**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

In the matter between:

TELKOM SA (SOC) LTD **APPLICANT**

and

PRESIDENT OF THE REPUBLIC OF **FIRST RESPONDENT**

SOUTH AFRICA

THE SPECIAL INVESTIGATING UNIT **SECOND RESPONDENT**

THE MINISTER OF COMMUNICATIONS AND **THIRD RESPONDENT**

DIGITAL TECHNOLOGIES

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]](#footnote-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).

[3] The Proclamation[[2]](#footnote-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]](#footnote-3) to the Proclamation identified the matters to be investigated.

[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

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]](#footnote-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]](#footnote-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

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]](#footnote-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]](#footnote-7); reviewable under PAJA[[8]](#footnote-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]](#footnote-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]](#footnote-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

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]](#footnote-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

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]](#footnote-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

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]](#footnote-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]](#footnote-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]](#footnote-15) Corruption and maladministration were inconsistent with

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]](#footnote-16) must be

confined to the SIU Act, that is, ‘kept in bounds,[[17]](#footnote-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]](#footnote-18) and SCA[[19]](#footnote-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]](#footnote-20), ‘Afribusiness’, and ‘British Tobacco’ was

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]](#footnote-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]](#footnote-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

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]](#footnote-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

investigation into serious allegations of malfeasance[[24]](#footnote-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]](#footnote-25) were given

after the decision was taken to issue a Proclamation and authorise investigation by

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]](#footnote-26)The record of the decision was said to provide a backdrop

against *ex post facto* justifications.[[27]](#footnote-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]](#footnote-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]](#footnote-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

decision rational, reasonable and lawful.[[30]](#footnote-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.

[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]](#footnote-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]](#footnote-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]](#footnote-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

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]](#footnote-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

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]](#footnote-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

particular category of the public.[[36]](#footnote-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

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]](#footnote-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

at least know on what grounds such person holds those views so that he can judge

for himself the soundness of the views.[[38]](#footnote-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]](#footnote-39) and that in this instance the

decision of the President was administrative action in terms of PAJA as defined in

section 1 thereof[[40]](#footnote-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]](#footnote-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]](#footnote-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

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]](#footnote-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.

[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 six months;

(6) The respondents are ordered to pay the costs of the applicant the which

include costs of two counsel.

 

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**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

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.” [↑](#footnote-ref-1)
2. The Proclamation states: “WHEREAS allegations as contemplated in section 2(2) of the SIU have been made in respect of Telkom” [↑](#footnote-ref-2)
3. “1. The contracting of or procurement of –

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

(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.” [↑](#footnote-ref-3)
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” [↑](#footnote-ref-4)
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 [↑](#footnote-ref-5)
6. section 6(2)(f)(i); [↑](#footnote-ref-6)
7. PAJA section 6(2)(d) [↑](#footnote-ref-7)
8. PAJA section 6(2)(e)(i) [↑](#footnote-ref-8)
9. PAJA section 6(2)(f) (ii) (aa)and (bb) [↑](#footnote-ref-9)
10. PAJA section (2)(c) [↑](#footnote-ref-10)
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) [↑](#footnote-ref-11)
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.

53.2Allegation 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. [↑](#footnote-ref-12)
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” [↑](#footnote-ref-13)
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".  [↑](#footnote-ref-14)
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 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 [↑](#footnote-ref-15)
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. [↑](#footnote-ref-16)
17. Masuku v Special Investigating Unit 2021 JDR 0720 [↑](#footnote-ref-17)
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.” [↑](#footnote-ref-18)
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…) [↑](#footnote-ref-19)
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’. [↑](#footnote-ref-20)
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) [↑](#footnote-ref-21)
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. [↑](#footnote-ref-22)
23. Heath para 55 - 54 and 60-65. [↑](#footnote-ref-23)
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.” [↑](#footnote-ref-24)
25. As contended by Telkom from paras 34-44 of the President’s answering affidavit. [↑](#footnote-ref-25)
26. Forum De Monitoria Do Orcramento v Chang and Others [2-22] 2 ALL SA 157(GJ) para 82 [↑](#footnote-ref-26)
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 [↑](#footnote-ref-27)
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” [↑](#footnote-ref-28)
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.” [↑](#footnote-ref-29)
30. National Energy Regulator of South Africa v PG (Pty) [2019] ZACC 28: 2020(1) SA 450 (CC). [↑](#footnote-ref-30)
31. Ngcobo and Others v Salimba CC; Ngcobo v Van Rensburg 199(2) SA 1057 SCA [↑](#footnote-ref-31)
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” [↑](#footnote-ref-32)
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’ [↑](#footnote-ref-33)
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……..” [↑](#footnote-ref-34)
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; [↑](#footnote-ref-35)
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 [↑](#footnote-ref-36)
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 [↑](#footnote-ref-37)
38. [↑](#footnote-ref-38)
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 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. [↑](#footnote-ref-39)
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” [↑](#footnote-ref-40)
41. Minister of Defence and Military Veterans v Motau and others 2014 (8) BCLR 930 (CC) [↑](#footnote-ref-41)
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” [↑](#footnote-ref-42)
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 [↑](#footnote-ref-43)