REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

CASE NO: 2019/46376

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

08.06.2020
DATE

SIGNATURE

In the matter between:

ALTRON TMT HOLDINGS PROPRIETARY LIMITED	First Applicant
MOBILE TELEPHONE NETWORKS PTY LIMITED	Second Applicant
And	
THE MINISTER OF TRADE AND INDUSTRY	First Respondent
TELKOM SOC LIMITED	Second Respondent
THE PRESIDENT OF THE REPUBLIC OF S A	Third Respondent
BUSINESS CONNEXION PROPRIETARY LIMITED	Fourth Respondent

MTN GROUP LIMITED Fifth Respondent

VODACOM GROUP LIMITED Sixth Respondent

JUDGMENT

LAMONT, J:

[1] The applicant ("Altron") applied for an order reviewing and setting aside a decision of the first respondent ("the Minister") which was made on or about 1st of April 2019 and published in the Government Gazette on 7th of May 2019. The publication reads: –

> "I, Dr Rob Davis, Minister of Trade and Industry hereby;
> Designate and grant the final approval for the Broad-Based Black Economic Empowerment Facilitator Status to the Government of South Africa represented by the Office of the Presidency for the full shares of 40.50 % held in Telkom South Africa State Owned Company."

[2] In the same application Altron sought a declarator that the second respondent was not under the "ownership control" of the Government as that phrase is defined in the Public Finance Management Act 1999 ("the PFMA") and is not a "public entity" in terms of the PFMA. In the alternative Altron sought a declarator that the second respondent is an inappropriate public entity for the purposes of being granting Broad-Based Black Economic Empowerment Facilitator Status in terms of the ICT Sector Code published in terms of section 9 (1) of the Broad-Based Black Economic Empowerment Act 2003.

[3] Altron relies on 3 main grounds of review:

3.1. the decision or the process leading to it was procedurally unfair and irrational;

3.2. the Minister failed to furnish reasons for the decision;

3.3. the decision was substantively unreasonable, irrational and unlawful.

[4] The fifth respondent applied to be recognized as a co-applicant and filed an affidavit supporting the relief sought by Altron. The fifth respondent relied upon the authority of *Reserve Bank v Public Protector and Others* 2017 (6) SA 198 (GP). The application was granted and the first respondent as co-applicant sought relief in the same terms as Altron.

[5] On 10 July 2018, a meeting took place during which the second respondent expressed a desire to apply to Government to be granted B-BBEE Facilitator Status. It is unclear whether or not there were further meetings before 28 September 2018 when Telkom's Group Chief Executive Officer wrote to the Minister of Telecommunications indicating that if the second respondent was designated as a facilitator it would have a significantly positive effect on Telkom's ownership score and motivating that the second respondent be so designated. The Minister as the Government Shareholder Representative in the second respondent motivated the application to the first respondent. In due course on 14 December 2018 it was recommended that "the Minister approve the gazetting of Broad-Based Black Economic

Empowerment Facilitator Status of Telkom SOC LTD for 30 days public commentary period." The first respondent approved the request and signed the General Notice on 15 January 2019.

[6] On 1 February 2019, the notice was published in the Gazette under Notice Number 42211. The terms of the notice are as follows:–

> "I Dr Rob Davies, Minister of Trade and Industry, hereby:
> (a) Issue for public comment, the intention to grant Telkom SA SOC Limited a Broad-Based Black Economic Empowerment Facilitator Status in terms of paragraph 3.6 of the Revised Codes of Good Practice.
> (b) Invite interested persons and the public to submit comments on the Facilitator Status within 30 days from the date of this publication."

[7] The notice also states, "Telkom shall use the B-BBEE facilitator status to accelerate transformation in the ICT sector. Transformation in the ICT sectors guided by the Amended ICT Sector Code"

[8] On an ordinary reading of the notice, interested parties were called upon to comment on the first respondent's intention to grant the second respondent facilitator status subject to a condition that the second respondent use the status to accelerate transformation. The first respondent invited interested parties to comment and afforded a meaningful opportunity for comments to be made. Having done this he was obliged to receive and consider the comments and afford an opportunity for the interaction, which he had invited to take place.

[9] Various interested parties in fact made submissions. The submissions as they were made in response to the notice would have been directed towards the topic raised in the notice namely the intention to grant Telkom SA SOC Limited facilitator status on the terms set out in the notice.

[10] During April 2019 a submission to be placed before the first respondent was formulated by the government department known as the Chief Directorate, BEE Unit to "request the Minister to grant the final approval of the BB-BEE Facilitator Status to the Government of South Africa represented by the Office of the Presidency "The Presidency" for the shares of 40.50 % held in Telkom". The submission contained facts and matters which presumably were to be placed before the Minister. The submission contemplated the imposition of a 10-year grant of the Facilitator Status, a 3-year review period and a quarterly reporting period. It stated the motive of the grant to be the achievement of transformation which otherwise was not being achieved.

[11] The submission motivated the grant of Facilitator Status to the Government of South Africa not the grant of Facilitator Status to Telkom as was stated to be the intention in the notice which was published and in respect of which the submissions had been received.

[12] It also stated the motive for the grant namely the achievement of transformation, which otherwise was not being achieved. Presumably, the controls contemplated in the submission namely a 10-year limit for the grant, a 3-year review period and a reporting period were designed to monitor the

extent to which the motive was being achieved. This whole issue is absent from the notice published requesting comment.

[13] No mention is made in the submission of the contents of any response to the notice in the Gazette calling for submissions from interested parties. Indeed no mention is made of there having been any response.

[14] On 7 May 2019 the first respondent published in the Government Gazette a notice Number 42448 his decision to designate and grant Facilitator Status to the Government of South Africa represented by the Office of the Presidency for the full shares of 40.5% held in Telkom.

[15] The 10-year limit, the 3-year review period and the quarterly reporting requirement were omitted from the terms of the final decision. The first respondent stated in the notice that Facilitator Status was granted on condition that Telkom and its subsidiaries use the status to increase their competitiveness and market share as contemplated in the ICT Policy White Paper. The proposed controls namely the 10-year limit, the 3-year review period and the quarterly reporting requirement appear to have been abandoned.

[16] The decision taken by the first respondent had no regard to the fact that the facilitator status was granted to a person different to that to which the notice had referred. There is further no evidence that the first respondent was ever made aware of the input of the public which the notice had requested or

that he analysed and considered such input. The input of the public was simply ignored in the submission made to the first respondent. A government official, not the first respondent, indicated that he supported the decision to be made based on the submissions received however the first respondent made no such notation.

[17] The review of the exercise of public power can take place under either the principle of legality as every exercise of public power, including every executive act must comply with the principle of legality, or the rights conferred under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). There are now few material differences between the standards of review.[1] The reason given is that ultimately both pathways to review derived from the common law the difference being that in PAJA those grounds have been codified. The submission of the first respondent is that the action was taken under section 85(2) of the Constitution and that the definition of "administrative action" in PAJA excludes "the executive powers of functions of the National Executive, including the powers of functions referred to in Section 85(2)(b),(c),(d) and (e) of the Constitution."

[18] The National Executive was dealing with the implementation of legislation. The function of "implementing legislation" is contained within the provisions of section 85(2)(a) of the Constitution and hence does not fall foul of the limitation contained within the definition section of PAJA.

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[1] See: *Minister of Home Affairs and Another v Public Protector of the Republic of South Africa* 2018 (3) SA 380 (SCA) at paragraph 38.

[19] Hence, both PAJA and the principle of legality are of application.

[20] The Minister is authorised to designate certain Organs of State Public Entities as B-BBEE Facilitators (See paragraph 3.6.1 of statement 100 of the BEE Codes). This right of designation is however subject to the requirements imposed by both PAJA and the principle of legality that a proper course of consultation takes place before the decision is made. At the very least, public notice of the intended decision should be given prior to its taking in such a way that interested parties are allowed a proper opportunity to comment prior to the decision being made.[2]

[21] In addition the B-BBEE Act in section 9 (5) obliges the Minister before he issues, replaces or amends a code of good practice to publish the draft code or amendment in the Gazette for public comments and to grant interested persons a period of at least 60 days to comment on the draft code of practice or amendment. As the decision involved the replacement or amendment of a code of good practice the first respondent was obliged to comply with section 9 (5). He failed to comply.

[22] The notice published by the first respondent concerned the application of Telkom SA SOC Limited for B-BBEE facilitator status. No such application was ever made. An application was cobbled together by the Department Trade Industry; the BEE Chief Directorate requested the designation; the Director-General recommended the designation to the Minister; the Minister

[2] See: *Minister of Home Affairs and Others Scalabrini Center, Cape Town and Others* 2013 (6) SA 421 (SCA) at paragraph 69; *Albutt v Center for the Study of Violence and Reconciliation and Others* 2010 (3) SA 93 (CC) at paragraph 72to 74

approved the designation. The Department Trade and Industry was both the applicant and a participant in the decision-making process.

[23] There is a material difference between the decision proposed in the notice and the decision which was made. The notice suggested a decision would be made to grant Telkom SA SOC Limited facilitator status whereas the final approval granted facilitator status to the Government of South Africa represented by the Office of the Presidency. This difference materially impacts upon what was proposed to be done, what the public perceived was proposed to be done, what the public was invited to comment upon.

[24] The nature and purpose of the proposed decision must be described with sufficient particularity in the notice so that the rights to make representations will be real rather than illusory.[3] It is irrelevant whether or not the following of the correctly described process as opposed to the incorrectly described process would have made no difference. "The "no difference" approach is generally anathema. Courts resist accepting that the right to a hearing disappears when it is unlikely to affect the outcome.[4]"

[25] The nature and purpose of the proposed decision are not the same as the nature and purpose of the decision as published. This is a fatal flaw rendering the decision reviewable.

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[3] See: *Heatherdale Farms v Deputy Minister of Agriculture* 1980 (3) SA 476 (T) at 486.
[4] See: *Psychological Society of Africa v Qwelane and Others* 2017 (8) BCLR 1039 (CC) at paragraph 35.

[26] The whole decision making process and reasoning for reaching the decision are not provided on oath as the decision-maker Minister Davies failed to file an affidavit in these proceedings. Altron suggested in its supplementary affidavit that there was no evidence to suggest that the submissions made by the public (including Altron) had ever been placed before the Minister for consideration; that the second submission to the Minister did not even contain a summary or reference to the representations made, there is no record setting out the basis upon which the Minister dealt with the representations made if he considered them at all. These were all invitations to provide the evidence in the form of an affidavit by the Minister dealing with the issues. There were other issues with which he would have been expected in my view to have dealt with including for example the change in the identity of the person awarded facilitator status, the failure to include the controls contemplated by the various reporting conditions, time limits and review period.

[27] The reaction of the first respondent was a bald denial of the paragraphs and the setting out of various matters not directly overcoming the issue of whether or not the Minister should file an affidavit. The affidavit filed does not allege that the minister considered the submissions – indeed, even if he did the allegation would be hearsay. It is not permissible for one person to make an affidavit on behalf of another the hearsay remains hearsay and remains inadmissible.[5]

> "That interpretation of the agreement, Mr *Doctor* points out, has not been answered by the State President who has, for whatever reason, seen fit not to

[5] See: *Gerhart v State President* 1989 (2) SA 499 (T) at 504F to H

file any affidavit in this matter. He seeks to rely upon the affidavit of the second respondent, i.e. the Commissioner of Prisons. For that purpose, for what it is worth, he gave an authority to the Commissioner of Prisons, which reads that:

'In my hoedanigheid as Staatspresident van die Republiek van Suid-Afrika magtig ek vir Willem Hendrik Willemse, die Kommisaris van Gevangenisse, tweede respondent, om namens en ten behoewe van my 'n antwoordende eedsverklaring af te le in die bogemelde aansoek.'

Clearly one person cannot make an affidavit on behalf of another and Mr *Hattingh*, who appears on behalf of the three respondents, concedes correctly that I can only take into account those portions of the second respondent's affidavit in which he refers to matters within his own knowledge. Insofar as he imputes intentions or anything else to the State President, it is clearly hearsay and inadmissible."

[28] The matter was also considered in *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) where it was held:

"At first glance, there is some merit in Mr *Arendse*'s submission, especially insofar as it concerns the attack upon the decision of the RSDO. Beyond the allegation that the RSDO acted under the dictation of Interpol officials, few other facts are alleged or averments made in the supporting affidavit regarding the other review grounds of alleged unfairness, irrationality and unreasonableness. The point loses some of its force, however, when regard is had to the supplementary affidavit filed in terms of rule 53(4), which added to the supporting affidavit once the rule 53 record had been filed. There the applicant made much of the fact that the record delivered was inadequate for the reason that it comprised one set of documents, and not two. The applicant accordingly maintained that the failure or inability of the first and fifth respondents to file separate and distinct records was clear evidence of their failure to apply their minds properly. If the decision-makers were not able to identify what documentation was served before them and which documents (such as the Amnesty International reports) were taken into account when

making the decision impugned, that in and of itself, he argued, would be a reason to set aside the decisions. The allegation is made that the RSDO failed to take into account the documentation and thus failed to apply her mind to the application and ignored relevant information. Because the fifth respondent did not file an answering affidavit she has not denied these allegations. The unanswered allegations of acting under dictation and a failure to properly consider the application therefore do indeed establish sufficient basis for the relief sought on the grounds that the RSDO violated the applicant's constitutional and statutory rights to reasonable, rational and procedurally fair administrative action. (It was intimated in argument that the denials of the second respondent might be extended to the fifth respondent. That cannot be so. One person cannot make an affidavit on behalf of another. The second respondent can only depose to matters in his own knowledge."[6]

[29] In *Von Abo v Government of the Republic of South Africa and Others* 2009 (2) SA 526 (T) it was held:

"[47] Counsel for the applicant developed this argument further by submitting that the respondents, not having furnished admissible evidence in rebuttal, in the process failed to rebut the applicant's allegations of irrational and unconstitutional conduct. In this regard I was referred to *Hurley and Another v Minister of Law and Order and Another* 1985 (4) SA 709 (D) at 725 G-H where the following passage from *Ex parte Minister of Justice: In re R v Jacobson and Levy* 1931 AD 466 at 479 is quoted:

"If the party, on whom lies the burden of proof, goes as far as he reasonably can in producing evidence and that evidence 'calls for an answer' then, in such case, he has produced prima facie proof, and, in the absence of an answer from the other side, it becomes conclusive proof and he completely discharges his onus of proof. If a doubtful or unsatisfactory answer is given it is equivalent to no answer and the prima facie proof, being undestroyed, again amounts to full proof.

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[6] *Gerhardt v State President and Others* 1989 (2) SA 499 (T) at 504G.)"

> [48] In the light of this trite law the effect of this failure by any of the respondents to adduce evidence is that the evidence in Stemmet's affidavit regarding what was in the mind of any of the respondents as justification for their decisions to refuse diplomatic protection is hearsay and inadmissible. The Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) (1999 (10) BCLR 1059) para 105.
>
> Prinsloo J accepted that hearsay evidence falls to be ignored, even in the absence of an objection or an application to strike out."

[30] It is a fundamental principle that the decision maker must provide reasons why he made the decision. No contemporaneous reasons were provided. Reasons were provided several months after the decision had been taken. There is neither evidence that the reasons provided were in fact the reasons relied upon nor that they are reasons connected to the decision. If the reasons were the ones founding the decision it would have been a simple matter for the decision maker to have said so yet he did not. I find that the evidence is both insufficient to establish that the reasons were relied upon by the decision maker and also that they were the reasons at all. In addition there is failure to establish what the facts were on which the decision taker relied. The reasons for taking a decision are founded both in fact and in the opinion of the decision taker. As neither the facts nor the opinions founding the reasons for the decision are established the decision is reviewable.

[31] There is no record of what the decision maker considered. This evidential flaw arises both because the evidence is simply absent as well as

because there is no evidence from the decision maker of the existence and content of a record.

[32] In my view the decision is procedurally flawed and falls to be reviewed.

[33] The parties agreed that if I found the decision to be reviewable the order concerning the timing and impact of it being set aside be in the form contained within the draft order which was handed to me.

[34] That leaves the declaratory relief with which I must deal. The declaratory relief concerns events which have not occurred and which may never occur. It was submitted that it was desirable that notwithstanding that the relief sought concerns no existing and live issue that I should make an order. I do not agree with this submission. The decision sought clearly concerns academic matters. Any order made in respect of these matters would an expression of a valueless opinion. There is also a joinder problem in that a necessary party namely the Minister of Finance is not a party to the proceedings. I decline to make the declaratory order.

[35] It was submitted that there was a significant impact on the costs if the applicant failed to establish a right to the order. I disagree. The time spent on

the declaratory was insignificant. In the circumstances, I make an order in terms of the draft:-

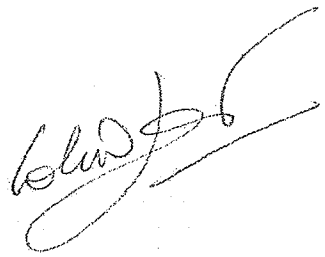
[36] It is ordered as follows:

1. The decision of the Minister taken on 5 April 2019 and published in the Government Gazette on 7 May 2019 under GN 262 of 2019 is reviewed and set aside.

2. The order in paragraph 1 will not affect the B-BBEE status of Telkom and its subsidiaries for the purposes of any tender or contract awarded and/or concluded after 7 May 2019 and prior to the date of this order.

3. For the purposes of the tenders and contracts referred to in paragraph 2, the B-BBEE status of Telkom and its subsidiaries shall continue to be treated as though Notice GN 262 of 2019 remained valid until the date of termination of the respective contracts, provided that this order shall have no application in respect of any renewal or extension of such tenders or contracts.

4. The first, second and fourth respondents are ordered to pay the costs of the applicant and the fifth respondent, including the costs of two counsel in each case.



C G LAMONT
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

ATTORNEY FOR 1st APPLICANT:	Webber Wentzel
COUNSEL FOR 1st APPLICANT:	Adv. S. Budlender SC Adv. N. Luthuli
COUNSEL FOR 2ND APPLICANT	Adv. H. Maenetje SC Adv. H. Rajah
ATTORNEY FOR 1st RESPONDENT:	State Attorney
COUNSEL FOR 1st RESPONDENT:	Adv. M. Chabedi Adv. A. Thompson
ATTORNEYS FOR 2nd AND 4th RESPONDENTS':	Werksmans Attorneys
COUNSEL FOR 2nd AND 4th RESPONDENTS':	Adv. M. Chaskalson SC Adv. S. Baloyi SC Adv. P. Ngcongo Adv. M. Dafel
DATE/S OF HEARING:	17 and 18 June 2020
DATE OF JUDGMENT:	08 July 2020

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 46376/19

On this the 8 day of July 2020

Before the Honourable Mr Justice Lamont

In the matter between:

ALTRON TMT HOLDINGS PROPRIETARY LIMITED	Applicant
and	
THE MINISTER OF TRADE AND INDUSTRY	First Respondent
TELKOM SOC LIMITED	Second Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
BUSINESS CONNEXION PROPRIETARY LIMITED	Fourth Respondent
MTN GROUP LIMITED	Fifth Respondent
VODACOM GROUP LIMITED	Sixth Respondent

DRAFT ORDER

HAVING read the papers filed of record and having heard counsel:

IT IS ORDERED AS FOLLOWS:

1. The decision of the Minister taken on 5 April 2019 and published in the Government Gazette on 7 May 2019 under GN 262 of 2019 is reviewed and set aside.

2. The order in paragraph 1 will not affect the B-BBEE status of Telkom and its subsidiaries for the purposes of any tender or contract awarded and/or concluded after 7 May 2019 and prior to the date of this order.

3. For the purposes of the tenders and contracts referred to in paragraph 2, the B-BBEE status of Telkom and its subsidiaries shall continue to be treated as though Notice GN 262 of 2019 remained valid until the date of termination of the respective contracts, provided that this order shall have no application in respect of any renewal or extension of such tenders or contracts.

4. The first, second and fourth respondents are ordered to pay the costs of the applicant and the fifth respondent, including the costs of two Counsel in each case.

BY ORDER OF THE COURT

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REGISTRAR