

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

CASE NO. 51159/2021

In the matter between:

e.tv (PTY) LTD

Applicant

and

**MINISTER OF COMMUNICATIONS AND DIGITAL
TECHNOLOGIES**

First Respondent

**INDEPENDENT COMMUNICATIONS AUTHORITY
OF SOUTH AFRICA**

Second Respondent

**CHAIRPERSON: INDEPENDENT COMMUNICATIONS
AUTHORITY OF SOUTH AFRICA**

Third Respondent

NATIONAL ASSOCIATION OF BROADCASTERS

Fourth Respondent

**SOUTH AFRICAN BROADCASTING CORPORATION
SOC LIMITED**

Fifth Respondent

VODACOM (PTY) LIMITED

Sixth Respondent

MOBILE TELEPHONE NETWORKS (PTY) LIMITED

Seventh Respondent

CELL C (PTY) LIMITED

Eighth Respondent

TELKOM SA SOC LIMITED

Ninth Respondent

WIRELESS BUSINESS SOLUTIONS (PTY) LIMITED

Tenth Respondent

THE MINISTER'S HEADS OF ARGUMENT

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[A] INTRODUCTION AND OVERVIEW

- 1 South Africa is a member of the International Telecommunications Union (“**ITU**”). The ITU’s 2006 Regional Radio Communication Conference (“**RRC-06**”) resolved that all countries, including South Africa, should migrate from analogue to digital broadcasting services by 2015.
- 2 Broadcasting digital migration is the process of moving the broadcasting of television from analogue to digital. The migration of the national broadcasting system from analogue to digital brings with it a variety of opportunities and the process is also critical to the future of the local broadcasting industry as well as the South African economy as a whole.
- 3 The Broadcasting Digital Migration Policy for South Africa (“**BDM Policy**”) made by the Minister in terms of s3(1) of the Electronic Communications Act 36 of 2005 (“**ECA**”)¹ recognises the developmental challenges that South Africa faces, such as the digital divide as well as building social cohesion and a common national identity, poverty eradication and employment creation.
- 4 Digital broadcasting has the potential to contribute significantly to addressing these challenges. Government has identified broadcasting digital migration as a national priority. The key benefit of digital broadcasting is that it uses the national radio frequency spectrum far more efficiently than analogue technology. This means that the existing broadcasting services can be provided using less of the radio frequency spectrum they currently occupy.

¹ FA annexure, AL4 p 001-255.

- 5 Digital migration begins with the “switch-on” and transmission of broadcasting digital signals and ends with the switch-off of analogue ones. Until total analogue switch-off (“**ASO**”) occurs there is a period of “*dual illumination*” during which both analogue and digital signals are simultaneously transmitted. In order to continue viewing television using current analogue TV sets, the public will require to use Set Top Boxes (“**STBs**”) which convert the transmitted digital signal to analogue. The dual illumination process commenced on 1 February 2016 when the transmission of broadcasting digital signals was switched on.
- 6 This dual illumination period will come to an end when the analogue signal is finally switched off. The Minister, on 28 February 2022, announced that the final switch-off will take place on 31 March 2022 (This final switch-off is called *ASO*.) The final switch-off will be a culmination of the switching off that had been started in October 2021 when the SABC transmitters in the Free State Province were switched off and the Northern Cape and North West Provinces were due to follow soon thereafter.²
- 7 Sentech has already switched off 84 MultiChoice analogue transmitters, 105 out of 288 SABC analogue transmitters and 4 of the 95 e.tv analogue transmitters.³
- 8 To enable the poor households to view television using the analogue TV sets, in 2015 Government started procuring STBs which convert the transmitted digital signal to analogue. Government procured 1,5 million STBs which were delivered from 2016 to 2019. Cabinet has approved a revised household migration delivery which includes the

² Pp010-59.

³ AA, p009-56 para 178.

involvement of the private sector and industry to complete the STB procurement and installation process and, ultimately, to complete the digital migration process.

- 9 Government in the BDM Policy decided as a matter of policy to consider finding means of making STBs affordable and available to the poorest TV owning households. Government is committed to bridging the digital divide in South Africa. The registration process for qualifying households started in 2015 and has been ongoing. Qualifying households could register for assistance at their local South African Post Office at branches across the country.
- 10 As at 31 October 2021, 1,228,879 qualifying households had registered for STBs. Of those, 556,954 STBs had already been installed in qualifying registered households and some 671,925 additional households will have to be provided with STBs by 31 March 2022. Government has about 800,000 STBs at various SAPO warehouses. These should be able to satisfy the 671,925 additional households that have registered by 31 October 2021.
- 11 Although Government made a final call that qualifying households register by 31 October 2021, this process has in fact not stopped and is ongoing. So, qualifying households may continue to register at their SAPO branches for Government assistance. Those who register after 31 October 2021 will be connected within 3 to 6 months of the final switch-off date.
- 12 So, when the Minister in her media statement of 5 October 2021, made a final call for households to register on or before 31 October 2021 the Minister was not calling for registration for the first time. This registration process had been ongoing since at least 2015. Government has taken all reasonable measures to ensure that all members of the

public are informed about digital migration and ASO as well as the need for eligible households to register for STBs.⁴

13 Government had undertaken various *Izimbizo* campaigns to raise awareness about the digital migration programme and registration by qualifying households for STBs.⁵ Government had also engaged with local and provincial government;⁶ engaged in door to door campaigns;⁷ and engaged in television and radio messaging.⁸ Government had also participated in various road shows and SMS messaging and social media campaigns.⁹

14 In anticipation of the final ASO date, Government has ensured that call centres are ready to support the migration and other related queries.¹⁰

15 The amendments to the BDM Policy of 18 March 2015 provides that the switch-on and switch-off date of the digital and analogue broadcasting DTT signals will respectively be determined by the Minister of Communications in consultation with Cabinet. The Minister has now determined that the ASO will happen on 31 March 2022.

16 We submit that the following issues arise from this application:

16.1 Is the Minister required to consult with e.tv and the interveners, before she determines the final switch-off?

⁴ AA, 009-98 para 318.

⁵ Para 327; see too annexure AA25.

⁶ Paras 335 and 336, annexure AA26

⁷ Para 342 and 343; annexures AA27 and AA28

⁸ Paras 348; annexure AA30

⁹ Para 360, 361, annexure AA25.

¹⁰ 009-89, para 291, annexures AA21.

- 16.2 whether the Minister's determination of the ASO date is an executive action or an administrative action.
- 16.3 what standard of review applies to the determination, depending on whether it is administrative action or an executive action?
- 16.4 Has the Minister behaved unreasonably in ensuring that the digital migration process is concluded within the timeframes set out in the Minister's media statement?
- 16.5 Finally, although it is not clear whether this case has been abandoned, has the Minister's conduct in ensuring that the digital migration is concluded limited the constitutional rights of e.tv and the interveners?
- 17 The Minister's case in sum is:
- 17.1 The Minister was not required to consult with e.tv or the interveners or indeed any other party, except the Cabinet, when determining the ASO.
- 17.2 The determination of the ASO is an executive action which does not require a public consultation or public participation or indeed an engagement process.
- 17.3 Nevertheless, this Minister and her predecessors have in fact, over a period of time, consulted with the relevant stakeholders. The Minister has taken on board the views and representations from those participants and the final implementation plan of the ASO reflects those interactions between the Minister and the stakeholders.
- 17.4 The so-called pre-conditions and/or minimum requirements for the successful conclusion of the digital migration process are in place: (a) there is a sufficient

number of STBs; (b) there is sufficient installation capacity; (c) Government has undertaken extensive and adequate awareness campaigns; (d) Sentech has adequate resources to retune the relevant transmitters and they are in place; (e) there is an adequate number of call centres to deal with any queries; and (f) there is also available a sufficient number of chip sets to service all those households that require STBs.

17.5 The Minister denies that her conduct is or has been unreasonable.

17.6 The Minister has in fact satisfied her constitutional obligations to respect, promote and fulfil the Constitution.

17.7 The relief sought by the interveners and e.tv is in any event inappropriate for all the reasons discussed hereinbelow. These submissions are structured below.

18 We have arranged these Heads as follows:

18.1 Firstly, we deal with the applicable relevant regulatory framework.

18.2 Secondly, we address the question of consultation.

18.3 Thirdly, we discuss the so-called minimum requirements.

18.4 Fourthly, we address the allegations of constitutional limitations.

18.5 Fifthly, we discuss the inappropriateness of the relief sought.

18.6 Finally, we conclude by asking that the application be dismissed.

[B] THE APPLICABLE RELEVANT REGULATORY FRAMEWORK

19 Under s3(1) of the ECA the Minister may make policies on matters of national policy applicable to the ICT sector, consistent with the objects of this Act and of the related legislation in relation to:

- “(a) *the radio frequency spectrum;*
- (b) *universal service and access policy;*
- (c) *the Republic’s obligations and undertakings under bilateral, multilateral or international treaties and conventions, including technical standards and frequency matters;*
- (d) *the application of new technologies pertaining to electronic communications services, broadcasting services and electronic communications network services;*
- (e) *guidelines for the determination by the Authority of licence fees and spectrum fees associated with the award of the licences contemplated in Chapter 3 and Chapter 5, including incentives that may apply to individual licences where the applicant makes binding commitments to construct electronic communications networks and provide electronic communications services in rural and underserviced areas of the Republic;*
- (f) *the promotion of universal service and electronic communications services in under-serviced areas;*
- (g) *mechanisms to promote the participation of SMMEs in the ICT sector;*
- (h) *the control, direction and role of state-owned enterprises subject to the Broadcasting Act and the Companies Act, 1973 (Act No. 61 of 1973); and*
- (i) *any other policy which may be necessary for the application of this Act or the related legislation.”*

20 The Constitutional Court in Electronic Media Network and others v e.tv (Pty) Ltd and others at [27] said that the Minister enjoys the constitutional entitlement to exercise

executive authority by developing and implementing national policy and that the reference to national policy in s3(1) of the ECA finds resonance with “national policy” in s85(2)(b) of the Constitution. The Constitutional Court described this as the Minister’s original policy-making authority and that it was a constitutional power not to be lightly dislodged by a clamour for consultation and commercial interests masked with the appearance of the advancement of public interest, ensuring fairness, competition and a diversity of use broadly representing South African society.

- 21 The Minister made the BDM Policy pursuant to her powers under s3(1) of the ECA. It is the Policy that provides for the switching-off of the analogue system. The executive functions of the Minister include the announcement of the date of the final switch-off. It is the Minister’s constitutional competency.

Digital Migration Policy¹¹

- 22 The Policy sets out the relevant context to the publication of the Policy, that is the South African commitments under the ITU Treaty to migrate from analogue to digital broadcasting services by 2015:

22.1 The migration of the national broadcasting system from analogue to digital brings with it a variety of opportunities. The process is also critical for the future of the local broadcasting industry as well as the South African economy as a whole.

¹¹ AA, p 009-16 paras 49 – 72.

- 22.2 The Policy identifies “development challenges” such as digital divide as well as building social cohesion and a common national identity, poverty eradication and employment creation.
- 22.3 The Policy recognises that digital broadcasting has the potential to contribute significantly to addressing these challenges and that Government has identified broadcasting digital migration as a national priority.
- 22.4 The key benefit of digital broadcasting is that it uses the scarce national radio frequency spectrum far more efficiently than analogue technology. This means that existing broadcasting services can be provided using less of the radio frequency spectrum that they currently occupy.
- 22.5 The Policy sees the delivery of quality education, health and small, medium and micro enterprises programmes, the opportunity for developing new skills and the creation of new jobs and employment opportunities as an important component of digital broadcasting in South Africa. Broadcasting digital migration can directly contribute to the accelerated shared growth initiative of South Africa (“ASGI-SA”) and be another tool in the war against poverty.
- 22.6 Digital divide (the radio frequency spectrum freed up through the digital migration process) has the potential to not only provide new and improved broadcasting but also to enable additional ICT services traditionally not provided in the broadcasting radio frequency spectrum band, such as mobile telephony and wireless broadband, as well as dedicated delivery of Government information and services.

- 22.7 Digital migration begins with the switch-on and transmission of broadcasting digital signals and ends with the switch-off of analogue ones.
- 22.8 In-between these two is a period of dual illumination during which both analogue and digital signals are simultaneously transmitted. In order to continue viewing television using the current analogue TV sets, the public will be required to use STBs which convert the transmitted digital signals to analogue. Otherwise, it will be necessary to acquire digital-enabled TV sets.
- 23 The Policy aims to achieve the following:
- 23.1 to establish a policy framework within which broadcasting digital migration is implemented;
 - 23.2 create an environment for the uptake of digital terrestrial television by TV-viewing households, including the poor;
 - 23.3 ensure a future for broadcasting existing services and introducing new services, taking into account the gaps related to programming of provincial content as well as Parliamentary and Government information, especially for the poor;
 - 23.4 give effect to the decision to implement digital migration within a three year dual illumination period;
 - 23.5 provide a framework for the provision of community television and mobile broadcasting services;
 - 23.6 provide for television services in more South African languages;

- 23.7 provide for access to broadcasting services to people with disabilities;
 - 23.8 the development of a South African world class electronic manufacturing industry;
 - 23.9 the development of the creative industries; and
 - 23.10 provide for the establishment of a body referred to as the *Digital Dzonga* to monitor the implementation of and raise public awareness about digital migration in South Africa.
- 24 The legislative context of the Policy is the:
- 24.1 Broadcasting Act, 1998.
 - 24.2 ECA; and
 - 24.3 ICASA Amendment Act of 2006.
- 25 Migration to digital broadcasting will result in the availability of more channels, thus bringing more access to broadcasting and content diversity to the public. It will enhance the country's ability to provide universal services and to ensure more equitable access to information.
- 26 The identified benefits of broadcasting digital migration are as follows:
- 26.1 to positively shape the future dynamics of the ICT sector, broadcasting digital migration will bring with it many benefits including efficient use of the frequency spectrum;
 - 26.2 a public and scarce resources;

26.3 more channels and, therefore, more diverse content delivered to the South African public;

26.4 better picture quality; and

26.5 potential for special interactive services to cater for people with visual and hearing impairments such as audio-description and subtitling and e-government delivery.¹²

27 **Under clause 2.1.4,** Government has decided as a matter of policy to consider finding means of making the STBs affordable and available to the poorest TV-owning households. This support by Government should be seen as part of its commitment to bridging the digital divide in South Africa. Accordingly, in South Africa, the STBs will have a special feature which will enable access to e-government services for all citizens, especially those who thus far have had limited or no access. Digital broadcasting also enables the provision of services in a multiplicity of languages, thus increasing access to information which, in line with Government's information society vision, is an important tool for societal and economic development. This is essential to meet our poverty-reduction roles.

28 The Policy sets out the digital switch-on and analogue switch-off dates.¹³

¹² Annexure PR24 p 001-255; Policy, para 1.3.

¹³ P001-269 Para 3.3.1.

- 29 There have been two amendments to the Policy. Insofar as the STBs are concerned, the February 2012 amendment provides that Government has decided as a matter of policy to consider finding the means to make STBs affordable and available to the poorest TV-owning households. The amendment provides that Government has decided to subsidise poor TV-owning households through the Universal Service and Access Fund (“USAF”).¹⁴
- 30 The March 2015 amendment states that the switch-on and switch-off dates of the digital and analogue broadcasting terrestrial signals will respectively be determined by the Minister in consultation with Cabinet.
- 31 Whilst the February 2012 amendment stated that the date for the ASO will be determined by the Minister after engaging with Cabinet and relevant broadcasting stakeholders, the 2015 amendment removed the requirement to engage with “*relevant broadcasting stakeholders*”. Thus, the Minister is not required to engage relevant broadcasting stakeholders but to consult only with the Cabinet when announcing the switch-off date¹⁵
- 32 The ASO is not something that was created by the Minister in her 5 October 2021 media statement. It comes from the Policy. By announcing the final ASO, the Minister was simply implementing a policy stipulation – she was not deciding that there will be a final ASO, that much is clear from the Policy instrument (there will be a ASO , that has been the case since 2008) – the announcement of the date is what needed to happen.

¹⁴ Annexure, PR25 001-274, annexure PR27 001-305

¹⁵ Annexure, PR27 001-305 para 3

[C] THE MINISTER IS ONLY REQUIRED TO CONSULT CABINET ON THE DETERMINATION OF THE ASO

33 e.tv complains that the Minister has “in fact” determined the ASO and that must be achieved by what is an “arbitrarily determined date”. e.tv says the Minister has not consulted with relevant parties who have years of experience in the field and which will be impacted by the deadline, the viewing public who rely on analogue broadcasting to ensure that digital migration can take place without disrupting the broadcasting sector.¹⁶

33.1 e.tv says that this requirement for a consultation is “court mandated”.¹⁷

33.2 e.tv says that prior to the determination by the Minister of the ASO, ICASA and the Minister are required to undertake a process of public consultation with affected parties.¹⁸ As these parties include a variety of stakeholders and constituents such as the general public, free-to-air broadcasters including e.tv and other stakeholders such as NGOs that may have an interest in the process. These consultations according to e.tv must be in respect of the date of the digital migration and whether appropriate measures are in place to ensure that those in South Africa who are reliant on analogue broadcasting are not deprived of their right of access to information by means of receiving free-to-air broadcasts.

34 It is against this background that e.tv seeks a declarator that prior to the determination by the Minister of the ASO date and the date for completion of digital migration, the

¹⁶ FA, p 001-13 para 8.

¹⁷ FA, p 001-14 para 9.

¹⁸ Para 15.1.

Minister is required to undertake a process of consultation with affected parties, including but not limited to e.tv, regarding the date of the ASO and the date for completion of digital migration and whether appropriate measures are in place to ensure that those in South Africa who are reliant on analogue broadcasting are not deprived of their right of access to information by means of receiving free-to-air broadcasts as a consequence of determination by the Minister.¹⁹

35 Apart from the fact that the ASO date has been announced, e.tv's case based on a lack of consultation is flawed for several reasons:

35.1 Under the Policy, the digital switch-on and analogue switch-off dates were in fact determined by Cabinet to be 1 November 2008 and 1 November 2011 respectively.²⁰ These dates were however not achieved.

35.2 The 2012 amendment made it clear that the date for the final ASO will similarly be announced by the Minister of Communications after engaging with Cabinet and other relevant stakeholders and assessing the extent of take-up by audience of the necessary equipment to facilitate universal access to broadcasting services.²¹ This was of course not done; in other words, the ASO was not announced by the Minister until the.

35.3 Under the 18 March 2015 amendments, the paragraph states that the date for the final ASO will similarly be announced by the Minister in consultation with

¹⁹ NOM p022-1 , para 2.

²⁰ Annexure, AL4 001-269, para 3.3.1.

²¹ 001-281, para 3.3.1.

Cabinet. The decision to switch-off has been made; it is the date that needed to be announced.

35.4 In paragraph 1.1.of the Policy it is stated that the RRC-06 of the ITU has resolved that all countries, including South Africa, should migrate from analogue to digital broadcasting services by 2015. The Policy recognises that there will be a dual illumination period where analogue and digital signals will be simultaneously transmitted. But the Policy also acknowledges that the switch-off of the analogue signal will end at some point.²²

36 Cabinet initially announced the switch-off date as being 1 November 2011, which proved impossible to achieve. The Minister is thus not determining or deciding on a switch-off. The Minister merely announces the date on which the decision to switch-off will be implemented. The decision to switch off has already been taken and is reflected in the Policy. The Policy requires the Minister in consultation with Cabinet to announce the date for the final switch-off of the analogue signal. It is therefore imperative to distinguish two legal acts.

36.1 The decision to finally switch-off AND the date on which that decision will be implemented.

36.2 The decision to finally switch-off has been taken already. It was expressed in the Policy. It has not been challenged.

36.3 What is being challenged is the announcement of that date, now the 31 March 2022.

²² 001-264, para 118.

36.4 The announcement of the ASO date is a matter that lies within the Minister's exclusive executive terrain. The Minister is thus only required to consult with Cabinet.

The announcement of the final ASO date is not an *administrative action*

37 Government already determined the Policy which provides for the switch-on and switch-off date.²³

“Taking into account the resolution of the ITU that the transition from analogue to digital terrestrial television broadcasting should end on 17 June 2015, the Cabinet decided that in South Africa, the switch-on date of the broadcasting digital signal and the switch-off date of the analogue signal should be on 1 November 2008, and/or 1 November 2011 respectively.”

38 In the 2012 amendment, the Policy provides that:

“3.3.1 A final date for the commencement of the illumination period will be announced by the Minister of Communications after engaging with Cabinet and all relevant stakeholders, including the broadcasting industry. The date for the final switch-off of the analogue signal will similarly be announce by the Minister of Communications after engaging with Cabinet and other relevant stakeholders and assessing the extent of take up by audiences of the necessary equipment to facilitate access to broadcasting services.”²⁴

39 The Digital Migration Regulations provide in regulation 3(1) that the date for the commencement of the dual illumination period as well as the date for the final switch-off of the analogue signal will be published by the Minister in the *Gazette*.²⁵

²³ 001-269, para 3.3.1.

²⁴ Amendment to Policy, 001-281, para 3.3.1.

²⁵ 001-291, para 3.1.

40 The decision to switch-off and the consequential announcement of the final ASO date is an obligation of South Africa's the 2006 Regional Radio Communications Conference and its ITU membership.

41 In the Policy at paragraph 3.3.1, it is stated that:

“The date for the final switch-off of the analogue signal will similarly be announced by the Minister of Communications after engaging with Cabinet.”²⁶

42 South Africa has opted for a phased-in approach targeting to terminate analogue service on a province by province basis advancing from low population density provinces to high population density provinces.²⁷

43 According to the ASO Implementation Plan, three provinces were switched off between October and November 2021, i.e. Free State, North West and Northern Cape. ASO will commence in the other provinces targeting to complete Mpumalanga and Limpopo earlier than the other provinces.²⁸

44 The provincial schedule details activities for each of the sites that will be switched off during the ASO process with an indication on the spectrum and occupation by each of the transmission sites. Once the ASO has been obtained, Sentech will undertake a digital-to-digital (D2D) migration process to move all the other DTT allocations to below 700 MHz.²⁹

²⁶ 001-306, para 6.

²⁷ 010-50 – 53.

²⁸ 010-59.

²⁹ 010-60 – 68.

- 45 The announcement of the final switch-off of the analogue signal is not an administrative action.
- 46 The formulation of the BDM Policy was recognised by the Constitutional Court as an executive competency in Electronic Network Ltd v e.tv (Pty) Ltd.³⁰ It said that any legislation, principle or practice that regulates a consultative process or relates to the substance of national policy must recognise that policy-determination is the space exclusively occupied by the Executive. The Judiciary may, as the ultimate guardian of our Constitution and in the exercise of its constitutional mandate of ensuring that further branches of Government act within the bounds of the law, fulfil their constitutional obligations and account for their failure to do so, encroach on the policy-determination domain only when it is necessary and unavoidable to do so.
- 47 The court in Electronic Network Ltd v e.tv (Pty) Ltd cautioned that the judicial arm would do well to resist the enticement or urge to inadvertently, yet impermissibly, encroach on the executive's national policy-determination space on some elasticised rationality or other constitutional basis that purportedly justifies judicial intervention.³¹ Judicial infusion in matters of policy formulation is permissible when policy determination constitutes a disregard for the law or Constitution.
- 48 The court recognised that the Minister's ability to formulate policy under s3(1) of the ECA was resonant with national policy provided for in s85(2)(b) of the Constitution.

³⁰ Electronic Network Ltd v e.tv (Pty) Ltd 2017 (9) BCLR 1008 (CC) at [2].

³¹ [26].

The Minister's ability to make the broadcasting migration policy derived from the Constitution itself.³²

49 This case is not concerned with policy-formulation. That has long passed. That Policy also determined that there will be a switching off of analogue signals - that was never challenged. All that was outstanding from the Policy was the announcement of the date of the final ASO. That has since been done.

50 The announcement of the final ASO was not done by a decision taken, or any failure to take a decision by an organ of state when:

50.1 exercising a power in terms of the Constitution or a provincial constitution; or

50.2 exercising a public power or performing a public function in terms of any legislation.

51 Nor was the announcement of the final ASO a decision of an administrative nature.

52 It is the function (here the announcement of the ASO) rather than the functionary (the Minister) that is important in assessing the nature of the action in question. The BDM Policy and the decision to switch-off analogue signals have already been undertaken. The final date has since been announced in the *Gazette*. That announcement is not administrative in nature. The Minister was not performing a public function or exercising a public power in terms of any legislation. It is not, as the Constitutional Court held in *Motau*³³ “... *the conduct of bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state, which necessarily involves the*

³² [27].

³³ 2014 (5) SA 69 (CC).

application of policy, usually after its translation into law, with direct and immediate consequences for individuals or group of individuals”.

53 The court said at [44]

“[In summary, the important question in this context is whether the power is more closely related to the formulation of policy, which would render it executive in nature, or the implementation of legislation, which would make it administrative. Underpinning this enquiry is the question whether it is appropriate to subject the power to the more rigorous, administrative-law review standard.”

54 It is clear that the announcement of the ASO is not an administrative action. The Policy makes it clear that only Cabinet requires to be consulted when the announcement is made. The Minister’s power to announce the ASO does not come from the Digital Migration Regulations as e.tv contends.

55 The Minister, when announcing the date of the final ASO, was performing an executive action that required no consultation except with the Cabinet.

56 In Law Society v President of the Republic of South Africa³⁴ the Constitutional Court was concerned with the legality of the State President’s conduct of a resolution by the Southern African Development Community Summit and operation of the SADC Tribunal. The President also signed the 2014 Protocol to the SADC Treaty. The resolution effectively stripped the Tribunal of its jurisdiction to hear complaints by individuals against member states. The court then, dealing with the question of public participation at [86], stated that participatory democracy is not provided for in similar terms in relation to the exercise of presidential or executive power (in contrast to public

³⁴ Law Society v President of the Republic of South Africa 2019 (3) SA [30].

participation in the law making process which is a requirement specifically provided for in the Constitution).

- 57 The court said that negotiation and signing of international agreements like the impugned protocol is an exercise of executive power (as we submit is the announcement of the ASO). The court stated the position as follows:

“There is no legal provision or principle that even remotely imposes an obligation on the executive to invite the public to participate in its decision-making processes as proposed. Desirable though it might be, we would be straining even the scheme of the Constitution if we were to elevate public consultation to the level of a requirement. It is always open to the executive , whenever it deems it fitting to do so, to involve the public. But a failure to do so, however enriching to the decision-making process it might otherwise have been, can never rise to the level of a failure to fulfil a constitutional obligation to consult the public.

There is thus no merit in the contention that the public should have been consulted in compliance with the dictates of participatory democracy before the President negotiated or signed the impugned protocol.”³⁵

Conclusion

- 58 The announcement of the ASO is not an administrative action. It is the exercise of executive authority by the Minister. It is not subject to PAJA and does not require the Minister to undertake a public participation process and/or a consultation and/or an engagement as contended for by e.tv. The Minister’s powers to determine the ASO are specifically set out in the Policy. The Minister’s ability to make the Policy comes from the Constitution read with s3(1) of the ECA.
- 59 The Minister’s power to announce the ASO does not come from the Digital Migration Regulations even though it is stated therein. The power comes from the Policy.

³⁵ [86] – [88].

60 All the Minister has to demonstrate is that there is a rational connection between the announcement of the ASO, a legitimate governmental purpose. The court may not take over the functions of Government to formulate and implement Policy. The court's preference of one or other of achieving an objective is immaterial. All that is required is that a legitimate public purpose is served. Political merits or demerits of disputed legislation are of no concern to a court. Courts cannot and should not substitute their opinions for the opinions of those in whom the power has been vested (the Minister). It cannot interfere with a decision simply because it disagrees with it or it considers that the power was exercised inappropriately.³⁶

Reliance on the judgment of Sutherland J and Baqwa J is misplaced

61 e.tv also places reliance for the contention that the Minister is obliged to consult on the judgment of Sutherland³⁷ and Baqwa J.³⁸ e.tv places reliance on the following statement made by Sutherland J:

“Second, in terms of the Amended Broadcasting Digital Migration Policy of 18 March 2015, the analogue-to-digital migration process is subject to a switch-off date which is to be determined by MOT [Minister of Telecommunications] in consultation with the Cabinet, a decision which shall be made after a process of engagement with the affected parties has been concluded and is not expected to be soon.” (Emphasis added)

³⁶ Merafong Demarcation Forum and others v President of the RSA and others 2008 (5) SA 171 (CC) at [62]; Pharmaceutical Manufacturers Association of SA and Another in re: Ex Parte President of the Republic of South Africa and others 2000 (2) 674 (CC) at para 90; Merafong above at para [63]; Ronald Bobroff and Partners Inc v De la Guerre 2014 (3) SA 134 (CC) at [7]; Albutt v Centre for the Study of Violence and Reconciliation and others 2010 (3) SA 293 (CC) at para 51.

³⁷ Minister of Telecommunications and Postal Services v Acting Chair, Independent Communications Authority of South Africa, Cell C (Pty) Ltd v Acting Chair, Independent Communications Authority of South Africa (2016/59722, 2016/ 68096) [2016] ZAGPHC 883 (30 September 2016).

³⁸ Telkom SOC Ltd and Ano v Independent Communications Authority of South Africa and others (66778/2020) [2021] ZAGPP HC 120 (8 March 2021).

- 62 It is important to set out the issues that arose in that case.
- 62.1 The judgment addressed two applications, both involving the same parties. The Minister was cited in one of the cases but not in the other.³⁹
- 62.2 The Minister and Cell C sought to set aside certain decisions taken by ICASA. In Part A the Minister sought an interim interdict suspending the implementation of the impugned decisions pending the review (Part B).⁴⁰
- 62.3 ICASA had published an invitation to apply in July 2016 inviting parties to participate in an auction of rights to use certain bands of the radio frequency spectrum to be followed by a licensing by ICASA.
- 63 Sutherland J said that in his view the case turned on the following major issues:
- 63.1 the alleged pre-emption of the Minister's new national policy;
- 63.2 alleged non-compliance with the radio frequency plans;
- 63.3 the risk of anti-competitive attributes contaminating the ITA; and
- 63.4 the criticism that the ITA consists in part of technological demands of industry actors that are irrational.⁴¹
- 64 In the context of discussing the second issue (alleged non-compliance with the radio frequency plan) the court said that the true *locus* of the controversy is confined to the

³⁹ Para 1 of the judgment.

⁴⁰ Para 2 of the judgment.

⁴¹ Para 20.

implications flowing from the presence of non-mobile operators, at present assigned space in the spectrum.

64.1 Whether those parts of the spectrum already assigned to non-mobile services can be assigned or re-assigned to mobile operators before and until the current non-mobile operators have migrated out of the spectrum, was problematic. According to ICASA the current non-mobile users occupy a small space in the spectrum and thus a significant amount of space can be accessed right now and the remaining space, presently occupied bandwidth, by non-mobile operators can after the migration then be accessed at an unknown future date, the mobile operators using the interim to gear up for a total rollout.

64.2 Even though such a conditional assignment shall not ostensibly impact adversely on the present non-mobile operators who have been assigned the spectrum and who will continue to enjoy effective access for the time being, was it appropriate or indeed valid to reassign on such basis? The court said that, although it could be done practically, the validity thereof was suspect.

64.3 Concern was a matter of interpretation of the plan and its enabling legislation. Second, that should the Minister not defer such an amendment until a secure harbour is found for the operators who are to exit this spectrum especially given the uncertainty as to when that could be effected, the court said that on the facts at a practical level does it make sense to assign space in the spectrum that is, at present, inaccessible on the basis that at a future unknown date, access will be made available when two other happenings have to take place to give effective access to the newcomers?

65 Those “two other happenings” were:

65.1 First, migrated operators need to have another spot assigned to them. They have to make do with a reduced bandwidth.

“In terms of the amended broadcasting digital migration policy of 18 March 2015, the analogue-to-digital migration process is subject to a switch-off date that is to be determined by MOT in consultation with the Cabinet, a decision which shall be made after a process of engagement with the affected parties has been concluded and is not expected soon.”

65.2 Second, the court found that ICASA could not migrate the current non-mobile users without MOT participation and an order that the process required coordination between them. This, according to the court, gave rise to a highly problematic set of circumstances not capable of being managed by ICASA on its own.

66 The court concluded that:

66.1 the assignment of spectrum already assigned to other operators is of questionable validity; and

66.2 to assign now and defer access to an unknown future date which is dependent on a host of process-dependant happenings has the look of a reckless decision and for that reason an irrational decision.

67 The Sutherland J statement on which e.tv relies was not the *ratio decidendi* on which the issues that arose in that matter were resolved. It was simply remarks made by him in the context of the conclusion that the migrated operators need to have another spot assigned to them.

68 In any event , the BDM Policy does not provide for a process of engagement with affected parties, when the Minister announces the final ASO. She is only required to consult with Cabinet.

69 The statement then made by Sutherland J is not binding on this court. Neither is it *res judicata* on the question of the Minister’s duties when announcing the final ASO. That was not an issue before Sutherland J.

The judgment of Baqwa J

70 This case concerned ICASA’s publication of an invitation to apply for the licensing and auctioning of spectrum. In Part B Telkom sought to interdict ICASA from implementing the licensing steps and processes referred to and contemplated in the ITA to operate pending the determination of Part C.

71 Baqwa J criticised ICASA for having failed to take on board previous mistakes. ICASA had repeated the same mistake as it had done when the matter came before Sutherland J.

72 Baqwa J said that ICASA had been in existence as a Chapter 9 institution since the advent of the constitutional state and that it had gathered a considerable amount of experience during that time. One would expect that where the institution has made mistakes, it would use such instances to reflect and ensure that they are not repeated.⁴²

⁴² [68].

73 Baqwa J said that the question ICASA should have asked itself were well set out in the judgment of Sutherland J. It was in that context that Baqwa J quoted the questions posed in paragraph 58 and 59 of Sutherland J’s judgment. Those questions were:

“58. *First, the concern is a matter of interpretation of the plan and its enabling legislation. Is a ‘re-allocation’ implicated? Should the ‘allocation’ by MOT, for exclusive use by mobile operators, not precede a decision by ICASA to ‘assign’ a licence, ‘exclusively’ for only one of the eligible usages? Should the assignments ICASA contemplates be restricted only to unassigned spectrum?”*

74 Baqwa J’s repetition of the questions also quoted the statement of Sutherland J where he said “*that the migration process subject to a switch-off date to be determined by the Minister in consultation with the Cabinet and a decision which shall be made after a process of engagement with the affected parties has been concluded ...*”.

75 Baqwa J did not deal with the Minister’s power to announce the final ASO. This was not an issue before him. His reference to Sutherland J was in the context of the questions asked by the latter. Neither judgments support the assertion made by e.tv that the Minister is obliged to consult.

The Minister and the Department held consultations with a diverse range of stakeholders

76 Despite not being required to consult, except with the Cabinet, the Minister and the Department nonetheless consulted for an extensive time with diverse stakeholders. In these consultations, neither the Minister nor the Department were required to agree with the stakeholders. All that is required is that a genuine effort be made to obtain views from the role-players and the public; to create a platform for the solicitation of views that would enable the policy-maker to appreciate that those being consulted think or make of

the major and incidental aspects of the issue or policy under consideration: people or entities must be left to express themselves freely on as wide a range of issues, pertinent to a policy proposal, as possible.⁴³

77 The 2008 BDM Policy provided for the establishment of a Digital Dzonga. It comprised of members of the public, government representatives, industry representatives, organised labour and consumer groups. It was concerned with education, awareness, liaising with relevant stakeholders including ICASA, STB manufacturers as well as monitoring, implementing and providing regular reports to the Minister.⁴⁴ The Dzonga was subsequently replaced by the Digital Migration Project Office to establish and monitor the implementation of digital migration in South Africa. It was attended by members of the Department, Sentech, USAASA, SABC, M-Net, SAPO and e.tv. The key functions of these meetings were to deal with the provision of public management and monitoring services to the DMP and to liaise with relevant stakeholders and dealt with public awareness programmes pertaining to digital migration and the constitution of public awareness teams and media teams. E.tv was represented on a body referred to as the Digital Migration Advisory Council. It was to oversee the rollout process and advise the Minister on the implementation and modalities of the programme. These were drawn from SABC, MultiChoice, MTN, Vodacom, Telkom, Sentech, USAASA and trade and industry. The meetings dealt with the status of the STB installation process, conducting awareness campaigns and establishment of a call centre to deal with challenges faced by the rollout programme and to suggest solutions thereto.⁴⁵

⁴³ Electronic Media Network Ltd and others v e.tv (Pty) Ltd and others 2017 (9) BCLR 1108 (CC) [38] [43] [45].

⁴⁴ 009-25 paras 79 – 80; annexure AA2 010-85.

⁴⁵ AA 009-25 paras 80 – 87; annexures AA2 010-85, AA3 010-501, and AA4 010-579.

The Department and/or the Minister has held consultations with free-to-air broadcasters, in particular e.tv and SABC.⁴⁶ e.tv was represented at these DMAC meetings.

- 78 Consultations were also held with community broadcasters.⁴⁷ Public awareness campaigns were conducted calling for qualifying households to register for STBs; to advise members of the public about digital migration and also the ASO.⁴⁸
- 79 Government embarked on *Izimbizo* campaigns⁴⁹ throughout the country.⁵⁰ SAPO also conducted an awareness campaign in particular targeting qualifying households to register for migration services.⁵¹
- 80 Government undertook door to door campaigns to make members of the public aware of the digital migration process as well as calling upon those who qualified to register for assistance.⁵²
- 81 Campaigns were conducted on television and radio by messaging.⁵³ Roadshows have also been undertaken⁵⁴ as well as conducting SMS and social media messaging.⁵⁵ All these processes were interactive.

⁴⁶ 009-29, para 95; annexure AA6; AA2 010-85, 5.1 010-87. AA4 010-579; 010-647.

⁴⁷ 009-29, paras 93 and 94.

⁴⁸ 009-97, paras 315 – 326.

⁴⁹ 009-99, para 327; annexure AA25, 010 ff.

⁵⁰ 009-100 ,paras 328, 329.

⁵¹ 009-101, para 334.

⁵² 009-102, para 342; annexure AA27 010-243 ff.

⁵³ 009-104, paras 348 – 356; annexure AA30.

⁵⁴ 009-106, para 360.

⁵⁵ 009-106, paras 361-363.

82 The Minister and the Department were able to obtain the views of role-players. They were also left to express themselves freely on a wide range of pertinent issues. Neither the Minister nor the Department are required to obtain agreement with the attendees.

[D] Project Steering Committee

83 The Minister set up a Steering Committee comprising of broadcasters, SABC, eMedia (e.tv's holding company), MultiChoice and StarSat as well as Telkom which owns Smart STB, Sentech, USAASA, SAPO and SITA. These entities were selected because of the value add they brought to the digital migration process. The Project Manager for the Steering Committee is the COO of Sentech. The team meets fortnightly and presents reports to the committee on the progress being made and recommends necessary adjustments to the ASO plan.⁵⁶

84 The first meeting was held on 20 September 2021 attended by the Minister, officials of the Ministry and the Department, SABC, USAASA, Sentech, SITA and SAPO. It was also attended by the COO of StarSat, eMedia and MultiChoice and Telkom Mobile. The purpose of the meeting was to present and discuss the integrated ASO plan for implementation of the BDM programme. The ASO plan was presented (annexure AA14 at pp 010-500). eMedia opposed the plan that it had been hashed in secret. This was denied by the Minister who confirmed that the plan had been compiled considering inputs from various stakeholders.⁵⁷

⁵⁶ AA, 009-132 and 133.

⁵⁷ AA, para 136 and 137.

- 85 SABC welcomed the presentation. MultiChoice stated that the plan was practical and that it has available STBs and chip sets indicated on the plan.⁵⁸ Sentech indicated that the plan was ambitious. StarSat indicated that the plan was achievable and while they do not have a strong market base in South Africa, they could make a contribution to the committee by their recent support to Mozambique on the migration.⁵⁹
- 86 eMedia raised concerns around accuracy of the data, chip set availability and the timeframes for the switch-off. e.tv was requested to make a presentation on 1 October 2021.⁶⁰
- 87 A further meeting was held on 1 October 2021 at which e.tv gave its presentation. We highlight this meeting to demonstrate that participants and role-players attended this meeting. They were given an opportunity to participate and to speak to all the issues that arose.
- 88 The Minister has considered e.tv's presentations and presentations made by other stakeholders.⁶¹ These meetings dealt with, amongst others, after-market support, project funding model, optimum STB registration and data management system; rollout in three provinces, communications and awareness, national registration readiness and chip set availability.

⁵⁸ Paras 138, 139 and 141.

⁵⁹ Paras 142 and 143.

⁶⁰ Annexure AA10 010-2.

⁶¹ Paras 161.

- 89 In addition to having discussed the subject matter of ASO and other related matters under the auspices of the Digital Dzonga, the PMO, DMAC, and other fora, the Department and the Minister has had consultations with e.tv.
- 90 The true question that should be asked is whether a genuine effort was made by the Department or the Minister to obtain e.tv's views on ASO and other related matters. It is not necessary that the Minister and e.tv should agree on the subject matter of the consultative process.
- 91 Put differently, has the Minister appreciated what e.tv's views are on ASO and the so-called minimum requirements and/or preconditions? Was e.tv afforded the opportunity to express itself on these issues? The simple answer is that indeed that is the case.⁶²
- 92 The earliest meeting with e.tv took place on 8 February 2021. The ASO plan provided by Sentech to the Department was discussed. e.tv raised the following issues:
- 92.1 preconditions to allow for digital migration;
 - 92.2 availability of STBs;
 - 92.3 the question of whether the conditions had been met;
 - 92.4 e.tv's concern of the availability of DTT STBs.⁶³

⁶² Electronic Media Network and others v e.tv (Pty) Ltd and others 2017 (9) BCLR 1108 (CC) [38].

⁶³ AA 009-31, para 101.

93 There was a further meeting on 17 February 2021 under the auspices of the BDM Project Management office. The question of the ASO was raised and e.tv raised the following:

93.1 Transmitters could not be switched off without sufficient market intervention in the coverage area of the identified transmitters.

93.2 It did not appear that any careful planning had been given about how specific geographical areas and affected households would receive television signal after the proposed ASO.

93.3 It was not possible to achieve nationwide transmitter switch-off in the proposed timeframe.

93.4 There was a shortage of chip sets to manufacture decoders.⁶⁴

94 e.tv raised the same concerns in respect of the proposed meeting of 19 February 2021.⁶⁵

95 Therefore, these so-called preconditions of minimum requirements are not matters that are presented or have been presented to the Minister for the first time in e.tv's presentation of 1 October 2021, or indeed its various letters to the Minister. These points were raised and discussed at earlier meetings between the Department and e.tv.⁶⁶

96 All these questions were considered by the Department who responded to e.tv's concerns and denies that it was disregarding any concerns raised by e.tv and other broadcasters.⁶⁷

⁶⁴ 009-33, para 104.

⁶⁵ 009-34 para 105 ff.

⁶⁶ Para 108.

⁶⁷ Para 111.

- 97 The Department made it clear that it in fact considered the comments made by various stakeholders, including e.tv.⁶⁸
- 98 In respect of the letters addressed to the Minister by e.tv, the Minister responded to e.tv's letter of 2 September 2021 which raises substantially the same issues as raised before. The Minister confirmed Government's commitment to ensuring that all households have access to free-to-air television for purposes of the proposed digital migration process.
- 99 The Minister in fact said in her letters of 19 August 2021 and 27 August 2021 that she intended on an inclusive process that would be undertaken to ensure that the digital migration process is completed within five months. The Minister committed to establishing a project steering committee which was subsequently done. This committee would include private sector participants including e.tv to deal with, amongst others, the question of the ASO and to finalise the rollout plan. The Minister in fact invited e.tv to the committee and promised that the details of the first meeting would be shared with e.tv as soon as they were finalised. (This was in fact done and e.tv attended the meeting of 21 September 2021 and made presentations at that meeting.)⁶⁹
- 100 e.tv was invited to interact with the Minister and other private sector participants to ensure that all indigent households requiring STBs were reached and supplied with the required equipment to ensure that all households have access to free-to-air television broadcasting.⁷⁰

⁶⁸ Para 112.

⁶⁹ 009-38, para 118.

⁷⁰ Para 119, annexure AA9 010-770.

- 101 In respect of e.tv's letter of 19 September 2021, all of these were presented in the ASO plan of 21 September 2021.
- 102 The issues that were raised in e.tv's subsequent letters of 19 and 23 September are no different from the issues that it had previously discussed with the Minister and/or the Department. They are no different from the subject matter that was presented to the Steering Committee meeting of 21 September 2021.⁷¹
- 103 There was another meeting of the Steering Committee on 1 October 2021. e.tv attended that meeting. One of the decisions taken at that meeting was that SABC would rollout the ASO communications strategy. SABC had a reach of about 30 million listeners per week using radio platforms and 25 million viewers on television. The purpose was to sensitise consumers about the upcoming ASO and DTT migration, benefits and to drive the migration and registration of qualifying beneficiaries of STBs to register before the 31 October 2021 deadline and to communicate the migration options available to consumers who do not qualify for the subsidised STBs.⁷²
- 104 SABC would focus on three areas: public relations; advertising; and digital communications. This would commence in October 2021 and would continue until 31 December 2021. The campaign would start on 5 October 2021 with a media briefing and there would be other options for ministers to address together with CEOs of mini stakeholders to convey the message using the platforms. MultiChoice and eMedia would also participate in the communications working group. It was decided that the Minister would have a separate meeting with eMedia to discuss some issues highlighted and

⁷¹ 009-39, para 121, 126, 127, 128 and 129.

⁷² 009-47, para 155.

eMedia would form part of the technical team to present specific technical issues from the presentation on what is possible and what is not possible. It encouraged eMedia to send representatives to participate in various working groups to find common ground.⁷³

105 e.tv argues that it ought to have been consulted on two topics. First, the last call for registration of STBs and, second, on the announcement of the final ASO.

106 E.tv was part of the discussions that dealt with the position regarding the availability of STBs as recent as in the Steering Committee meetings of September and October 2021. Updates were given to e.tv about the question of availability of STBs. e.tv expressed its views on the subject matter. The Minister is not required to agree with e.tv on the question of availability of STBs. Suffice it, that based on the registration of qualifying households, the Minister and the Department will be in a position to supply those registered qualifying households with the necessary STBs. The registration of STBs for qualifying households has been open for the last six years with effect from 2015. There have been public imbizos and public awareness campaigns undertaken by the Department. e.tv was part of the meeting that discussed the upcoming ASO and DTT migration benefits and the drive for migration and registration of qualifying beneficiaries for STBs to register before the 31 October 2021 deadline.⁷⁴

107 By virtue of its participation and membership of the various fora, e.tv was aware of the ASO. e.tv was aware that there was going to be a phased-in process of ASO. The final ASO time period was also discussed at the various committee meetings. It is also part of the ASO plan that e.tv was fully aware of.

⁷³ 009-49, para 159; annexure AA12 010-30; AA13 010-37.

⁷⁴ 009-47, para 153; Minutes annexure AA12 010-30.

- 108 Again we emphasise the point that it is not necessary that there be agreement between e.tv's position and that of the Minister and/or Department. The Minister has not ignored any of e.tv's submissions and/or representations made insofar as the final call for registration by qualifying households for installation of STBs and intended and/or proposed ASO.
- 109 To ensure that the process of digital migration is fully completed, the Minister sought it prudent to make a final call. (We emphasise the point that this was not the first time that the Minister and/or the Department had called on qualifying households to register.) The Minister had given these households approximately up to 31 October 2021 to register. Even though this date will not be strictly enforced, it only means that those households that qualify but who register after 31 October 2021 will only be installed between the period of three to six months after the ASO.
- 110 We submit that the same considerations apply with respect to the proposed ASO. At some point the digital migration process must be concluded, the dual illumination period must come to an end and the analogue signal must be switched off. To set a target date for that is both at a level of process and in respect of the decision.
- 111 We submit that the steps taken are rationally related to the end sought to be achieved – conclusion of digital migration and conclusion of the ASO processes.⁷⁵

⁷⁵ NERSA v PG Group (Pty) Ltd and others 2020 (1) SA 450 (CC); Democratic Alliance v Minister of International Regulations and Cooperation and others 2017 (3) SA 212 (GP) para [64].

[E] THE INTERVENORS

112 The case of the intervenors is no different from e.tv. They only made the point that they are public or civil society organisations and should have been invited to SteerCom or TechCom meetings where the question of digital migration was addressed. What they omit to deal with, and this is addressed quite squarely in the Minister's answering affidavit, is that there have been broad public-based interactions around all the issues pertaining to digital migration, including the registration by qualifying households, installation of STBs and processes that ought to be followed. All these have been ongoing since 2015. Nothing has changed. If the MMA and the SOS wished to participate in those processes nothing prevented them from doing so. The fact that they were not invited to SteerCom and TechCom does not mean that the views of the public were not taken on board. They certainly cannot claim that they are the sole representatives of the views of the general public. We point out the extensive nature and the breadth of the various public awareness campaigns conducted by the Department and/or the Minister.

113 Neither *Scalabrini* nor *Earthlife Africa* help e.tv or the intervenors.⁷⁶ The SCA did say in *Scalabrini* that there are indeed circumstances in which rational decision-making calls for interested persons to be heard. *Scalabrini* references *Albutt (supra)*. In *Albutt* the specific interest by persons' groups was a specific and identifiable group of the victims of the offences (not like the current qualifying households, public and/or critical public interest organisations such as the intervenors).

⁷⁶ Minister of Home Affairs v Scalabrini Centre 2013 (5) SA 421 (SCA) at [67] ff; Earthlife Africa v Minister of Energy 2017 (5) SA 226 (GP).

114 It cannot be argued in this case that without hearing MMA or SOS that the Minister and/or the Department has not benefitted from the views of “interested persons”. The public has expressed its views in the interactions held with the Minister over an extended period of time. The Minister has taken those views on board. *Albutt* was quite clear that the decision to undertaken the special dispensation process without affording the victims an opportunity to be heard, must be rationally related to the achievement of the objectives of the process.

115 Unlike *Albutt* and *Scalabrini*, in this case the omission of the intervenors rationally related to the objectives of the process:

115.1 members of the public are quite diverse;

115.2 they spread throughout the country;

115.3 extensive and expansive public consultative processes were undertaken; and

115.4 there were processes open for members of the public to make representations;

116 The question to be answered is not whether the intervenors have been excluded and should have been canvassed, but rather whether Government benefitted by its interactions with members of the public and obtained the views of members of the public which the intervenors are now complaining have been excluded.

117 We submit that the intervenors do not bring anything new that the Minister/Department would not have obtained from their extensive and expansive interactions.

118 The intervenors have not made a case for the remedy they seek.

Government's commitment on qualifying households has not changed

119 Government's commitment on STBs has not changed. E.tv grounds a further cause of action upon what it says is Government's alleged change in its stance insofar as STBs are concerned. They say this departure was not consulted on with interested parties. It cites itself, the MMA and SOS and/or the public.

120 There was a "*fundamental change to the approach of the Government to a critical feature of the digital migration process*".⁷⁷

121 Government has not departed from its policy.

122 To illustrate this point it is important to take it from the first iteration of the Policy. The following paragraphs from the 2008 Policy are illustrative of Government's policy:

"1.1.9 In order to continue viewing television using the current analogue TV sets, the public will be required to use Set-Top Boxes (STBs) which convert the transmitted digital signal to analogue. Otherwise, it will be necessary to acquire digital-enabled TV sets."⁷⁸

...

2.1.3 Universal Service and Access or the availability and accessibility of broadcasting services to all citizens is a key component of successful digital migration. In order for households to continue to receive television services on their current analogue TV sets after the analogue signal is switched off on 1 November 2011, Set-Top Boxes (STBs) which convert the digital signal into analogue signals are required. The total TV owning households in SA are estimated at 7.5 million, of which approximately 94% rely exclusively on free-to-air broadcasting services. Of these, 7.5 million TV households, about 4.5 million are poor households who would find it very difficult to afford STBs by November 2011."

⁷⁷ HOA, para 87.4.8.

⁷⁸ Policy p 001-267

123 Importantly, Government said the following:

“2.1.4 Government has decided, as a matter of policy, to consider finding means of making the STBs affordable and available to the poorest TV-owning households. This support by Government should be seen as part of its commitment to bridging the digital divide in South Africa. Accordingly, for South Africa, the STBs will have special features which enable access to e-Government services for all services, especially those who thus far have had limited or no access. Digital broadcasting also enables the provision of services in a multiplicity of languages, thus increasing access to information which in line with Government’s information society vision, is an important tool for societal and economic development. This is essential to meet our poverty reduction goals.”

124 The following was said the in the amendment to the Policy in February 2012. It amended paragraph 2.1.3 by stating the following in amended paragraph 2.1.4 of the original policy as follows:

“Government has decided, as a matter of policy, to consider finding means of making the STBs affordable and available to the poorest TV-owning households. This support by Government should be seen as part of its commitment to bridging the digital divide in South Africa. Government has therefore decided, as mandated by s 88(1)(a) of the Electronic Communications Act (ECA) to subsidise poor TV households through the Universal Services and Access Fund (USAF). In supporting the South African bid to host the Square Kilometre Array (SKA), Government will also subsidise affected communities using satellite technology. The Government will also consider extending the incentive scheme to households that can only experience free-to-air digital services via the DTH platform, to ensure close to 100% coverage, which include the following signal distribution realities ...”⁷⁹

125 The new feature introduced by this February 2012 amendment was that the *“Government has therefore decided, as mandated by s 88(1)(a) ..., to subsidise poor TV households through ...”*.

⁷⁹ Annexure PR24 to the Founding Affidavit: p 001-267, para 2.1.4, emphasis added.

126 Government has not changed its policy stance as alleged by e.tv.⁸⁰ The Minister says in her media statement of 5 October 2021 that:

“the Government undertook to assist beneficiary households (households earning total salary of less than R3 500 per month) with installation of Set-Top Boxes to ensure universal migration.”

127 Government does say that *“Government has not and will not be leaving any South Africans behind”*. This was in response to an allegation made by e.tv in paragraph 4 of its founding affidavit. The preconditions were focused on trying to ensure that millions of analogue South Africans were not left behind on the date of switchover to digital.⁸¹

128 This statement that Government has not and will not be leaving any South Africans behind is not inconsistent with Government’s commitment as reflected in the Policy, namely that:

“Government has decided, as a matter of policy, to consider finding the means to make STBs affordable and available to the poorest TV owing households.

...

“It has therefore decided ... to subsidise poor TV households ...”

129 Government is not, and has not, departed from this position.

130 In a statement the Minister made it clear that in respect of those households that qualify for support, they should register on or before 31 October 2021.

131 The Minister affirmed Government’s undertaking to assist beneficiary households with installation of STBs to ensure universal migration. Thus, e.tv’s case based on a breach of

⁸⁰ 021-90, para 87.8.

⁸¹ Para 4.

the so-called KZN principle and/or a requirement that there should be consultation ostensibly because of some alleged departure from policy is simply without merit. It is not borne out by the facts.

The Minister is not acting under the dictates of the President

132 The Minister is not acting as e.tv seems to suggest, subject to the dictates of the President. The President is the head of the executive under the Constitution. He makes these announcements in his State of the Nation address. It does not however mean that when the Minister, exercising his/her own executive powers pertaining to digital migration, in particular the announcement of the final ASO, is acting subject to the dictates of the President. That is no legal or factual basis for such an assertion.

133 Nor is it true as e.tv submits that the date of 31 March 2022 was made without reference to the parties currently using the relevant spectrum, nor without engaging them.⁸² We have demonstrated quite extensively that the department and the Minister have in fact engaged extensively with e.tv and SABC.

134 We submit in conclusion on this point that the complaint based on a failure to consult is simply without merit for all the reasons discussed above.

[F] THE SO-CALLED MINIMUM REQUIREMENTS ARE IN PLACE

135 e.tv complains that Government has failed to take meaningful steps to ensure that the “*various preconditions to ensure that the analogue transmitters can be switched off without causing significant damage to the public and to the broadcasters who serve it*”.

⁸² HOA, 021-107 para 129.

136 These “preconditions” include the following:

136.1 sufficient STBs;

136.2 sufficient resources to install the STBs; and

136.3 whether there is sufficient planning to ensure that indigent South Africans are identified to ensure that they are provided with the means of timeously accessing digital broadcasts in a free-to-air manner that is reasonable and ensuring that adequate support structures are put in place, such that the public is properly informed of the steps which need to be taken and that such steps can meaningfully be taken in time before the switch-off.⁸³ These were echoed at the meeting held between the Department and e.tv in February 2021.⁸⁴

137 This complaint however is not borne out by the facts as we seek to demonstrate hereinbelow.

138 The case has somewhat narrowed in the replying affidavit and in e.tv’s heads of argument. The case now appears to be focussing on what is called the reasonableness enquiry and this we understand e.tv to be suggesting that the Minister’s conduct is unreasonable if assessed under s7(2) of the Constitution. That provision provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights. e.tv’s case now appears to be that the Minister has failed to respect, protect, promote and fulfil the rights in the Bill of Rights.

139 First we deal with what the original case was as articulated in the founding affidavit.

⁸³ FA, 001-11 para 4.

⁸⁴ AA, 009-31 paras 101, 103, 104 and 105 001-65 paras 160 (practical steps required).

There are sufficient STBs

140 Statistics SA stated in 2018 that there were approximately 14 million households in the country that own TV sets.⁸⁵ On this data the Department estimated that there may be at least 3.75 million households that may be eligible for government assistance in the digital migration programme. Not all indigent households will register for Government assistance. Some have elected to self-migrate.

141 In 2015 the process of registering qualifying households for STBs commenced at SAPO branches across the country. The process of registering has therefore been opened for approximately six years. At no stage did this process of registering qualifying households stop. And, therefore, this court in determining whether or not the time afforded for registration is adequate, should bear in mind that the process has been ongoing. Public awareness processes and programmes have also been ongoing as we seek to demonstrate elsewhere in these heads.⁸⁶ As can be seen, the previous Ministers engaged in public awareness programmes to advertise and publicise the digital migration programme but also to inform members of the public about how those qualifying households could register for Government assistance. The reach of these Izimbizo campaigns was national.⁸⁷ As can be seen, these were started in 2015. They continued throughout. These were hard physical meetings with members of the public. SAPO also conducted awareness campaigns.⁸⁸ The provincial and local government were also

⁸⁵ AA 009-78 para 253.

⁸⁶ See in this regard Government's *Izimbizo* campaigns at AA 009-99, paras 327ff.

⁸⁷ AA, para 328.

⁸⁸ AA, para 334.

engaged.⁸⁹ What this clearly demonstrates is that Government has indeed embarked on a process of identifying households that are eligible for assistance.

142 Although Government imposed a cut-off date of October 2021 for qualifying households to register, this process of registration continues beyond 31 October 2021. This means that qualifying households can continue to register beyond 31 October 2021 and they will be connected within three to six months of the ASO.⁹⁰

143 Ideally, Government would like to connect all the qualifying households and for them to register before the cut-off date but this is simply not practicable. There will be households that will not register within the time provided but provision is made for them, even if they register beyond 31 October 2021.

144 Households cannot be forced to register. It is an important point we emphasise that this has been ongoing since 2015. When Government made the final call roughly around the first week of October 2021, it was not for the first time that Government was calling on qualifying households to do so. As will be shown, Government has been embarking on ongoing public awareness programmes to make sure that members of the public are aware of the digital migration programme but, more importantly also, they are aware that qualifying households can register for Government assistance.

145 31 October 2021 there were 1.2 million qualifying households that had registered for STBs during the digital migration process. Of those, 556,954 STBs had already been

⁸⁹ AA, para 336 ff.

⁹⁰ FA, para 253 – 257.

installed in qualifying registered households. It means that approximately 671,925 additional households will be provided with STBs by 31 March 2022.

146 There are approximately 800,000 STBs at SAPO warehouses and this means that the number of available STBs will be able to cover the outstanding 671,925 households.⁹¹

147 Whilst, theoretically speaking, there about 2.5 million households that qualify that remain unregistered does not mean that they will fall off and not migrate. We have already stated that there are households that have elected to self-migrate.

148 Of the estimated 14 million TV owning households, approximately 7.8 million households have self-migrated through DSTV subscriptions, 2.3 million through Open View installation and 450,000 through StarSat. This equates to approximately 75% of the TV-viewing households. Amongst these numbers there are those who would have been eligible for registration for Government assistance.⁹²

149 Important and linked to the above are that subscription service providers and broadcasters have produced increasingly affordable packages, for instance DSTV has introduced an Easy View package costing R29 per month which provides a variety of channels including *inter alia* e.tv, SABC and community TV stations. The remainder of the qualifying households who register after 31 October 2021 will be catered for through a broadcaster retailer distribution model to be funded through the existing USAF funds within three to six months after 31 March 2022.

⁹¹ AA, 009-80 at para 259 - 262.

⁹² AA, 009-82 para 273

150 The following broadcasters and platform operators, including Sentech, had initially confirmed their installation as follows as shown in the Management Integrated Model, the Cabinet approved ASO plan:

150.1 OVHD Open View HD 400,000;

150.2 StarSat 100,000; and

150.3 Telkom 1.1 million.

151 To cater for installations that are required based on registration after 31 October 2021 qualifying households will be allocated to broadcasters and platform operators based on confirmed capacity. Where STB installation from one entity lags behind, households will be reallocated to another installer.

152 Sentech already has an established network of operation centres with dedicated capacity across all provinces to effect switch-off activities as and when required.⁹³

153 In addition to the availability of STBs, there are new DTT compliant TV sets that are available on the market. There are people who will self-migrate and in fact as and when people buy television sets (the newer ones), the number of STBs that will be bought also reduces because a DTT compliant TV does not require that one also has an STB. In other words, this must factor in the 2.5 million qualifying households that have not registered but they will likely have self-migrated by purchasing new DTT compliant TVs that do not require STBs.⁹⁴

⁹³ *Ibid*, para 274 – 277.

⁹⁴ *Ibid* at 280.

154 All of this means that the numbers provided by e.tv are exaggerated. They do not take into account people buying TVs that are DTT compliant. The installation capacity will be ramped up to meet increased demand should it arise.

There is sufficient installation capacity

155 In terms of installation capacity, the following are important factors. In a bid to improve delivery of STBs in December 2019, Cabinet approved a revised household migration delivery model. Government also approved a 100% Government subsidy for eligible indigent households in the digital migration process. The revised model include the involvement of the private sector and industry to complete the STB procurement and installation process and ultimately to complete the digital migration process. It is aimed at assisting Government with additional capacity to provide STBs to beneficiary households as registration numbers were expected to rise and also to give consumer choice to the qualifying households in the form of the type of STBs that they would have installed in their homes.⁹⁵

156 In 2020 Sentech was appointed to manage installation services which comprised the appointment and management of installers. We have also pointed out to the installers who have capacity to install approximately 1.6 million STBs.⁹⁶

157 Installation is ongoing. The number of installers is sufficient to cope with the installations on account of the registration that came through by 31 October 2021. Two tenders for installation were issued due to be finalised in December 2021.

⁹⁵ *Ibid* at 268 and 269.

⁹⁶ *Ibid*, para 275.

158 There were approximately 7,000 to 8,000 installers who were expected to be engaged. There is sufficient capacity to install the STBs.⁹⁷

159 There is also no merit to the assertion that the procured STBs have become obsolescent.

159.1 The STBs remain fully usable and will continue to be fully usable for the foreseeable future.

159.2 The International Digital Transmission Technology Standard is internationally mandated and will stay with us into the future. There is no immediate technology lifecycle prospects to discontinue the technology.

Availability of Chip sets

160 It is important to make the point that Telkom, Sentech, StarSat and MultiChoice who are members of the BDM Steering Committee have committed to making capacity available should the number of registrations after 1 November 2021 outstrip the number of available STBs in Government's hands.

161 The broadcasters source the STBs from local manufacturers.

162 One of the manufacturers has committed to increasing capacity and has that capacity available to scale up production to about 350,000 STBs per month.⁹⁸

⁹⁷ *Ibid*, para 281.

⁹⁸ *Ibid*, para 284.

163 One of the producers is able to produce 2 million chip sets to execute the project.⁹⁹ These producers also are in a position to provide a network of installers to make the process smooth.¹⁰⁰

Adequately resourced call centres

164 Sentech has been operating a call centre service which provides support for general consumer queries, coordination with installers, signal testing and conditional access activation for satellite direct to home STBs. These centres also provide call centre support services such as technical support related to warranty of STBs and registration process that is required. Currently the Sentech call centre handles all queries pertaining to STBs that are installed by Sentech.

165 This call centre has been operating since 2018. It uses English as the main official language. It is also equipped with multilingual staff who are conversant in Nguni and Sotho languages.

166 There is also text-based support in the form of WhatsApp, email and other social media applications. The new call centre plan envisages support for all languages.¹⁰¹

167 Broadcasters also manage their own contact centres in respect of the devices issued and/or installed by them.

168 SABC will in due course undertake various activities, including monitoring and reporting on the after-market trends and process; running an information centre to respond to

⁹⁹ *Ibid*, para 286.

¹⁰⁰ See in this regard AA19 010-854 and AA20 010-136.

¹⁰¹ AA, 009-89, para 291; annexure AA21 010-137.

household data verification service support and enquiries on service; providing toll free numbers; providing first level support; providing inbound call centre infrastructure and routine services and many other services.¹⁰²

169 What is clear is that the complaint by e.tv that there is not a call centre in place is without any basis. The evidence demonstrates that these call centres conducted by Sentech and, in due course, by the SABC are fully functional and they will expand their services to cover any concerns from households.¹⁰³

Sentech has resources to re-tune the relevant transmitters¹⁰⁴

170 The challenge is misplaced because the frequency migration, also called re-stacking process or re-tuning of the relevant transmitters, is an overlapping activity that is not linked or dependent on the conclusion of the ASO.¹⁰⁵

171 Notable also is the fact that Sentech has sufficient resources to re-tune transmitters and conclude the frequency migration process within a period of 12 months.¹⁰⁶

172 Sentech has a network of operation centres with dedicated capacity across all provinces to effect switch-off activities as and when required to do so.

173 Transmitter re-tuning, re-stacking, frequency migration, digital to digital (“**D2D migration**”). All of these terms mean essentially the same thing. How re-tuning

¹⁰² *Ibid*, pp009-91 para 299; annexure AA23 010-165

¹⁰³ *Ibid*, paras 301 – 305.

¹⁰⁴ AA, pp009-94, paras 306 – 314.

¹⁰⁵ AA pp009-94, paras 306 and 307.

¹⁰⁶ *Ibid*, para 309.

is done would best be illustrated by means of example of an old radio receiver. In that case re-tuning would operate similar to moving the dial on one's radio to select the particular radio station. The number at which the needle or knob settles and at which the station is clearly audible represents the frequency in which the user has "tuned" to.

174 The frequency that has been tuned to in turn represents the frequency in which the transmitter at Sentech has been tuned to spread out the signal for user reception. The frequency must correspond between the transmitter and the user receiving equipment in order to intelligibly receive the signal and television works in very much the same way.¹⁰⁷

175 South Africa is in a transitional mix of digital and analogue frequency transmissions. Once the entire analogue transmission has been switched off, South Africa will only be left with digital signals. That is not the end. The final part of the BDM conclusion will be realised when the final colours are neatly re-stacked. This means all the digital broadcast frequencies above 694 MHz have been re-tuned to below 694 MHz (the so-called final DTT band between 470 – 694 MHz). This final destination of DTT band is coordinated at ITU level and that is the ultimate destination of digital migration.

176 There are a total of 183 transmitter sites across all nine provinces in which the re-tuning will occur where 143 of the transitional DTT frequencies currently located between 694 - 862 MHz need to be re-tuned between 470 - 694 MHz assuming all current analogue frequencies for SABC and e.tv have been switched off.¹⁰⁸

¹⁰⁷ *Ibid*, para 310.

¹⁰⁸ *Ibid*, para 311 – 313.

177 Sentech has confirmed it has sufficient resources to re-tune or re-stack within a period of 12 months for all nine provinces. Sentech is currently working with e.tv and SABC to agree on the practicalities of the technical approach to conclude the re-stacking in the shortest possible time. This does not affect ASO. e.tv is part of the discussion pertaining to the re-stacking.¹⁰⁹

Public awareness campaigns

178 Elsewhere in this document under the heading dealing with consultations we have discussed the various campaigns undertaken by Government to make members of the public aware of digital migration as well as for qualifying households to register for STBs. The registration process as we have stated started in 2015. They have been ongoing. The cut-off date was 31 October 2021 but that cut-off date is actually ineffective because registration continues to take place as indicated.

179 We do not repeat what we have already stated except to emphasise possibly the following insofar as messaging is concerned:

179.1 Roadshows have been undertaken.¹¹⁰

179.2 SMS messaging has also occurred.¹¹¹

179.3 Government has also embarked upon using various social media to raise awareness of the BDM process and looming ASO.¹¹²

¹⁰⁹ *Ibid*, para 314.

¹¹⁰ Para 360.

¹¹¹ Para 361.

¹¹² Para 363.

179.4 TV and radio messaging has also been undertaken.

179.5 SABC plays a very important role in this regard.¹¹³

179.6 Government has also embarked upon awareness campaigns.¹¹⁴

180 For all the reasons discussed above that e.tv has failed to make out a case for the relief contained in paragraph 5 of its notice of motion.¹¹⁵ e.tv has simply not answered the case presented by the Minister insofar as paragraph 5 of the notice of motion is concerned (the so-called preconditions / minimum requirements).

181 It is quite clear from the foregoing that a sufficient number of STBs are available; there is sufficient capacity to install these STBs; Sentech has sufficient resources to re-tune the relevant transmitters; there is sufficient and adequate resources available to assist with steps to be taken to conclude digital migration and Government has embarked on a viewer information campaign. All of these cannot be gainsaid by e.tv. Instead e.tv has now in its heads of argument and replying affidavit not dealt with these minimum requirements and preconditions. They simply cannot because what Government has done cannot be gainsaid.

182 The same goes for the intervenors. The intervenors are content with making assertions without providing the necessary evidence.¹¹⁶

¹¹³ Para 348 and 349; annexure AA30; see also annexure AA31.

¹¹⁴ Para 315; annexures AA24 010-167; AA25 p010-172; AA26 010-230; AA27 010-243; AA28 010-478; and AA29 010-489.

¹¹⁵ AA, 009-156 paras 648.4; 648.5.

¹¹⁶ Intervention FA, 005-42 para 89.

183 It is quite clear from the foregoing that Government has engaged in public awareness programme to educate members of the public around the ASO as well as to make them aware that those that qualify were entitled to do so since 2015. Those that fail to register by 31 October 2021 will as we have stated above continue to enjoy the opportunity to register but they will only be serviced after the ASO.

Paragraph 5 of the notice of motion is flawed

184 In any event, what e.tv seeks in paragraph 5 of the notice of motion including an order ordering the Minister to ensure that members of the public who are currently reliant on analogue broadcasting services (including but not limited to 54% of e.tv's viewers as measured over the period September 2020 to August 2021 are provided with access to STBs and/or reception devices to enable them to continue to be in a position to access free-to-air broadcasts without subscription or charge following digital migration. This is over-broad because it is not clear if it includes qualifying households or all South Africans who are reliant on analogue broadcasting systems even if they can afford to self-migrate. Government has not made any commitments whatsoever to people who are in a position to afford STBs and/or reception devices to enable them to continue with accessing free-to-air broadcasts. Therefore prayer 5.1 is simply not consistent with Government's commitment to qualifying households. This order must fall.

185 It is not clear how one is to measure "adequately resourced call centres". In any event, Government has demonstrated that that there are presently fully resourced call centres that can deal with the BDM migration process and adequately deal with queries sufficiently and effectively. e.tv has not sought to contradict the Minister's case in this regard.

186 e.tv in paragraph 5.3 of the notice of motion also seeks an order directing that an effective information campaign be conducted. Again, there is no objective measurement proposed on how this is to be done. Government has demonstrated that it has been undertaking awareness campaigns for at least six years and there is no basis upon which it can be argued that these campaigns have not been effective.

187 Insofar as paragraph 5.4 is concerned, similarly Sentech had demonstrated that it has sufficient resources to action the analogue switch-off of transmitters.

188 It is not necessary that Sentech be ordered to present to court (without any basis for doing so) to demonstrate that it has sufficient resources. It is enough that these are in place.

[G] THE MINISTER HAS NOT BREACHED ANY OF HER CONSTITUTIONAL OBLIGATIONS

189 e.tv appears to suggest that the Minister's obligations under the Constitution read with the Policy extend to non-qualifying households. That seems to be the theme that e.tv stretches throughout its replying affidavit and heads of argument.¹¹⁷ e.tv will be disingenuous in suggesting that this obligation to ensure that South Africans who rely on an analogue signal are able to access digital signal once the ASO occur is open-ended.

190 This could not be further from the truth. Government's commitment is reflected in the Policy itself. In paragraph 2.1.3 of the Policy, Government stated that universal service and access or the availability and accessibility of broadcasting services to all citizens is a key component of successful digital migration. Government emphasised the fact that

¹¹⁷ See in this regard RA, 020-8, paras 18 and 19. HOA, e.tv para 62 021-74.

for households who continue to receive analogue signal they would require an STB which converts the digital signals into analogue signals. In this regard, Government stated at paragraph 2.1.4 that it has decided as a matter of policy to consider finding means of making STBs affordable and available to the poorest TV owning households. This support by Government should be seen as part of its commitment to bridging the digital divide in South Africa.¹¹⁸ This is repeated in the 7 February 2012 amendment. It is also repeated in the 18 March 2014 amendment. Therefore there is no inconsistency whatsoever. Government's assistance is geared at assisting by making the STB's affordable and available to the poorest TV owning households. These are the qualifying households where the registration process was focussed and has been ongoing since 2015. This aspect is dealt with in the Minister's media statement of 5 October 2021. Paragraph 2.1 states that Government undertook to assist beneficiary households (households earning a total salary of less than R3500 per month) with installation of STBs the plaintiff ensure universal migration.

191 At paragraph 4.5.1 Government said that given the low numbers of registered beneficiary households, Cabinet approved a last call for registration with a cut-off date of 31 October 2021.

192 Government's assistance therefore is confined to registered beneficiary households. Those that qualified can continue to register to be assisted with being connected to digital broadcasting services.

193 Although in the founding affidavit e.tv pleaded the following rights:

¹¹⁸ Annexure PR24, p001-267, paras 2.1.3 and 2.1.4.

- 193.1 freedom of expression and equality;
 - 193.2 right to property;
 - 193.3 right to choose ones trade and occupation;
 - 193.4 the Minister’s position under s7(2) of the Constitution;
 - 193.5 irrationality and unreasonableness of the process of the open and accountable Government in terms of s195 of the Constitution; and
 - 193.6 the public promise (the so-called KZN principle). We have already dealt with this and do not address it in this section.
- 194 The case appears to have now distilled to “*the Minister’s failure to give effect to section 7(2) of the Constitution*”. This is referred to as “*the crux of this case*”.¹¹⁹
- 195 e.tv alleges that Government’s choice of 31 March 2022 as the goal date for ASO violates various constitutional rights. It does so because it will have the effect of:
- 195.1 cutting-off a portion of the television-viewing public still reliant on analogue transmission, and who will not have had STBs installed, from receiving e.tv’s broadcasts; and
 - 195.2 depriving e.tv of a large portion of its audience, which will cost it “*billions of Rands*”.¹²⁰

¹¹⁹ RA, 020-7 para 13.

¹²⁰ e.tv FA, pp 001-72 to 73, paras 172-8.

196 In its founding affidavit e.tv alleges that, if the Minister's determines ASO on 31 March 2022, her decision will violate:

196.1 the right to freedom of expression (s16 of the Constitution);¹²¹

196.2 the right to equality (s9 of the Constitution);¹²²

196.3 the right to property (s25 of the Constitution);¹²³ and

196.4 the right to choose one's trade and occupation (s22 of the Constitution).¹²⁴

197 In its replying affidavit, e.tv seeks to make out a new case, presumably in recognition of the weakness of the case set out in the founding papers. In reply e.tv does not address the above rights, but states instead that the "*crux*" of its case is the violation of the Minister's positive obligation to respect, protect, promote and fulfil the Bill of Rights in terms of s7(2) of the Constitution.¹²⁵ The particular right e.tv invokes under this heading, which is not mentioned in the founding papers, is the right to social security and assistance, protected under s27(1)(c) of the Constitution.¹²⁶

198 e.tv appears to contend that s7(2), along with s27(1)(c), places upon the Minister a positive obligation to ensure that households that currently rely on analogue broadcasting will be provided with the means to receive digital transmissions before ASO.¹²⁷ In other words, it obliges Government to provide these households with STBs before ASO.

¹²¹ e.tv FA, pp 001-74 to 76, paras 179-83.

¹²² e.tv FA, pp 001-74 to 76, paras 179-83.

¹²³ e.tv FA, p 001-76, para 184.

¹²⁴ e.tv FA, p 001-76, para 184.

¹²⁵ e.tv RA, pp 020-7 to 8, paras 13-6.

¹²⁶ e.tv RA, pp 020-19 to 20, para 28.

¹²⁷ e.tv RA, pp 020-9 to 10, paras 18 and 19.

Flowing from this, e.tv states that the “*critical question present for the Court is whether the Minister’s actions are reasonable*”.¹²⁸ It then proceeds to categorise the ways in which it considers the Minister’s conduct to be unreasonable.¹²⁹

199 The Minister submits that e.tv’s contentions are flawed for a number of independent reasons:

199.1 The Minister has not violated e.tv or anyone’s constitutional rights.

199.2 The Minister has not failed to fulfil her positive obligations to respect, promote and fulfil the right to social security.

199.3 The Minister’s actions are not, in any event, unreasonable.

200 We address each of these submissions below.

The Minister has not violated anyone’s constitutional rights

201 In terms of the Minister’s plan for digital migration:

201.1 all qualifying households (earning less than R3,500/month) will receive a STB to enable them to receive digital transmissions;

201.2 households which registered before the 31 October 2021 cut-off will have STBs installed before ASO; and

201.3 households which register after this date will have STBs installed within three to six months of ASO.

¹²⁸ e.tv RA, pp 020-11 to 12, para 20.

¹²⁹ e.tv RA, pp 020-11 to 12, para 20 *et seq.*

202 e.tv’s rights-violation argument is premised on the fact that the latter group will not be able to receive digital transmission for a period of up to six months. The Minister’s answering affidavit has demonstrated that this is factually incorrect.

203 This cannot, we submit, tenably amount to a violation of the rights cited by e.tv. We address them each in turn:

203.1 The Minister’s conduct does not violate the right to the freedom of expression under s16 of the Constitution.¹³⁰ While the freedom of expression does include the “*freedom to receive or impart information or ideas*”, it does not entitle television viewers to access particular television content (i.e. e.tv’s channel) free of charge.¹³¹ If this vividly unreasonable proposition were true, the right could be invoked to demand access to any subscription television service. It would also render unconstitutional the requirement that people must pay for licences to watch television (which they are required to do).

203.2 The Minister’s digital migration plan does not bar anyone from receiving or imparting information. It merely requires television broadcasts to be transmitted and received through a different medium. The Minister has already made the BDM Policy. According to the ASO plan of September 2021, (annexure PR10 001-169) the Minister intends to terminate analogue

¹³⁰ “(1) Everyone has the right to freedom of expression, which includes –

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research;

(2) The right in subsection (1) does not extend to –

- (a) propaganda for war;
- (b) incitement of imminent violence; or
- (c) advocacy of hate that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm.”

¹³¹ Vodacom AA, p 006-36, para 72.3.

television services at 282 sites across the country by 31 January 2022 and connect television households to digital platforms.¹³² This plan is underpinned by a number of principles.¹³³ It is intended that the ASO would occur progressively in phases and it is intended to be concluded by end of January 2022. By the time the Minister filed her answering affidavit, the Free State Province had been completely switched off and the North West and Northern Cape Provinces were to follow.

203.3 The implementation of the ASO plan will not affect the s16(1) rights enshrined in the Constitution. Everyone remains entitled to the right of freedom of speech and the rights set out in s16(1) of the Constitution. The implementation of the ASO do not limit the s16(1) rights of everyone. All this plan requires is that South Africans must either have an STB and/or DTT enabled television sets. Those households that qualify for Government's assistance would have had to register for this. They have had a period of six years to do so. They were finally reminded by the Minister in her final call as reflected in her media statement of 5 October 2021.¹³⁴

203.4 e.tv somewhat tentatively engages also the so-called "political rights". It references the right to participate in elections.¹³⁵ It also pleads these as "related rights to dignity and political rights".

¹³² 001-173.

¹³³ 001-174 and 001-175.

¹³⁴ Minister's statement, annexure PR17, 001-214, esp. pars 4.5 001-217

¹³⁵ FA 001-16 para 13.

- 203.5 Nowhere in the pleadings does e.tv deal with the right to dignity nor does it demonstrate how the announcement of the final switch-off date affects political rights.
- 203.6 e.tv does not develop this assertion which is made without evidence on how the Minister's announcement of the ASO will affect the constitutional right to participate in elections. All the Minister will be doing is to announce the final date for the migration from analogue to digital. This, South Africans, have known at least since the inauguration of the BDM Policy in 2008. At no stage did South Africans attempt to reverse the Policy or challenge the final implementation of the digital migration.
- 203.7 The Minister's conduct does not violate the right to equality under s9 of the Constitution. e.tv appear to want to draw a differentiation between wealthier members of society and those that do not have. It says that wealthier members of society will be able to switch to digital services after the ASO. The majority of the population will simply be left without access to free-to-air television.
- 203.8 e.tv forgets that the less fortunate have had an opportunity and continue to have the opportunity to register for assistance. e.tv then leaps to the conclusion that if the Minister implements the ASO then that would be unlawful and in violation of s9 of the Constitution.
- 203.9 e.tv's contention has no merit, first because it must first establish whether the provision that allows the Minister to switch-off differentiates between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate Government purpose? If it does, then there is a violation of the equality provision. The second stage of the enquiry is, does

the differentiation amount to unfair discrimination? This requires a two-stage analysis and that is:

203.9.1 Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

203.9.2 If the differentiation amounts to “discrimination” does it amount to “unfair discrimination”? If it has found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focusses primarily on the impact of the discrimination on the complainant and others in his or her situation.

203.10 If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of the equality provision in the Constitution.

203.11 If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitation clause.¹³⁶

¹³⁶ Harksen v Lane NO and others 1998 (1) SA 300 (CC) at [54].

- 203.12 e.tv's contention does not even clear first base, that is there is no provision that draws a differentiation between people or categories of people. The Minister's ability to announce a switch-off draws no distinction between "*wealthier members of society*" and those that are less fortunate. It makes no discrimination or differentiation at all.
- 203.13 The discrimination case has simply not been established.
- 203.14 e.tv contends the right to equality is violated because ASO will "*have the effect of depriving a significant segment of the South African population of their ability to receive free television broadcasting*".¹³⁷ But the "ability to receive free television broadcasting" is obviously not something specifically protected by the right to equality. And e.tv does not allege that the Minister's plan will unfairly discriminate against anyone, on listed or analogous grounds. e.tv thus offers no support for its contention that the right to equality is violated.
- 203.15 e.tv appears to suggest (by merely asserting) that Government discriminates on the basis of those that have and those that do not have. This is simply not the case. Government's policy is without doubt in favour of those that do not have which is why Government has undertaken since the initiating of the BDM Policy to assist qualifying households. The fact that Government has made a call for final registration (which process continues) cannot constitute unfair discrimination.

¹³⁷ e.tv FA, pp 001-74 to 75, para 182.1.

- 203.16 Qualifying households continue to qualify and they can register at SAPO to be offered Government's assistance. There is therefore no basis to suggest that the final call means that Government discriminates poor people.
- 203.17 The Minister's conduct does not violate the right to property under s25 of the Constitution. e.tv alleges that the "switching off of its transmitters", which are licensed to it, constitutes an arbitrary deprivation of property.¹³⁸ While a licence may in certain circumstances constitute property, a right to transmit in terms of that licence on a particular spectrum band cannot be the property of a licensee or any person. Spectrum is a scarce public resource. The BDM Policy explains that radio frequency spectrum "*is a national resource and that Government has a responsibility to use such a resource in the public interest prioritising it for developmental objectives*".¹³⁹ And even if the right to transmit on a particular band was e.tv's property, the deprivation of it would not be arbitrary, servicing as it does the national interest in increasing and improving IMT coverage.
- 203.18 e.tv has not made out a case for arbitrary and irrational process, deprivation of property. Government is not depriving e.tv of any property. e.tv can continue to conduct its business. e.tv has known for at least 12 years that digital migration would at some point have to be concluded. Qualifying households continue to qualify to register for assistance.

¹³⁸ FA, 001-76, para 184.

¹³⁹ Annexure PR24 to the FA, p 001-271, para 6.1.1.

203.19 The Minister’s conduct does not violate the right to choose one’s trade or profession under s22 of the Constitution. e.tv does not even attempt to explain its invocation of this right: it does not contend that anyone’s right to choose or practice a trade is precluded or limited. No violation of this right has thus been established.

203.20 e.tv continues to enjoy its right to choose a trade, occupation or profession freely. That right is delineated by what is stated in s22 of the Constitution:

“The practice of a trade, occupation or profession may be regulated by law.”

203.21 The Minister’s right to determine the ASO date does not seek to regulate e.tv’s right to broadcast. The conclusion of the digital migration process does not limit e.tv’s right to broadcast.

203.22 The announcement of the final ASO does not have a negative impact on e.tv’s right to broadcast.¹⁴⁰

204 But even if the Minister’s conduct did violate one or more of these rights, the violation would be at most indirect or peripheral and would be justifiable in light of the rights and interests legitimately furthered by Government’s policy decision to expedite digital migration (i.e. to free up the relevant spectrum for urgently needed IMT assignment).¹⁴¹ Furthermore, it would be justifiable under s36 of the Constitution. As Vodacom explains, any impact on the right to freedom of expression by proceeding with digital migration pales into insignificance when considered against the severe impact on communication

¹⁴⁰ South African Diamond Producers Organisation v the Minister of Minerals and Energy NO and others 2017 (6) SA 31 (CC) at [64] – [79].

¹⁴¹ Vodacom AA, p 006-9, para 11.

and the wider economy that would be caused by the further delay of licencing the digital dividend to IMT.¹⁴²

205 e.tv also founds its case upon “open and accountable government” and in this regard it says that the Minister has refused to play open cards with it or the public or with the court and that therefore amounts to a violation of the principle of openness and accountability.¹⁴³ There is demonstrable evidence that the Minister has in fact interacted with e.tv.¹⁴⁴

205.1 The Minister has replied to e.tv’s letter of 2 September 2021. That letter is important because it references the meetings of 19 August 2021 and the Minister’s letter of 27 August 2021. There the Minister made clear her intention on the inclusive process that she intended embarking upon to ensure that the digital migration process was completed within five months. The Minister committed to establishing a Project Steering Committee on broadcasting digital migration where the private sector will be invited, including e.tv, to deal with the detail of the ASO and finalisation of the rollout plan.

205.2 The Minister extended the invitation once more to e.tv to participate in the Steering Committee. The Minister also reiterated her request that e.tv partner with her and other private sector players to ensure that all indigent households requiring STBs are reached and supplied with the required equipment to

¹⁴² Vodacom AA, p 006-31, paras 59-60.

¹⁴³ FA, 001-79 para 193 ff.

¹⁴⁴ The history of the meeting goes back to the Department in February 2021.

ensure that they are able to access free television broadcasting.¹⁴⁵ The balance of the letters that e.tv addressed to the Minister are in fact repetitive of the demands that e.tv had been making and in fact that e.tv makes in this application. The substance of those letters was also dealt with at the Steering Committee meetings.¹⁴⁶ It is therefore not true to suggest that the Minister has violated democracy and responsive government as e.tv contends.

The Minister has not failed to fulfil her positive obligations to respect, promote and fulfil the right to social security

206 e.tv states in reply that its case is founded upon the Minister’s failure to “*respect, protect, promote and fulfil the rights in the Bill of Rights*” as required by s 7(2) of the Constitution. e.tv cites only one right which it alleges the Minister has not respected, protected, promoted and fulfilled: the right to social assistance in terms of s27(1)(c) of the Constitution. This section provides that:

“[e]veryone has the right to have access to ... social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.”¹⁴⁷

207 This case, we respectively submit, has nothing to do with the right to social security or social assistance. These rights are about ensuring that people have the basic necessities needed to survive and to live a dignified live. Like the other socio-economic rights in the

¹⁴⁵ Annexure AA9, 010-770.

¹⁴⁶ Minutes of meeting of 20 September 2021, annexure AA10 010-2; meeting of 1 October 2021 AA 12 010-30; meeting of 8 October 2021 AA13 010-43.

¹⁴⁷ Emphasis added.

Bill of Rights – housing,¹⁴⁸ healthcare, food and water¹⁴⁹ – the right to social security and assistance is about meeting basic, first-order needs.

208 In the leading case of *Khosa*, the Constitutional Court explained as follows:

*“The right of access to social security, including social assistance, for those unable to support themselves and their dependants is entrenched because as a society we value human beings and want to ensure that people are afforded their basic needs. A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational.”*¹⁵⁰

209 The Constitutional Court recently reaffirmed this in *Mahlangu*, where it held that “[t]he purpose of social security is to ensure that everyone, including the most vulnerable members of our society, enjoy access to basic necessities and can live a life of dignity”.¹⁵¹

“Social security” accordingly concerns ensuring “that all people have adequate economic and social protection during unemployment, ill health, maternity, child rearing, widowhood, disability and old age, by means of contributory and non-contributory schemes for providing for their basic needs”.¹⁵² And “social assistance” concerns benefits associated with “old age, disability, child and family care and relief for the poor”.¹⁵³

¹⁴⁸ Section 26 of the Constitution.

¹⁴⁹ Section 27(1)(a) and (b) of the Constitution.

¹⁵⁰ *Khosa and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC) at para 52, emphasis added.

¹⁵¹ *Mahlangu and Another v Minister of Labour and Others* 2021 (2) SA 54 (CC) at para 63, emphasis added.

¹⁵² Swart “Social Security” in Woolman *et al* (eds) *Constitutional Law of South Africa* 2nd ed at 59D-3.

¹⁵³ *Ibid.*

210 The right to social security and social assistance plainly does not include an entitlement to access television broadcasts. The Minister's actions, even if they result in certain members of the public no longer being able to view television broadcasts, could not conceivably violate the right to social security or assistance or her positive obligation to respect, protect, promote and fulfil the right. e.tv's contention in this regard should therefore be rejected.

The Minister's actions are, in any event, not unreasonable

211 e.tv further contends that the crucial question to be answered by the court "*is whether the Minister's actions are reasonable*".¹⁵⁴

212 Executive decision-making, such as the court is concerned with here, is not ordinarily subjected to reasonableness review. Reasonableness is instead the standard ordinarily employed where a constitutional right is limited or where a court reviews administrative action. As no right has been violated, and the Minister's decision is not administrative action, the Minister's conduct is not required to be reasonable.

213 However, even accepting e.tv's false premise that the Minister's conduct is subject to this standard of review, e.tv does not establish that the Minister's conduct was unreasonable.

¹⁵⁴ e.tv RA, p 020-11, para 20.

214 To start with, it is important to explain what “reasonableness” requires in the context of a review application. It does not require Government to make what is, in the court’s evaluation, the “best” or a “perfect” decision. It requires only that the decision fall within a range of reasonable measures available to Government. In the context of socio-economic rights, the Constitutional Court explained as much in *Grootboom*:

*“A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.”*¹⁵⁵

215 The Constitutional Court made a similar point Bato Star with respect to the requirement that administrative action should be “reasonable” where it held as follows:

*“[The] decision must strike a reasonable equilibrium between the different factors but the factors themselves are not determinative of any particular equilibrium. Which equilibrium is the best in the circumstances is left to the decision-maker. The court’s task is merely to determine whether the decision made is one which achieves a reasonable equilibrium in the circumstances.”*¹⁵⁶

216 Thus, in assessing the reasonableness of a Government decision, our courts will ordinarily show the decision-maker deference.¹⁵⁷ Where executive decision-making is reviewed, as is the case here, a court will be even more reluctant to intervene, because of its limited constitutional and institutional competence to adjudicate such matters.

¹⁵⁵ Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) at para 41, emphasis added.

¹⁵⁶ Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) at para 49.

¹⁵⁷ *Ibid* at para 48.

217 e.tv's allegations that the Minister's conduct is unreasonable appear in its papers, which are prolix and repetitive. It is thus not easy to summarise their import. We nevertheless attempt to do so, and to answer e.tv's concerns, under the headings that follow.

218 e.tv states that the Minister's conduct is unreasonable because some people will be left behind (i.e. they will not have migrated or been provided STBs before ASO).¹⁵⁸

218.1 The Minister's plan does not envisage leaving anyone "*behind*". Government's policy is still, as it has always been, to assist all qualifying households with procuring a STB to enable them to receive a digital transmission.

218.2 It is an inevitable consequence of digital migration that some persons will be left without means to access television broadcasts for at least a short period of time. Were Government to wait until it could confirm, as a matter of certainty, that every single qualifying household had received a STB, digital migration would be perpetually delayed. This is because, as Vodacom explains, certain households will, as a matter of human experience, only register to receive a STB once analogue broadcasts are ceased. Some qualifying households may even elect not to get a STBs. And it would in any event be very difficult to determine with certainty whether *every* qualifying household had been provided with a STB.

218.3 None of this entail the Minister "*leaving people behind*". Government's intention is still to ensure that they are provided with STBs within six months of ASO.

¹⁵⁸ e.tv RA, p 020-10, paras 20.1 and 20.4

219 *e.tv contends further that the Minister's conduct is unreasonable because qualifying households were given only three weeks before closing deadline to register in circumstances and where the public campaign for registration was only started after 5 October 2021.*¹⁵⁹

219.1 This submissions are founded on false premises. Registration for qualifying households has been open since 2015.¹⁶⁰ Awareness campaigns around digital migration commenced in 2009,¹⁶¹ and extensive campaigns geared to registering qualifying households have been ongoing since 2015. These campaigns have involved numerous Government officials and Departments.¹⁶² The Minister's answering affidavit provides great detail in this regard.

219.2 The 31 October 2021 deadline was not unreasonable. It provided a full three weeks to unregistered households, in circumstances where registration has been open and well-advertised for seven years. In any event, the Minister's answering affidavit details how registration continues even after the 31 October 2021 registration deadline in order to encourage continued registrations and to continue education about digital migration and ASO.¹⁶³

220 *e.tv says that the Minister's conduct is unreasonable because she has failed to proclaim ASO date while nevertheless imposing a cut-off on registrations.*¹⁶⁴

¹⁵⁹ e.tv RA, p 020-11, para 20.2; p 020-20 to, para 29; p 020-21 to 27, para 32-43.

¹⁶⁰ Minister AA, p 009-79, para 256.

¹⁶¹ Minister AA, p 009-98, para 317.

¹⁶² Minister AA, p 009-99 to 107, paras 327-63.

¹⁶³ Minister AA, pp 009-103, para 344.

¹⁶⁴ e.tv RA, p 020-11, para 20.3; p 020-17, para 22.50.

- 220.1 To the contrary, it was eminently reasonable for the Minister to set a cut-off date for registration before determining ASO.
- 220.2 As the Minister's affidavit states, ASO date has not been finally determined. By determining a cut-off date before determining ASO, the Minister will be able to assess, before finally determining ASO, the extent to which Government has met its policy obligations of rolling out STBs before ASO to qualifying households which registered before 31 October 2021.
- 221 *e.tv contends further that the Minister's conduct is unreasonable because she falsely views digital migration as a prerequisite to the spectrum auction when spectrum could selectively be auctioned in terms of a staggered digital migration plan presented by e.tv.*¹⁶⁵
- 221.1 The Minister properly views the release of the digital dividend spectrum (i.e. the 700MHz and 800MHz bands) as a priority. This spectrum is, as we explain above, particularly important to South Africa's developmental objectives given its ability to reach rural areas. It is also spectrum that is well-suited to being paired with higher frequency spectrum in the auction (for 5G capability). It is therefore not unreasonable for the Minister to favour the freeing the entire digital dividend in terms of one expedited process.
- 221.2 e.tv's punting of its own plan for migration also misses the point of reasonableness review. It does not matter whether, in e.tv's or even the court's view, its plan is better or more suitable. What matters is whether the

¹⁶⁵ e.tv RA, pp 020-29 to 40, paras 47-62.

Minister's plan is in the realm of reasonable decisions. For all the reasons cited above, we submit it is.

222 It follows therefore, for the reasons set out above, that e.tv has failed to establish that the Minister's conduct is unreasonable. This contention should therefore be rejected.

222.1 Insofar as the question of registered qualifying households is concerned, the Minister has afforded this class of persons a period of approximately six years to register to be assisted by Government.

222.2 It is not unreasonable for the Minister to give qualifying households three weeks to register for Government's assistance. The Minister made that qualifying households will be assisted beyond the end of October 2021.¹⁶⁶

223 The question whether it was reasonable to determine the cut-off date for registration was for STBs before the announcement of the ASO ignores the following critical factors:

223.1 The registration process had been ongoing for six years.

223.2 Under the UTI and Policy digital migration will have to be concluded (switching off of analogue systems).

223.3 The qualifying households were under the final call afforded a period of three weeks before the cut-off date.

223.4 Despite the cut-off date of 31 October 2021, qualifying households remain eligible to register for assistance.

¹⁶⁶ AA, 009-79 para 257.

- 223.5 The ASO had in any event been ongoing and at least three provinces had been switched off by the time the answering affidavit was filed.
- 223.6 It is also false to suggest that no notice was given to qualifying households when e.tv itself says that households were given three weeks' notice.¹⁶⁷
- 223.7 Finally it is also false to say that the qualifying households face the risk of being left behind when in fact the Minister made clear that despite the final call qualifying households would continue to be eligible to register for assistance.
- 224 The third question asks if it is reasonable for the Minister to “leave people ... in the dark” from 31 October 2021 until 3 - 6 months or longer after analogue switch-off.
- 225 The Minister made clear that households that register after the cut - off date would be connected three to six months after the ASO. This must be understood against the following background:
- 225.1 the six year registration period;
- 225.2 the three weeks' final call; and
- 225.3 the eligibility to continue to register even despite the three weeks' period.
- 226 We submit that the fact that the qualifiers may be able to register beyond the cut off and be assisted within a stipulated time period of the ASO is not unreasonable given all the relevant factors discussed above. They will not be left in the dark. They will be provided with STBs – the delay was/is occasioned by their own failure to register on time.

¹⁶⁷ RA, para 20.1 – 20.6

227 So far as the switching off of analogue transmitters is concerned, MultiChoice has already switched off, SABC had switched off 105 ; e.tv has switched off about 4 of 95 analogue transmitters. It is false to argue that the switch-off will leave vulnerable South Africans in the dark for an unknown period. It is clear that the qualifying households will continue to register beyond the 31 October period and they will be afforded assistance.

228 It is alarmist to suggest that South Africans would be “*left in the dark*” for an unknown period. The Minister made it clear that South Africans would be connected as soon as the ASO is completed but nevertheless within three to six months. e.tv exaggerates the point when it says that this will be for an unknown period. The period is clearly known.

229 Insofar as the ASO is concerned (paragraph 20.6 of the replying affidavit 020-12), the process of switching off is underway.

Conclusion on alleged rights-violation

230 The Minister has not violated any of the rights alleged by e.tv. The digital migration process does not implicate the rights to freedom of expression, equality, property and freedom of trade and occupation. And it has nothing to do with the State’s obligation to provide social security and assistance.

231 Even if the digital migration plan and ASO did implicate constitutional rights (which the Minister denies), the Minister has acted reasonably and unimpeachably.

232 e.tv’s submissions based on the alleged violation of rights are thus unsustainable and cannot justify the relief it seeks.

233 Insofar as e.tv says that the Minister has failed in her obligation under s7(2) of the Constitution, that the State must respect, protect, promote and fulfil the rights in the Bill of Rights.

234 e.tv has not shown anything by way of what Government intends doing that shows that Government is failing in its constitutional obligations. This is simply not the case. Government has done what it sought to do.

234.1 It has laid out the Policy.

234.2 It has for a period of approximately six years called on qualifying households to register.

234.3 It now has to comply with its international treaties by switching off the analogue signal and utilise the digital signals.

234.4 There are clear benefits that will flow from the spectrum. Government is simply actioning that for the benefit of South Africans.

234.5 There is no doubt and in fact it is common cause that the parties appreciate that there are benefits that will flow from the dividend spectrum, efficient use of the frequency spectrum, public resources; more channels and therefore more diverse content delivered to South Africans; better picture quality; potential for special interactive services to cater for people with visual and hearing impairments such as audio description and sub-titling and e-government delivery.

234.6 The Minister is taking steps as envisaged in s7(2) of the Constitution.

235 South Africans remain entitled to their right to freedom of expression, equality, practice a trade and a profession. That can be done under DTT. There is nothing about the Policy and the ASO that interferes or limits the rights of South Africans. In any event, even if it is shown that there has been a limitation of the rights, that limitation is reasonable and justifiable as envisaged in s36 of the Constitution. The following factors are important for purposes of assessing whether or not the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

[H] THE RELIEF IS IN ANY EVENT INAPPROPRIATE

236 The interdictory relief in paragraph 3 of the notice of motion is also inappropriate insofar as it interdicts and restrains the Minister from claiming the ASO “*unless and until the Minister has complied with her constitutional obligations and public promises to provide South Africans who are presently reliant on analogue broadcasting with alternative means to access e.tv’s services on a free-to-air basis*”.

237 The Minister is mandated to proclaim the ASO by gazetting same. This comes from the Policy. The Policy was made in terms of s3(1) of the ECA.

238 The interdictory relief in paragraph 3 therefore seeks to restrain the Minister from discharging her executive obligations of determining the ASO.

239 The Constitutional Court in *OUTA*¹⁶⁸ said that:

“When it evaluates where the balance of convenience rests, a court must recognise that it is invited to restrain the exercise of statutory power within the exclusive terrain of the executive or legislative branches of government. It must assess

¹⁶⁸ National Treasury v Opposition to Urban Tolling Alliance (OUTA) 2012 (6) SA 223 (CC) at [65].

carefully how and to what extent its interdict will disrupt executive or legislative functions conferred by the law and thus whether its restraining order will implicate the tenet of division of powers. Whilst a court has the power to grant a restraining order of that kind, it does not readily do so except when a proper and strong case has been made out for the relief and, even so, only in the clearest of cases.”

240 At paragraph 47 the Constitutional Court said that:

“The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of Government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant’s case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define ‘clearest of cases’. However one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights.”¹⁶⁹

241 Paragraph 3 of the notice of motion is interdictory in nature. It effectively seeks to impermissibly restrain the Minister from exercising her constitutional duties.

242 In *OUTA* the Constitution warned that the court should caution itself not to stall the exercise (statutory or constitutional powers) unless a compelling case has been made out for a temporary interdict. (Admittedly this one is also temporary pending the so-called compliance with the Minister’s constitutional obligations and public powers.)

243 The Constitutional Court warned that this should be done “*only in the clearest of cases*”. This can hardly be described as the clearest of cases. Another reason provided why the digital migration process should not be completed and conversely why the ASO should not proceed on a day to be determined by the Minister.

¹⁶⁹ Paras 47, 63, 65 - 66, 71 and 72

- 244 There is nothing preventing South Africans who are presently reliant on analogue broadcasting to switch to digital broadcasting. The opportunity for qualifying households has been given and extended to them since 2015. For those South Africans who do not qualify, none have come forward to state a reason why they could not proceed to shift to digital services in time. No South African has approached the Department or the Minister to say they are unable, despite the fact that they do not qualify, to migrate from analogue to digital signal.
- 245 The fact of the matter is that migration is ongoing and it tracks the installation of STBs to those households that have been registered. There are households that are self-migrating and there are houses that have self-migrated by subscribing to digital broadcasting services by other service providers.
- 246 We have already dealt with paragraph 5 of the notice of motion which seeks to impose a supervisory/statutorily interdict on the Minister to report the items referred to in paragraphs 5.1, 5.2, 5.3 and 5.4 of the notice of motion. It is an over-broad structural interdict and is inappropriate. Members of the public including those qualifying that those who do not qualify have had an opportunity since at least 2015 to make sure that when the time comes to totally switch-off the analogue signal they are in a position to migrate to the digital signal. Those that qualify but have not registered and will register after 31 October 2021 will be reconnected to the digital signal within a period of three to six months. There is no reason why the Minister should provide a report how they would be provided with STBs and/or reception devices to enable them to continue receive broadcasts without subscription or charge following digital migration. They have had ample opportunity. e.tv is not arguing that those that do not qualify should be provided with STBs and/or reception devices. There is no right and/or a corresponding obligation

on the part of the Minister to provide STBs and/or digital devices to non-qualifying households to enable them to access digital services.

247 Insofar as call centres and viewer information campaigns and well as sufficiency of Sentech resources are concerned, these have been adequately addressed. e.tv has not come back in their replying affidavit to deny this position. They simply cannot do so. They do not have the facts. The Minister has placed facts before this court to satisfy the court that all the so-called preconditions and/or minimum requirements are in place.

248 In any event, the subjective language used in the prayer (paragraph 5) in, for instance, paragraph 5.2 “*adequately resourced*”, “*sufficiently and effectively*”, “*effective viewer information campaigns*” and “*sufficient Sentech resources*” is unhelpful. This subjective language requires this Honourable Court to effectively make policy/subjective calls on what are clearly matters that fall within the Minister’s policy purview.

249 Courts are generally unsuited, as a matter of principle, from granting and overseeing such relief. They are also institutionally ill-suited to make them. In this regard, the Constitutional Court in *Du Plessis*¹⁷⁰ said the following:

“ The judicial function simply does not lend itself to the kinds of factual enquiries, cost-benefit analyses, political compromises, investigations of administrative / enforcement capacities, implementation strategies and budgetary priority decisions, which appropriate decision-making on social, economic, and political questions requires... How best to achieve the realization of the values articulated by the Constitution, is something far better left in the hands of those elected by and accountable to the general public, than placed in the lap of the courts.”

¹⁷⁰ Du Plessis and others v De Klerk and Ano 1996 (3) SA 850 (CC) at [180]

250 We submit that this court should decline to arrogate unto itself these matters that are suited to those accountable to the general public. e.tv has not contradicted the Minister's response insofar as those items that are set out in paragraph 5 of the notice of motion are concerned. So for both policy reason and based on the facts of this case, e.tv has simply failed to make out a case for the granting of paragraph 5 of the notice of motion.

251 The same goes for the relief sought by the intervenors.

251.1 They have simply not made a case for a repeat of the consultations with members of the public or any of those interested stakeholders. The Minister has amply demonstrated that these consultative processes have taken place.

251.2 The intervenors have simply not made out a case for why the Minister must report on the preconditions and/or minimum requirements. The Minister has made out a case quite adequately and convincingly that all those are in place.

251.3 Insofar as the provision of STBs (which is a sub-topic of the minimum requirements), the Minister has demonstrated that an adequate period to allow those that qualify to register has occurred over six years.

251.4 They still have an opportunity to register at their local post offices within a period of three weeks from the date on which the call was made in early October.

251.5 There is no cut-off to the registration process. Those who qualify can continue to do so even after October 2021. They will be provided with STBs soon after the ASO but nevertheless between the period of three to six months from the ASO date.

251.6 Those that do not qualify will and have had an opportunity to self-migrate over the years that the dual illumination was switched on from approximately February 2016.¹⁷¹

[I] CONCLUSION

252 For all the reasons discussed above, neither e.tv nor the intervenors have made out a case for the relief sought by them and we ask that the application be dismissed with costs, including the costs of three counsel.

TERRY MOTAU SC
BENNY MAKOLA SC
BUHLE LEKOKOTLA
PETER SMITH
BUSANI DHLADHLA

Counsel for the Minister
Chambers , Sandton
1 March 2022

¹⁷¹ AA, 009-19 para 62, annexure AA1.

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