These requirements are specific and evidence must be produced in the complaint which would have been a ground for authorising the investigation. There is a complaint that Dr Scott was not satisfied with previous outcomes and that he had fresh complaints and a witness. The record is not specific about the alleged unlawful or improper conduct by identifying the person was, what is the conduct and what is the serious harm caused to the public. Telkom has given Baine which was appointed in 2013 as an example, and was not subject to compliance in terms of the PFMA as the exemption was applicable, and the instruction to investigate all advisory services provided to Telkom over a period of 15 years or more.

Decision to issue Proclamation is Irrational / The Proclamation was Vague and Overboard

[72] Telkom contended that the President took the allegations against it at face value without questioning the veracity thereof. It was not correct to suggest that it was

[36] Heath paras: [52]- a narrow meaning had to be applied to safeguard the rights in the Bill of Rights; [60][61][62]- any person to be investigated must be clear from the Proclamation that he/she/it is the subject of investigation

Telkom's view that the allegations against it be proved first before the allegations are investigated. What was required was for the President to have sufficient facts to justify a referral to an investigation. A report to the President by the Minister and SIU that Dr Scott was not happy with previous processes which had been concluded cannot in my view be good reason for conducting another investigation.

[73] Telkom also contended that a key part of its commercial business over the past

16 years has "been its broadband and mobile strategy for which it has engaged advisors and that was where most of the work was done. What was missing from the authorisation is the identity of who was to be investigated, did this include an investigation into every advisory service over the past 16 years or not. The Proclamation does not identify which on the many contracts. It was apparent from the record that the SIU wanted Bain's contract to be investigated. It was contended that an investigation over 16 years overall was overboard. It was also contended that item 3 of the schedule widened the ambit of the schedule. Item 1(b) permitted investigation into unlawful or improper conduct of employees, officials of Telkom or 'any other person or entity' in relation to the matter set out in the schedule

[74] It is contended for the President that in exercising his discretion to refer allegations for investigation he exercises a wide discretion. The investigation is authorised on the basis that there was scant information to base civil proceedings. The fact that there was insufficient information for a decision, the President need not need to be satisfied that the allegations are 'established, true or even sufficient to find the institution guilty if their truth was established". He need only satisfy himself that the allegations fall within the ambit of section 2(2) and that there is room for correction in his power to set aside and amend the terms of reference in terms of section 2(4).

[75] It was contended for the President that there was nothing arbitrary or irrational about the allegation to be investigated. It was conceded that the period was long but

that included the earliest allegation until the date of Proclamation and this constituted a rational reason for choosing that period. The allegations to be investigated were not arbitrary of irrational because they were made by Dr Scott and a second source.

[76] A few examples were given by Telkom for the irrational decision:

(1) the allegation that Telkom sold iWayAfrica, Africa , African Online, Mauritus and MultiLinks Communication, a business worth R14 billion for $1. What was ignored was information in Telkom's integrated annual report (also available to the SIU) for the year ended 31 March 2012 which included information that there was a R895 Million relating to the disposal of MultiLinks and that the sale was necessary to avoid further operating losses of R269 millions. That this allegation was repeated in the memoranda before the President without any underlying evidence before him should have raised eyebrows. Telkom contends that the complaint by Dr Scott was poorly substantiated.

(2) The allegation on the advisory services was sparsely motivated, a little more than four lines. Telkom awarded a R91 million contract to Bain without tender which was not denied by Telkom. Telkom stated that Bain was appointed in 2013 during a period when it was not required to contract for services in the manner that the State was required to as a result of the exemption.

[77] My view is that a report to the President by the Minister and SIU that Dr Scott was not happy with previous processes some of which had been concluded and further that there was a second source both having fresh information not disclosed should be considered with caution. The President is afforded by the SIU Act as head of

government the onerous task to exercise power conferred by the Act to authorise an investigation by a specialised unit. He does so having evaluated what is before him and only when he deems it necessary does he authorise an investigation. It might be necessary, also having applied his mind, independent of the advice that he received to evaluate whether it is necessary to involve Telkom, not in a full- scale enquiry, but sufficient to assist him to conclude that an investigation must be authorised. No two cases are the same and to even suggest that it is not necessary for him to establish preliminary that certain facts exist, is not correct and this is not what Telkom contended.

Is the Proclamation invalid on account of the President's Abdication of Power?

[78] It is preferable to begin with what is submitted for the President, that it is stated under oath that he applied his mind to the decision based on the information before him and did not merely rely on the recommendation of the Minister and the SIU. Furthermore, that (i) it is the functionary, the President in this case who must exercise the power vested in him;(ii) if he wishes to rely on advice he must at least be aware of the grounds on which such advice is given; (iii) the functionary does not necessarily need to read every word of every application and may rely on assistance of others; (iv) the functionary may not rubber stamp without knowing the grounds on which that advice was given; (v) whether there was an abdication of the discretionary power is to be decided on the facts.[37]

[79] Telkom contends that it may seem on the surface that the President had complied with the Act, however, the facts have to be interrogated and this can only be achieved by interrogating the Rule 53 record. The President under (v) above seems to agree that the allegation of an abdication has to be decided on the facts and that if the President "relies on the advice of another when exercising his discretion, he must

[37] Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty)Ltd [2005] ZASCA 11; [2005] 2 All SA 239(SCA) at para 20 with reference to Vries v Du Plessis NO 1967 (4) SA (SWA) 481-F-G

at least know on what grounds such person holds those views so that he can judge for himself the soundness of the views.[38]" It is not in all cases where it is required that the president asks questions, make enquiries and not investigate as is suggested is the demand of Telkom which it is not. This is special and more complex. The fact that there were prior investigations and an application which had been declined called for reasons why these were of no consequence to the President, especially when it is alleged that there are fresh and more serious allegations against Telkom which have not been disclosed in the record.

[80] Telkom contends that the allegations relied upon in the Minister's letter to the President were annexed as "A". These allegations were not annexed instead, to the SIU's updated memorandum which is part of the record is annexed an annexure "A" which is a list of the directors of the companies to be investigated. It is common cause that there were earlier complaints by Dr Scott which were presented to President Zuma who declined to authorise the issue of a proclamation to investigate Telkom and that the SIU was part of a presentation to the then President. It should be accepted in my view that this complaint was laid to rest and could not be resuscitated.

[81] The Minister and the SIU tell the President that Dr Scott was not satisfied with how previous matters were handled, that Dr Scott had come up with fresh allegations and a witness who was willing to cooperate with the SIU. A request for the allegations to the President revealed reliance on a 2014 complaint by Dr Scott. This was bound to be confusing as what the President explains in the answering affidavit is that there was a complaint which was submitted to the Presidency and referred to the SIU. Telkom submitted that it called for further information on the alleged complaint because no other details were provided.

[82] The President was informed that a previous request for a Proclamation was declined, he was told of the presence of fresh allegations. In my view Dr Scot was

within his right to say he had come up with fresh evidence since the last time he was before the erstwhile President and there was a witness who was prepared to cooperate with the SIU. The least the President could have done was to ascertain that what he was presented with related fresh allegations even if the fresh allegations shed a new light on what prevailed before, the existence a fresh perspective which called for a fresh investigation. The Proclamation having been published it does not seem to me that the President or Telkom had knowledge of Dr Scott's fresh complaints, sourced within or after 2015 to date of the Proclamation; yet, the President relied solely on the advice of the Minister and SIU. In my view, he was allowed to do so provided, the advice was based good grounds and that the SIU and Dr Scott were transparent about the nature of the fresh allegations.

[83] Was the President expected to interrogate the advice from the Minister and SIU, especially in terms of the SIU Act? I would say it depended on the facts. In this case, yes, because the facts demanded that he appraise himself properly and the reasonable conclusion I arrive at is that he did not. In the SIU's own narrative as to what transpired after Dr Scott's direct approach to the SIU, it seems, as correctly pointed out on behalf of Telkom, that the SIU embarked on an investigation prior to it being authorised to do so, where it says, it went through 'reams and reams of documents, Dr Scott's complaint and the two arch lever files, it interviewed a prospective witness, evaluated the complaint of Dr Scott and selected which of Dr Scott's various complaints deserved to be investigated by the SIU via a request to the President to issue a Proclamation. There is no indication of why or what complaints were left out, and the reasons for selecting those that remained. What appears is a memorandum of Dr Scott's complaint to the President authored and edited by the SIU.

[84] As I see it, an evaluation of the complaint entailed the SIU taking upon itself to direct the course of the investigation even before the President was involved and as already indicated, its narrative prior the Proclamation cannot be overlooked. It is contended for the President that the SIU was entitled to do the pre-ground work that

is why it was able to direct the content of the Minister's letter to the President and as is evident from the schedule which is part of the record on the way forward. The updated memorandum says as much. Dr Scott's complaint it seems to me was stripped of what was not important or /relevant to be investigated in the eyes of the SIU and it is the result that was forwarded to the President.

[85] The SIU Act provides when the President is empowered to authorise an investigation by the SIU, when he deems it necessary and when the jurisdictional requirements in subsections 2(2)(a) –(g) have been satisfied. Most important is that the SIU functions within the parameters of the framework of its terms of reference as as provided in section 2(3) and 4(1) of the SIU Act. The Proclamation having been issued still obliges the SIU to report back to the President on that has transpired and what needs to be done with the information collected.

[86] In my view the issue around the 2015 refusal and the fact that there are other fresh complaints known to the SIU which the President and Telkom have not been appraised of should have been questioned by the President by calling for better information and not to allow the course of investigation to be dictated by the SIU as to what should happen even going as far as suggesting the times frames for the investigation which the President accepted without question. This in my view could amount to an abdication of Power, leaving everything in the hands of the SIU without question.

Is PAJA Applicable to the President's Decision / Is the President's Decision Procedurally Irrational

[87] Telkom asserts that the exercise of public power is subject to judicial review, the forms of which may differ according to the facts[39] and that in this instance the

[39] Pharmaceutical Manufacturers Association of SA and Others; In Re: Ex Parte Application of President of the RSA and others 2000 (3) BCLR 241 (CC) at para 20: "The exercise of public power must comply with the Constitution which is the supreme law and the doctrine of legality which is part of that law. The question

decision of the President was administrative action in terms of PAJA as defined in section 1 thereof[40], in that it involved a decision by the President exercising public power or performing a public function as defined in legislation, the SIU Act;[41] It was contended that there was no merit in a suggestion by the SIU that the President was performing an executive function as envisaged in section 85(e) of the Constitution.

[88] It was also contended that even if PAJA was not applicable this did not close the door to Telkom requesting that procedural rationality prevail and be imposed on the President.[42]

[89] Although Albutt addressed the right of the victims of crime to be heard, the purpose being to achieve the goal of reconciliation, the President's decision to exclude them from the process of pardon did not accord with the spirit of reconciliation as propounded before the TRC. The pardon in this case was in a different category than other applications for pardon and the High Court's finding that the process of pardon was administrative action, was found to have erred by not differentiating between the category of pardons in determining that the right to be heard in that instance was based on PAJA. The court also examined the difficulties it would face if it were to consider whether PAJA was relevant and includes within 'its ambit the power to grant pardon. A

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whether the President acted intra vires of ultra vires in brining the Act into force when he did is accordingly a Constitutional matter. A finding that he acted ultra vires is a finding that he acted in a manner that was inconsistent with the Constitution.

[40] "… a decision or failure to take a decision that adversely affects the rights of any person which has a direct external legal effect – this included action that has the capacity to affect legal rights – whether or not administrative action which would make PAJA applicable has been taken cannot be determined in the abstract, Regard must always be had to the facts of each case"

[41] Minister of Defence and Military Veterans v Motau and others 2014 (8) BCLR 930 (CC)

[42] Telkom relied on the following cases: Albutt v Centre for the Study of Violence and Reconciliation and Others 2010 (5) BCLR 391 (CC) at para 47 "This decision is challenged on three main grounds 1. The decision to exclude victims from participating in the special dispensation process is irrational 2, the context-specific features of the special dispensation process requires the president to give victims a hearing and 3, the exercise of the power to grant pardon constitutes administrative action and therefore triggers the duty to hear the people affected; Minister of Home Affairs and Others v Scalabrini Centre, Cape Town (SCA) 735/12 and 360/13; Law Society of South Africa v President of the Republic of South Africa2019(3)BCLR 329 (CC) at para 70 " In tjis case the Director-General was pertinently aware that the were a number of organization including the Scalabrini Centre with long experience and special expertise in dealing with asylum seekers……..I am left to infer that the Director General's failure to hear what they might have to say when deciding whether that office was necessary for fulfilling the purpose of the Act was not founded on reason and was arbitrary"

different conclusion was arrived in the Law Society matter as quoted in the footnote below.

[90] It was contended for the President Telkom that his decision fell outside of PAJA in that it did not affect the rights of any person or had a direct of external legal effect. Telkom had made a concession that it may be right or wrong on the PAJA aspect. The President's decision was simply for the SIU to investigate and nothing more and this did not include a right to be heard. The claim that Telkom's shares had dropped and that it had lost millions when the decision of the President to investigate Telkom by the SIU was announced to the world, was a hollow one since it concerned merely an interest of Telkom and not a legal right and no evidence had been adduced by Telkom to support its contention.[43]

[99] In my view the issues to be determined under this heading are competing and complex. Telkom contends that this is an extraordinary matter where special circumstances prevail which cannot be ignored. Telkom says it is not averse to complying with the law and that it has so far done so, however, while agreeing to be cooperative in the investigation it maintained its right to voice its grievance by being denied a right to be heard. I am of the view that given the circumstances of this case the President had an obligation to hear out parties who might be and in fact have been impacted by his decision.

[43] Competition Commission v Telkom SA LTD and others [2009] ZASCA 155; [2010]2 All SA 433 at para:10 " Care must be taken not to conflate two different aspect of the definition of administrative action in PAJA, namely the requirement that the decision be one of an administrative nature and the separate requirement that it must have capacity to affect legal rights; I consider that Telkom has failed to establish both requirements. As to the second of these although the complaint referral indeed affects Telkom in the sense that it may be obliged to give evidence under oath, be subjected to a hearing before the Tribunal and be required to submit its business affairs and documentation to Public scrutiny it cannot be said that its rights have been affected or that the action complained of had that capacity" Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro Tech Systems (Pty) Ltd and Another (CCT 34/10) [2010] ZACC 21; 2011 (1) SA 327 (CC) para 37 " PAJA defines administrative action as a decision or failure to take a decision that adversely affects the rights of any person, which has a direct exact l legal effect- this includes "action that has the capacity to affect legal rights- whether or not administrative action which would make PAJA applicable, has been taken cannot be determined in the abstract. Regard must always be had to the facts of each case"; Corpcio 2290 CC t/a U-Care v Registrar of Banks [2013] 1 All SA 127(SCA) para 26

[100] For the President is contended that this court is bound by well stablished principles of stare decisis, Telkom deserves no special treatment, it has no right to be heard, its rights have not been affected and if they have, it has a chance of recourse within the process of investigation. This view is shared by the SIU. The parties are in agreement that the application of the law is also determined by the facts before the court and by the Constitution. In my view the select on which issues were to be investigated was that of the President and not the SIU as happened.

[101] I have considered all the facts. The purpose to the SIU Act is to assist root out the scourge our country faces as a result of corruption and maladministration which must be rooted out and our courts have consistently ruled in that regard. This is not a simple matter and I take into consideration that Telkom states that it is not shying away from the investigation and wishes to comply with the law, albeit that it has a right to protection of its rights and to a fair procedure. I have considered the contention that Telkom had undertaken to cooperate with the investigation in a meeting however, there is no record of the meeting nor a confirmation or agreement as to what actually was agreed upon. I am weary to accept that the letter from its attorneys constituted a binding agreement after all its states that Telkom's rights are reserved.

[102] I have made several findings, that Telkom is not a State institution; that Telkom under 2(2)(g) of the SIU Act is not excused from being investigated provided that the jurisdictional requirements are satisfied; that there was lack of transparency to the President and to Telkom of what fresh evidence of Dr Scott and the second informant was, which was shared with the SIU and which prompted the request; that the reason for the Proclamation in the President's answering affidavit constituted *ex post facto* rationalisations; that the decision was irrational and overboard and that on the facts there was an abdication of power conferred by the SIU Act. The SIU by launching and investigation before it was authorised to do so by Proclamation placed the President in a precarious position in that it presented a report which was fully adopted by the Minister and the President without the slightest query or comment. On

these facts I find that Telkom should at least have been brought on board in writing by the President notifying Telkom of the enormity of the allegations, that he was considering issuing a Proclamation and inviting input before publication. This was the most rational manner the President could have adopted and our courts should hold all those exercising legislative power to this standard. The President's Proclamation was unconstitutional, irrational, invalid and of no force or effect. The Proclamation is therefore set aside.

Remedy

[103] I have regard to Telkom's and the SIU's contentions in this regard. Telkom in terms of an agreement requires that all documents retrieved from them to be returned in terms of an agreement pertaining to Part A. The SIU contends that I am not bound by the agreement and that I could exercise a discretion to allow it to keep the documents, this is motivated by the hours and months spent during its investigation at huge cost to the SIU. There is an understanding by Telkom that the setting aside of the Proclamation does not preclude the President from authorising another investigation. I think an appropriate order would be for the parties to make arrangements to complete an inventory of the documents seal them for 6 months and return same to Telkom. I am also aware that Telkom might in the future need the documents and I leave it to the parties to arrange when these documents can be unsealed.

[104] In the result the following order is granted:

(1) It is declared that Proclamation 49 of 2022 issued by the first respondent under Government Gazette No. 45809 on 25 January 2022 in declared unconstitutional, invalid and of no force or effect;

(2) The Proclamation is set aside;

(3) It is declared that the investigation by the second respondent in terms of

the Proclamation is invalid and of no force or effect;

(4) The investigation by the second respondent is set aside;

(5) The documents retrieved from the applicant by the second respondent are to be returned subject to them being sealed for twelve months;

(6) The respondents are ordered to pay the costs of the applicant the which include costs of two counsel.

Tlhapi

TLHAPI J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD AND RESERVED ON: 24 NOVEMBER 2022

DELIEVERED ON 19 JULY 2023

Appearances:

For the Applicant: Adv N H Maenetje SC with Adv T N Nqucukaitobi SC, Adv L Zikalala and Adv P Sokhela (instructed by) Edward Nathan Sonnenbergs INC

For the First Respondent: Adv D Joubert SC with P Ngcongo (instructed by) The State Attorney Pretoria

For the Second Respondent: Adv M du Plessis SC with Adv K Hofmeyr SC, Adv J Thobela-Mkhulisi and Adv T Palmer (instructed by) The State Attorney Pretoria

For the Third Respondent: Adv Adv R Ramawele SC with Adv K Magano (instructed by) The State Attorney Pretoria