


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.  |
| 11 DECEMBER 2023 |  |
| DATE             | SIGNATURE   |

In the matter between:

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

---

**JUDGMENT**  
**LEAVE TO APPEAL**

---

**TLHAPI, J**

[1] This is an application by the first and second respondents (“the President and the SIU”), for leave to appeal to the Supreme Court of Appeal alternatively the Full Court of this division on various grounds and in terms of section 17 (1)(a) of the Superior Court’s Act 10 of 2013. The application is opposed by Telkom.

[2] Section 17(a) provides:

“(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a)(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

Based on the various grounds of appeal the President and the SIU contend that there are reasonable prospects of success under s17(1)(a)(i) and (ii) above.

[3] The grounds of appeal of the President and the SIU overlap in certain instances and they are the following:

1. The court failed to determine whether the President's decision to issue the proclamation constituted administrative action or an exercise of executive powers in terms of section 85(2)(e) of the Constitution and, whether the decision was reviewable under PAJA or under the principle of Legality. Reliance by the court on Albutt<sup>1</sup> was misguided.
2. The court erred in its conclusions and finding that Telkom was not a state institution; that the state does not have a 'material financial interest' and that the exemptions played a significant role in determining the status of Telkom.

The court ignored that a shareholder had financial interest in a company and failed to give reasons why the 40.5% shareholding did not represent a material financial interest which was 'appreciable, important and of some consequence', as contended by the SIU. Furthermore, the court failed to give an explanation for not considering that the Interpretation of Statutes Act 33 of 1957 'dictates that the definition of 'a state institution' referred to a statute that was repealed and that the Reporting by Public Entities Act 93 of 1992 must be read to referring to the statute that replaced the repealed legislation, the PFMA.

3. The court erred in not finding that Telkom was a public entity till May 2011 and could be investigated as a state institution when the maladministration occurred which period fell within the purview of the SIU Act up to May 2011.
4. The court erred in finding that the President did not have sufficient facts

---

<sup>1</sup> Albutt v Centre for the Study of Violence and Reconciliation and Others 2010(3)SA 293 (CC)

justifying a referral to an investigation in terms of section 2(2)(g) of the SIU Act and the court did not specify what the sufficient facts entailed. It was contended that the updated memorandum set out in detail what was to be investigated and the President under oath stated that he had considered these facts aided by the Minister's recommendation and the SIU motivation.

5. The court erred in giving no reasons why the President had to conduct an own investigation, why the record lacked specificity and reasons why the President had to satisfy himself that section 2(2)(g) had been complied with. The court erred in accepting Telkom's submissions and not explaining 'why the conduct specified in the schedule to the Proclamation has not or may not cause serious harm to the interests of the public.'
6. The court erred in finding that the word "necessary" in section 2(1) should be narrowly interpreted.
7. The court erred in finding that the reasons for the Proclamation in the President's answering affidavit were *ex post facto* rationalizations.
8. The court erred in finding that the decision was irrational and overboard.
9. The court erred in concluding that the President was obliged to 'hear out' Telkom and the court ignored the fact that Telkom was heard out in the form of a detailed engagement with the Minister of Telecommunications.
10. The court erred in finding that the President had abdicated his power, and contrary to case law advanced that the President was required to interrogate the advice of the Minister and the SIU.

11. The court erred in finding that the SIU launched an investigation before it was authorised to do so by Proclamation.

[4] Our courts have pronounced on the standard applicable to the test in applications for leave to appeal in terms of the provisions of s17(1)(a). The determination of reasonable prospects is a dispassionate exercise. An applicant must convince the court on proper grounds that there are sound reasonable prospects of success on appeal<sup>2</sup>; “a possibility of an arguable case or one that is not hopeless is not enough<sup>3</sup>.” If the court is unpersuaded under s17(1)(a)(i) the court must still under s17(1) (a)(ii) enquire ‘whether there are compelling reasons to entertain in the appeal. A compelling reason includes an important question of law or a discreet issue of public importance that will have an effect on future disputes<sup>4</sup>.”

[5] Adding to the test applicable Telkom submitted that no appeal lies against the reasons in a judgment but against the ‘substantive order of the lower court.<sup>5</sup>

[6] The President and the SIU contend that the application lies against all the grounds stated in the applications for leave to appeal. However, since most of these grounds overlap, I give consideration to the argument of counsel and to those grounds which in my view are important in determining whether this application should succeed or not. The random choice of grounds does not mean that the grounds not dealt with have been disregarded and the issues to be determined in the notice of motion of the review application were amplified by the parties in their joint practice note.

[7] I commented in the judgment on the importance and complexity of the issues before me, which involved in particular the interpretation of the powers of the President

---

<sup>2</sup> Smith v S 1475/10[11]2011 ZSCA 2012(1) SACR 567(SCA).

<sup>3</sup> MEC for Health Eastern Cape v Mkhitha 1221/2015 (2016) 25 November 2016) para 17.

<sup>4</sup> Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd 2020 (5) SA 35 (SCA).

<sup>5</sup> Tecmed Africa (Pty) Ltd v Minister of Health and Another [2012] 4 ALL SA 149 (SCA) para 17 and Masstores (Pty) Ltd v Pick n pay Retailers (Pty) Ltd 2017 (1) SA 613 (CC) para 59.

in issuing the Proclamation, followed by the mandate to the SIU to investigate as contemplated in the SIU Act. These comments alone should not be viewed as opening the door to a conclusion that there are compelling reasons for leave to be granted in terms of s17(1)(a)(ii). It still remains the duty of the court in this application to determine first, in terms s17(1)(a)(i) whether there are reasonable grounds that another court would find differently. Whether the first determination succeeds or not the court is still obliged to consider whether there are compelling reasons to grant leave.

[8] I remain resolute in the finding that the SIU commenced with an investigation before the Proclamation was issued by the President and I would venture to say even before it approached the Minister with its motivation. The updated motivation gives background of an earlier attempt to seek to issue of a Proclamation which was rejected by the former President in 2015. What the SIU did the second time around is seen from the SIU's answering affidavit<sup>6</sup>. The SIU received reams of documents from Dr Scott which were accompanied by a letter in which he listed what he sought to be investigated.

[9] After scrutinising the content of Dr Scott's complaints and going through 'reams and reams' of supporting documents handed over by Dr Scott, the SIU determined that it would propose that only three matters raised in the letter be investigated. The recommendations or proposals were established by the SIU from a preliminary investigation. Dr Scott also provided information of a potential source and the SIU conducted a preliminary interview with this source. The President was not informed of the nature of the evidence of this source in the updated motivation. The SIU is not allowed to launch a preliminary investigation of a complaint before the President issues a Proclamation.

---

<sup>6</sup> SIU Answering Affidavit para 60; 'credible allegations backed by reams and reams of supporting evidence; para 76 'the SIU did not indiscriminately adopt DR Scott's complaints but rather scrutinised them and sifted out those that it though merited further investigation.....Dr Scott provided further information on the basis of which the SIU interviewed a source named by Dr Scott and through that source obtained further information'.

[10] The following grounds are in my view reasonable grounds and relevant and another court would arrive at a different decision:

- (a) Whether the powers of the President under section 2 of the SIU Act should be given a wider or narrow interpretation in determining whether it is necessary to authorise an investigation and in as far as the basic rights of persons might be impacted;
- (b) Whether Telkom is a state institution as defined in the SIU Act in particular with reference to the President's power to institute an investigation in terms of s2(2)(a) - (f) and 2(g) of the SIU Act.

[11] In my view the complaints by Mr Scott not only allude to malfeasance and maladministration they also relate to issues of procurement and the President states that according to Mr Scott there had been other investigations on the complaints which had not been satisfactorily dealt with.

[12] A compelling reason for granting leave lies in interpreting whether Telkom is a state institution and in that regard a number of factors have to be considered, being the PFMA and the deviation which has prevailed as a result of the exemptions from application of the PFMA to Telkom over a number of years. Whether the court erred in not finding that up to May 2011 Telkom, was a public entity and could be investigated by the SIU and the relevance of the SIU Act at that time and whether on those grounds the SIU could extend its investigation beyond that period. Another important issue is about definition of whether if a state institution, the state had a material financial interest in Telkom; whether it was a public entity as defined in section 1 of the Reporting by Public Entities Act 93 of 1992 (the RPEA), and whether the court erred in not considering the meaning of material financial interest as contended by the SIU.

Lastly, is the question of how the President should have applied or exercised his power to authorise an investigation in terms of section 2(2)(g) of the SIU Act should it be determined that Telkom is not a state institution. Also relevant to this question of the powers of the President in section 2(2) of the SIU Act is whether the court had erred in its finding that authorising the investigation was irrational and overboard.

[13] In light of the above reasons I find that S17(1)(a)(i) and (ii) of the Superior Courts Act has been satisfied and I grant the following order:

1. Leave is granted to the Supreme Court of Appeal and costs shall be costs in the appeal.



---

**TLHAPI J**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION, PRETORIA**

**HEARD AND RESERVED ON: 27 NOVEMBER 2023**

**DELIVERED ON: 11 DECEMBER 2023**

Appearances:

For the Applicant: Adv N H Maenetje SC with Adv L Zikalala (instructed by) Edward Nathan Sonnenbergs INC

For the First Respondent: Adv P Ngcongco with M Lekwape (instructed by) The State Attorney Pretoria

For the Second Respondent: Adv M du Plessis SC with Adv T Palmer (instructed by) The State Attorney Pretoria



