IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC CASES CCT 89/22 and CCT 92/22

In the matter between:

CCT89/22

e.tv (PTY) LTD	Applicant
and	
MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES	First Respondent
THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA	Second Respondent
CHAIRPERSON: INDEPENDENT COMMUNICATION 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 t/a RAIN	Tenth Respondent
LIQUID TELECOMMUNICATIONS SOUTH AFRICA (PTY) LIMITED	Eleventh Respondent
SENTECH SOC LIMITED	Twelfth Respondent
MEDIA MONITORING AFRICA	Thirteenth Respondent
SOS SUPPORTING PUBLIC BROADCASTING	Fourteenth Respondent

CCT 92/22

MEDIA MONITORING AFRICA	First Applicant
SOS SUPPORTING PUBLIC BROADCASTING	Second Applicant
and	
e.tv (PTY) LTD	First Respondent
MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES	Second Respondent
THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA	Third Respondent
CHAIRPERSON: INDEPENDENT COMMUNICATION AUTHORITY OF SOUTH AFRICA	Fourth Respondent
NATIONAL ASSOCIATION OF BROADCASTERS	Fifth Respondent
SOUTH AFRICAN BROADCASTING CORPORATION SOC LIMITED	Sixth Respondent
VODACOM (PTY) LIMITED	Seventh Respondent
MOBILE TELEPHONE NETWORKS (PTY) LIMITED	Eighth Respondent
CELL C (PTY) LIMITED	Ninth Respondent
TELKOM SA SOC LIMITED	Tenth Respondent
WIRELESS BUSINESS SOLUTIONS (PTY) LIMITED t/a RAIN	Eleventh Respondent
LIQUID TELECOMMUNICATIONS SOUTH AFRICA (PTY) LIMITED	Twelfth Respondent
SENTECH SOC LIMITED	Thirteenth Respondent

MMA AND SOS' HEADS OF ARGUMENT

TABLE OF CONTENTS

INTRODUCTION AND OVERVIEW

1 This application concerns digital migration. Digital migration begins with the switch on of digital broadcasting transmission signals while analogue broadcasting transmission signals remain active. The period during which both analogue and digital broadcast transmission signals are active is the "dual illumination" period.[1] During the dual illumination period, analogue signals across the country are switched off incrementally until finally the Minister determines an analogue switch-off date ("**ASO date**") which marks the end of dual illumination.

2 Modern television sets are integrated with a built-in digital tuner, so they are able to receive digital transmissions. Older television sets are analogue and cannot receive digital transmissions. In order to view digitally transmitted programming, the older, analogue television sets require a Set-Top-Box ("**STB**") which converts the transmitted digital signals to analogue.[2]

3 Anyone with a television set (and, after ASO, the requisite receiver set) can receive free-to-air ("**FTA**") broadcasting services without paying for them. The only way to make a wide range of programming available to significant numbers of people is through FTA broadcasting services.

4 When analogue transmission is switched off the following will occur:

4.1 All South Africans who are in possession of functioning new generation television sets or analogue television sets and a STB, or watch television by

[1] Minister's answering affidavit ("**AA**") to e.tv, p977 para 54. All page numbers referenced in these heads of argument are in respect of the record prepared for the Constitutional Court.

[2] Minister's AA to e.tv p980 para 64.

means of satellite signals (for example with a subscription service) will be able to continue viewing FTA television services.

4.2 All South Africans who do not have new generation television sets, STBs or access to satellite television, will lose their existing access to FTA television services and will be unable to view television broadcasts unless and until STBs are installed on their existing television sets or they obtain a new generation television set which has the ability to decrypt digital transmissions.

5 Millions of South Africans (36% of the population) are dependent on analogue television broadcasts in order to watch television. The state has repeatedly promised to assist the millions of poor television-owning households to obtain free STBs through a government subsidy.

6 To get a subsidised STB, qualifying households were (and still are) required to register at the South African Post Office. However, as we explain below:

6.1 Because of government's rush to implement the ASO date by the end of March 2022 (now extended to June 2022 by the High Court), millions of television-owning indigent households did not manage to register for a STB before the last-minute 31 October 2021 deadline.

6.2 Because of the extremely slow rate of installation of STBs by government, a global chip shortage resulting in manufacturing delays, and lack of supply of STBs, there is no realistic prospect of avoiding lengthy periods of television blackouts for those who do not have STBs installed before the ASO date, even for some of those indigent households who managed to register by the deadline.

7 The Minister of Communications ("**the Minister**") decided to switch off the analogue transmission of television signal from 31 March 2022. The High Court held that this decision was lawful, but nonetheless extended the date of switch off to 30 June 2022, which does not remedy the problem.

8 The case accordingly concerns the expression rights of millions of indigent South Africans. Millions of the poorest and most vulnerable South Africans have not yet been able to obtain the necessary STBs and have no realistic prospect of doing so in the immediate future. The first and second applicants in CCT92/22 ("**MMA and SOS**") are public interest organisations who, as they have before, approach the Court in the interest of the public and, in particular, to safeguard the interests of those vulnerable South Africans.[3]

9 If this Court does not intervene, the result will be that millions of the most vulnerable South Africans will be plunged into a television blackout and will not have access to FTA television services for an indeterminate period of time.

10 This constitutes a severe and irreparable breach of the right of freedom of expression. FTA broadcasters play a critical role in our democracy. They are integral to the advancement and realisation of the constitutionally guaranteed right to freedom of expression, which includes the right to receive or impart information or ideas.

11 Because they do so for no fee, FTA broadcasters are able to provide the poorest and most vulnerable members of our society with access to televised content such as news, current affairs, public service announcements, informal knowledge building and educational content. The only way to make a wide range of programming available to

[3] MMA & SOS FA pages 392 and 393, paras 31 to 38.

significant numbers of people is through FTA broadcasting services.[4] Access to such content is, for many millions of South Africans, essential to be able to participate in our democracy. [5]

12 All of the parties to the litigation agree that analogue switch-off must occur, and that the benefits which will result from freeing up scarce radio frequency spectrum must be realised. What is in dispute is whether this may permissibly be implemented in a manner that deprives millions of the poorest South Africans of their existing access to FTA television broadcasts, for many months (at best), and probably for far longer than that.

13 In the remainder of these heads of argument, we address the following issues in turn:

13.1 The factual background. The facts are largely undisputed.

13.2 The limitation of the right to freedom of expression.

13.3 The implementation of an impermissible retrogressive measure.

13.4 Irrationality.

13.5 Direct access and urgency.

13.6 Remedy.

[4] MMA & SOS founding affidavit ("**FA**") p404 para 55; not addressed in Minister's AA to MMA & SOS p1740; not addressed in ICASA AA; not addressed in Vodacom AA to MMA & SOS at p1781.

[5] MMA & SOS FA p396 para 43; not addressed in Minister's AA to MMA & SOS p1740; not in ICASA AA; admitted by Vodacom in its AA to MMA & SOS p1780 para 38.

FACTUAL BACKGROUND

The process leading to the ASO

14 In 2006, the UN International Telecommunications Union ("**ITU**"), of which South Africa is a member, resolved that all African countries should migrate from analogue to digital broadcasting services by 17 June 2015.[6]

15 In 2008, the Minister published the Broadcasting Digital Migration Policy ("**BDM Policy**").[7] It provided for three-year dual illumination period, which was to be from 1 November 2008 to 1 November 2011.[8] This first deadline for the ASO was missed.[9]

16 In 2012, the Chairperson of the Independent Communications Authority of South Africa ("**ICASA**") published the Digital Migration Regulations, 2012.[10] The Digital Migration Regulations empowered the Minister to determine the date for the start of the dual illumination period and the ASO date.[11] In the same year, the BDM policy was amended to provide that the switch on date for the digital terrestrial television signal (the start of the dual illumination period) would be the last quarter of 2012.[12] This did not occur.

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[6] Broadcasting Digital Migration Policy; published in terms of the Electronic Communications Act 36 of 2005 under GN 958 in GG 31408 of 8 September 2008; section 1.1.1.

[7] Broadcasting Digital Migration Policy; published in terms of the Electronic Communications Act 36 of 2005 under GN 958 in GG 31408 of 8 September 2008. The BDM Policy is attached to e.tv FA as annexure PR24 at pages 254 to 272.

[8] Minister AA to e.tv, p977 para 55.

[9] Minister AA to e.tv, p1015 para 177.

[10] Digital Migration Regulations, 2012; published in terms of the Electronic Communications Act 36 of 2005 under GN 1070 in GG 36000 of 14 December 2012.

[11] Digital Migration Regulations, regulation 1.

[12] Minister AA to e.tv, p978 para 57.

17 Between 2006 and 2015, the state did not do much to achieve digital migration in South Africa. Only in 2015, when ICASA planned to auction spectrum worth billions of Rands[13] (including the spectrum used for analogue television broadcasts[14]), was there movement in the digital migration process.

18 In 2015, the BDM Policy was again amended, to provide that the ASO date would be announced by the Minister in consultation with Cabinet.[15] South Africa missed the June 2015 deadline resolved by the ITU.[16]

19 Nevertheless, in July 2015, ICASA invited participation in an auction to use certain bands of radio frequency spectrum ("**the spectrum auction**").[17]

20 Since 2015, qualifying households have been able to register for government assistance for STB installation.[18] They must do so through the South African Post Office.[19]

21 On 1 February 2016, the Minister determined the commencement date of the dual illumination period to be 1 February 2016.[20]

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[13] e.tv FA p23 para 29; no denial of the value of spectrum to be auctioned in Minister AA to e.tv p1078 para 431.

[14] ICASA AA pages 1764 and 1765 para 14.

[15] Minister AA to e.tv, p979 para 60.

[16] Minister AA to e.tv, p1015 para 177.

[17] Sutherland J judgment, e.tv FA annexure PR30, p318 para 4.

[18] Minister AA to e.tv, p1016 para 178.

[19] Minister AA to e.tv, p1026 para 211.5.

[20] Declaration of the Performance Period and Start of Dual Illumination Period; published in terms of the Electronic Communications Act 36 of 2005 under GN 87 in GG 39642 of 1 February 2016; e.tv FA p38 para 73; admitted in Minister AA to e.tv p979 para 62 and at p1083 para 459.

22 On 30 September 2016 Sutherland J granted an order interdicting ICASA from proceeding with the spectrum auction pending a review by Cell C.[21]

23 Between 2016 and early 2021 little was done by the state to achieve digital migration in South Africa. However, in late 2020, when ICASA again planned to auction the spectrum worth billions of Rands, there was movement in the process.

24 On 2 October 2020,[22] ICASA again invited participation in the spectrum auction.[23] Telkom and e.tv challenged the decision.

25 In February 2021, in the 2021 State of the National address[24], President Cyril Ramaphosa announced that the digital migration process must be completed by 31 March 2022.[25] That was a "goal date".[26]

26 On 8 March 2021, Baqwa J gave an order interdicting ICASA from adjudicating any application received pursuant to the invitation to participate in the spectrum auction.[27]

27 On 15 September 2021, by agreement between the parties including the Minister, Fourie J granted an order reviewing and setting aside ICASA's 2 October 2020 decision to invite participation in the spectrum auction.[28] The order effectively allowed the

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[21] e.tv FA annexure PR30, p352 para 89.

[22] Baqwa J judgment, e.tv FA annexure PR1, pages 103 to 120.

[23] Baqwa J judgment, e.tv FA annexure PR1, p106 para 3.

[24] Minister AA to e.tv, p984 para 75.2.

[25] e.tv FA p57 para 136; Minister AA to e.tv p966 para 8.

[26] Annexure PR17, e.tv FA p214 para 1.3; annexure also relied upon by the Minister in Minister AA to e.tv p1015 para 176.

[27] Annexure PR1, e.tv FA p120 paras 71.1 to 71.3.

[28] e.tv FA p24 para 33; annexure PR3, pages 128 to 130; no denial in Minister AA at p1079 para 436.

spectrum auction process to begin anew.[29] However, a challenge by e.tv to the Minister's efforts to rush the digital migration process remained live.[30]

28 The Minister's "Analogue Switch-Off Plan" ("**ASO plan**") is dated 19 September 2021, just four days later.[31] Cabinet approved the plan on 29 September 2021, 10 days after that.[32]

29 The ASO plan was based on the President's announcement that analogue television services should be terminated by March 2022.[33] It provided for an ASO date not later than the end of March 2022[34] and for a STB assistance registration deadline for qualifying households of 31 October 2021.[35]

30 On the same day, 29 September 2021, e.tv asked for a case management meeting in respect of the relief it sought challenging the Minister's efforts to rush the digital migration process.[36] The case management meeting took place on 5 October 2021.[37] The application that is the subject of this appeal was brought pursuant to the Directive issued by Fourie J at that case management meeting.[38] On the same day, after the case management meeting, the State Attorney expressed a view that e.tv's challenge to the

[29] e.tv FA p47 para 100; not addressed in Minister AA to e.tv, p1085.

[30] e.tv FA p47 para 100; not addressed in Minister AA to e.tv, p1085.

[31] Annexure AA14, Minister AA to e.tv pages 1168 to 1193.

[32] Minister AA to e.tv p1072 para 397.

[33] Annexure AA14, Minister AA to e.tv, p1171.

[34] Annexure AA14, Minister AA to e.tv, p1173 para 4.2(a).

[35] Annexure AA14, Minister AA to e.tv, p1173 para 4.2(c).

[36] e.tv FA p51 para 113; no denial in Minister AA to e.tv p1087 para 479.

[37] e.tv FA p52 para 117; no denial in Minister AA to e.tv p1087 para 479.

[38] e.tv FA p26 para 39; annexure PR4 pages 131 to 133; not addressed in Minister AA to e.tv pages 1079 to 1080.

Minister's efforts to rush the digital migration process had been "withdrawn".[39] If that were the case, there would no longer be any barrier to the spectrum auction proceeding.

31 On the following day, 6 October 2021 the Minister released a statement (dated the previous day, 5 October 2021, 16:00) – seemingly hours after the case management meeting – announcing a "last call" for registration for government assistance with STB installation and a cut-off date of 31 October 2021 (a mere three weeks later).[40]

32 e.tv launched the application before the Full Court on 12 October 2021.[41]

33 By the time heads of argument were filed by the applicants during February 2022, the ASO date had not been formally gazetted. However, on 28 February 2022 the Minister formally determined 31 March 2022 as the ASO date.[42] This was also the date that ICASA had determined as the date of the recommencement of the spectrum auction process. It is undisputed that that is not a coincidence.[43]

34 The High Court handed down judgment on 28 March 2022. The order of the High Court deferred the ASO date to 30 June 2022.[44]

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[39] e.tv FA p54 para 125; no denial in Minister AA to e.tv pages 1088 to 1089 paras 486 to 488.

[40] Annexure PR17, e.tv FA, pages 213 to 218; admitted in Minister AA to e.tv p1090 para 500.

[41] Notice of motion ("**NOM**"), p1.

[42] High Court judgment p2360 para 21.

[43] e.tv FA p23 para 29; no denial in Minister AA to e.tv pages 1078 to 1079 paras 431 and 432; ICASA also says that it would auction the available spectrum during March 2022 and that the date must coincide with digital migration in its AA p1765 para 14.

[44] High Court judgment p2384 order para 3).

The number of affected of South Africans

35 It is not clear precisely how many South Africans will lose their access to television as a result of ASO because the state has never conducted any investigation or research on this issue. However, the statistics relied on by MMA and SOS and the Minister paint a similar picture.

36 MMA and SOS rely on updated information from the Television Audience Measurement Survey carried out by the Broadcast Research Council, the validity of which has not been disputed by the respondents.[45] The Minister relies upon data produced by StatsSA in 2018.[46]

36.1 MMA and SOS say there are 15 876 571 television households in South Africa (covering approximately 90% of the population).[47] The Minister relies on the StatsSA figure of 14 025 000 households as at 2018.[48]

36.2 47% of the 15 876 571 households (7 460 182 television households) have access to subscription services via DSTV. A few tens of thousands more have Starsat. For subscribers of DSTV and Starsat, they will have access to currently available free to air analogue TV services as long as they remain paid-up

[45] MMA & SOS FA, p405 para 58; only a bare denial in Minister AA to MMA & SOS at pages 1740 to 1741 paras 18 to 24; not addressed in ICASA AA; Vodacom says it "*does not have data which would enable it to admit or deny the allegations in these paragraphs*" in AA to MMA & SOS p1781 para 42.

[46] Minister AA to e.tv pages 1037 and 1038 paras 249 and 250.

[47] MMA & SOS FA, p405 para 58; only a bare denial in Minister AA to MMA & SOS at pages 1740 to 1741 paras 18 to 24; not addressed in ICASA AA; Vodacom says it "*does not have data which would enable it to admit or deny the allegations in these paragraphs*" in AA to MMA & SOS p1781 para 42.

[48] Minister AA to e.tv p1038 para 253.

subscribers.[49] That leaves more than 8 million television households who don't have access to subscription services and are reliant on FTA broadcasting services.

36.3 Only 17% of the population (less than one in five persons) have access to FTA broadcasting services on digital services (DTT and DTH).[50] That includes 2.1 million households using OpenView.[51]

36.4 The Minister says approximately 7.8 million households have self-migrated through DSTV subscriptions, 2.3 million through OpenView installations and 450 000 through Starsat.[52]

36.5 The Minister accepts that 36% of the population – 5 747 823 households – rely entirely on analogue terrestrial television services to access FTA broadcasting services.[53]

36.6 The Minister estimates (based on the 2018 StatsSA data) that there may be at least 3.75 million households eligible for STB assistance (equating to 12 million people).[54] MMA and SOS say that the number is likely to have increased substantially since 2018 as in Quarter 2 of 2021 alone the number of unemployed

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[49] MMA & SOS FA, p405 para 58; only a bare denial in Minister AA to MMA & SOS at pages 1740 to 1741 paras 18 to 24; not addressed in ICASA AA; Vodacom says it "*does not have data which would enable it to admit or deny the allegations in these paragraphs*" in AA to MMA & SOS p1781 para 42.

[50] MMA & SOS FA, p405 para 58; only a bare denial in Minister AA to MMA & SOS at pages 1740 to 1741 paras 18 to 24; not addressed in ICASA AA; Vodacom says it "*does not have data which would enable it to admit or deny the allegations in these paragraphs*" in AA to MMA & SOS p1781 para 42.

[51] MMA & SOS FA, p406 para 62.2; only a bare denial in Minister AA to MMA & SOS at pages 1740 to 1741 paras 18 to 24; not addressed in ICASA AA; Vodacom says it "*does not have data which would enable it to admit or deny the allegations in these paragraphs*" in AA to MMA & SOS p1781para 42.

[52] Minister AA to e.tv p1041 para 272.

[53] MMA & SOS FA, p406 para 62.1; only a bare denial in the Minister AA to MMA & SOS at pages 1740 to 1741 paras 18 to 24 and an admission at p1093 para 510; not addressed in ICASA AA; Vodacom says it "*does not have data which would enable it to admit or deny the allegations in these paragraphs*" in AA to MMA & SOS p1781 para 42.

[54] Minister AA to e.tv p1037 para 250 and p1039 para 254.

persons increased by 183 000.[55] The Minister admits the number might have increased following the Covid-19 pandemic.[56]

37 The Minister has never conducted any form of investigation to determine how many people will be plunged into television darkness after the ASO date. She has no idea what the impact of the ASO will be because she has made no effort to investigate or find out how many people will lose all access to FTA broadcasts following the ASO date.[57]

38 By 31 October 2021, only 1 228 879 qualifying households (approximately one third of the estimated number) had registered for STB assistance.[58] Registration remains open. The Minister said that those who registered after 31 October 2021 would be connected within three to six months after the ASO date of 31 March 2022.[59]

39 MMA and SOS provided substantial evidence that STBs could not be installed at a rate significant enough to meet the Minister's 31 March 2022 deadline or the three to six-month later projection:

39.1 There is a worldwide shortage of silicon and resultant lack of electronic chipsets needed to manufacture STBs.[60] Since the Covid-19 pandemic, demand for chipsets exceeds supply.[61] There has been a surge in demand for electronics.[62]

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[55] MMA & SOS reply ("**RA**") to the Minister's supplementary affidavit ("**SA**") p2273 para 10.

[56] Minister AA to e.tv p1014 para 171.

[57] MMA & SOS application for direct access p2497 para 36; no response in the Minister AA.

[58] Minister AA to e.tv p1040 para 259.

[59] Minister AA to e.tv p1039 para 257.

[60] Expert affidavit of Sydney Linden Petzer, filed by MMA and SOS, p773 para 88.1.

[61] Affidavit of Walter Stander, filed by MMA and SOS, p792 paras 8 and 9.

[62] Affidavit of Walter Stander, filed by MMA and SOS, p795 para 12.1.

39.2 There are no STBs available in the retail market due to diminished manufacturing and supply. To the extent that STBs are available, consumers will experience price increases.[63]

39.3 There are insufficient capable installers able to effect the rollout of STBs to millions of households within a short period.[64]

40 The Minister's response was:

40.1 To downplay the scale of the global chipset shortage on the basis that Government only has to provide STBs to those who have registered and in respect of the number of households who had registered before the 31 October 2022 deadline, government has enough STBs in storage to cater for that number of households (together with those STBs already installed).[65]

40.2 To provide a one-page extract from a letter from one local manufacturer in which it committed to reworking its process to assist with increased requirements[66], and one email from one other manufacturer committing to two million chipsets but the commitment is conditional as the manufacturer asked for further information in five areas.[67]

41 By 28 November 2021 (when the Minister deposed to the answering affidavit to e.tv), 556 954 STBs had been installed in qualifying households since 2015.[68] The Minister

[63] Expert affidavit of Sydney Linden Petzer, filed by MMA and SOS, p773 para 88.2.

[64] Expert affidavit of Sydney Linden Petzer, filed by MMA and SOS, p773 paras 88.1. to 88.3.

[65] Minister AA to e.tv p1045 para 283.

[66] Minister AA to e.tv pages 1045 to 1046 para 284.

[67] Annexure AA20, Minister AA to e.tv, p1253.

[68] Minister AA to e.tv p1040paras 259 and 260.

said that there are approximately 800 000 STBs in storage and that the remaining 671 925 additional STBs would be installed by 31 March 2022.[69]

42 Unsurprisingly, by 10 March 2022 (the date up to which data had last been gathered by the Minister), only 103 707 more STBs (660 661 STBs in total) had been installed, leaving a further 507 251 registered households yet to be assisted.[70] That equates to an estimated national average of 362 installations per day over five years.[71] Even with an increased installation rate between the date of the Minister's answering affidavit and the date of the Minister's supplementary affidavit, the national rate of installation was 1 401 STBs per day.[72] The Minister nevertheless projected that the installations for qualifying households would be completed by 31 March 2022.[73] MMA and SOS explained that the Minister's projections could not possibly be achieved.[74] Between 31 October 2021 and 10 March 2020, only 260 868 more households registered for STB assistance.[75]

43 The High Court said it was "sceptical" that government would be able to install STBs in accordance with its projections.[76] It granted an order which *inter alia*:

43.1 Deferred the ASO date to 30 June 2022.[77]

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[69] Minister AA to e.tv p1040 paras 261 and 262.

[70] Minister SA p2240 para 8.

[71] MMA & SOS AA to Minister SA p2274 para 12.1.2.

[72] MMA & SOS AA to Minister SA p2274 para 12.1.3.

[73] Minister SA p2242 para 14.

[74] MMA & SOS AA to Minister SA pages 2273 to 2278 paras 11 to 17.

[75] Minister SA p2242 para 17.

[76] High Court judgment p2380 para 66.

[77] High Court judgment p2384 order para 3).

43.2 Directed that STBs for registered qualifying households must be installed by 30 June 2022.[78]

43.3 Directed that STBS for qualifying households that registered after 31 October 2021 but before 10 March 2022 (the most recent data-gathering date) must be installed no later than 30 September 2022.[79]

44 As a result, on the best possible case for the Minister, it is established on the pleadings that:

44.1 At least 3.75 million households require state assistance to procure a STB to avoid a television blackout at the ASO date.

44.2 Only 1 489 747 qualifying households have managed to register for assistance (including before 31 October 2021 and between 31 October 2021 and 10 March 2022),

44.3 Of those who registered before the 31 October 2021 deadline, more than half a million households (507 251 households) have yet to receive STB assistance. At least 260 868 more households have registered since then. There are thus 768 119 registered households without STBs.

44.4 On the historical improved installation rate of 1 401 STBs per day excluding weekends and public holidays, it would take more than 548 days (excluding weekends and public holidays), which equates to slightly more than two years, to install 768 119 STBs.

[78] High Court judgment p2384 order para 4).

[79] High Court judgment p2384 order para 5).

44.5 Accordingly, at best for the Minister 2.5 million households (3.75 million qualifying households minus the 1 228 879 million who registered before 31 October 2021) will lose access to FTA television services on the ASO date. That equates to approximately 8.3 million people[80].

44.6 However, on historical installation rates that number could be as high as 9.6 million people.[81]

45 MMA and SOS are particularly concerned about three categories of persons directly affected by the 31 October 2021 registration deadline and the ASO date of 30 June 2022:

45.1 Qualifying persons who have not registered at all, or who were unable to register by 10 March 2022.[82] The High Court order does nothing to protect the rights of this category of persons. It caters only for those who managed to register before 31 October 2021 (paragraph 4 of the order) and for those who managed to register between 31 October 2021 and 10 March 2022 (paragraph 5 of the order).

45.2 Qualifying persons who managed to register before 31 October 2021 but whose STBs have not yet been installed.[83] The High Court attempted to protect this category of persons by deferring the date of ASO by three months and requiring installations to occur by certain dates.

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[80] According to StatsSA there are approximately 3.3 individuals per household in South Africa; MMA & SOS replying affidavit to the Minister and ICASA p1796 para 9.

[81] On historical installation rates, 103 674 STBs can be installed in the 74 days (excluding public holidays and weekends) between 10 March 2022 and 30 June 2022 at a rate of 1401 STBs per day. 507 251 outstanding registered households minus 103 674 STBs is 403 577 households. 403 577 households multiplied by the average number of 3.3 individuals per household is 1 331 804.1 additional individuals.

[82] MMA & SOS application for direct access p2497 para 35.1; no response in Minister AA.

[83] MMA & SOS application for direct access p2497 para 35.2; no response in Minister AA.

45.3 Those who do not qualify for assistance but are unable to obtain STBs or new generation television sets because of the global chip shortage and manufacturing delays.[84] The High Court order does nothing to protect the rights of this category of persons.

First category: the missing millions

46 As no purpose-specific investigation has ever been conducted by the Minister to determine how many television households qualify for STB assistance, the exact number of people who fall into this category is unknown. However, even on the outdated StatsSA 2018 estimate, there are at least 3.75 million qualifying households.

47 1 228 879 qualifying households registered by 31 October 2021 and a further 260 868 registered between 31 October 2021 and 10 March 2022[85]. In total, 1 489 747 households registered – that is still only approximately 40% of qualifying households. The number of people who require assistance but have not yet managed to register is thus at least 2.26 million households or approximately 7 458 000 individuals.[86]

48 The High Court order does not cater for this category of persons. Accordingly, at least 7 458 000 people (and most likely more) will lose access to FTA television broadcast services on 30 June 2022 until at least 30 September 2022 (the court ordered deadline for installation of STBs to those who registered between 31 October 2021 and 10 March 2022), but for an indeterminate period thereafter.

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[84] MMA & SOS application for direct access p2497 para 35.3; no response in the Minister AA.

[85] Minister SA p2242 para 17.

[86] According to StatsSA there are approximately 3.3 individuals per household in South Africa; MMA & SOS replying affidavit to the Minister and ICASA p1796 para 9.

Second category: registered for assistance but not yet installed

49 The High Court order attempted to cater for this category of persons by ordering that those who registered for assistance by 31 October 2021 must receive their STB by 30 June 2022 (paragraph 4 of the order) and that those who registered between 31 October 2021 and 10 March 2022 must receive their STBs by 30 September 2022 (paragraph 5 of the order). However, the High Court's order does not remedy the problem.

50 First, the effect of the High Court order is that it accepts that those who registered between 31 October 2021 and 10 March 2022 will be without access to television from 30 June 2022 (when the court determined the ASO date) until they receive their STB, as late as 30 September 2022.

51 Second, the High Court did not take into account the practical difficulties in implementing the Minister's ambitious installation targets.

51.1 On 28 November 2021 (when the answering affidavit was deposed to), the Minister said government had enough STBs in storage (to cover the 1 228 879 registered households) because it had already installed 596 954 STBs and had a further 800 000 STBs in storage.[87] That equates to 1 396 954 STBs in total (installed and in storage).

51.2 But, a further 260 868 households have registered after that date. Government is bound by the Court Order to install STBs for all of these additional households. If the number of STBs required to be installed is at least 1 489 747, then there will not be enough STBs to satisfy the court order unless more are procured by government.

[87] Minister AA to e.tv p1045 para 283.

52 As at 10 March 2022 there were 507 251 of those households who registered before 31 October 2021 (approximately 1.6 million individuals) still waiting for their STB to be installed.[88] The Minister said that would occur by 31 March 2022.[89] MMA and SOS noted that it would require increases of between 800% and 2600% in the rates of installation.[90]

53 The Minister was expressly invited in the direct access application to indicate what the rates of installation have been since 10 March 2022.[91] She declined to do so.

54 There is also no reason to believe that between now and 30 June 2022 and thereafter 30 September 2022, the other practical difficulties facing the Minister (the global chipset shortage, lack of availability of STBs in the retail market and insufficient installer capacity) will be remedied.

Third category: those who do not need assistance but cannot obtain a STB, DTT television set or access satellite television (whether paid or free)

55 Even those who are able to self-migrate (through purchasing a newer television set, obtaining a STB themselves or accessing a free or paid satellite television broadcasting service) are at risk of being plunged into a television blackout on 30 June 2022 because those individuals have only two months left in order to self-migrate in the face of:

55.1 The economic impact of the Covid-19 pandemic.

55.2 The global chipset shortage and resultant lack of availability of STBs in retail outlets.

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[88] Minister SA p2242 para 14.

[89] Minister SA p2242 para 14.

[90] MMA & SOS AA to Minister SA pages 2274 to 2275 para 12.2.

[91] MMA & SOS application for direct access p2501 para 40.5.

55.3 The increased demand for – and price of – electronic goods.[92]

Conclusion on the facts

56 In summary the factual position is the following:

56.1 Government inexplicably failed to implement digital migration for more than 15 years, until February 2021 when the President in his State of the Nation Address in announced that ASO would occur by 31 March 2022.

56.2 Seven months later, in September 2021, when the lucrative spectrum auction process began again, the Minister of Communications suddenly started to accelerate implementation of the programme aiming towards ASO.

56.3 This culminated in the Minister's announcement on 5 October 2021 that there was – for the first time – a deadline for registration for STB assistance at the end of October 2021. That statement made clear that all unregistered indigent South Africans who did not manage to register within the three weeks would inevitably be plunged into a three to six-month television blackout.

56.4 The state has failed to come anywhere close to achieving the installation rates of STBs that would be required to achieve even a three to six-month delay period. It is instead overwhelmingly probable that even for those who registered before 31 October 2021, a long period of television darkness will inevitably result while Government gets through its installation backlog. For

[92] MMA & SOS application for direct access p2502 para 44; affidavit of Walter Stander, filed by MMA and SOS, p792 paras 8 and 9 and p795 para 12.1; expert affidavit of Sydney Linden Petzer, filed by MMA and SOS, p773 para 88.

those who registered and continue to register after 31 October 2021, there will be an even longer period of television darkness.

56.5 While the precise number of South Africans who have self-migrated is not known, it was undisputed on the papers before the High Court that 36% of South Africans are entirely reliant on analogue television broadcasts in order to access television, and that significant numbers of those are indigent families. There can accordingly be no serious denial that the effect of the Minister's determination of ASO would be to plunge millions of South Africans into a television blackout for an indeterminate period of time.

56.6 The ASO date was determined by the Minister in the absence of any attempt to determine what the impact would be on the millions of South Africans who require government assistance to migrate to digital television transmission.

56.7 The Minster has never offered any justification for the selection of the 31 March 2022 date or any justification for the arbitrary imposition of a three-week deadline to finalise registrations in October 2021.

56.8 Neither the Minister nor any other entity of State conducted any consultation on either of the following issues:

56.8.1 the date of ASO; or

56.8.2 the imposition in October of a three-week deadline for a final call for registrations.

THE LIMITATION OF FREEDOM OF EXPRESSION

57 Section 16(1) of the Constitution provides that '*everyone has the right to freedom of expression'* which includes the '*freedom to receive or impart information or ideas."*[93]

58 This court has repeatedly emphasised the importance of freedom of expression and its underlying values in the context of our constitutional democracy. In *South African National Defence Union,* this court held that: [94]

> *"Freedom of expression lies at the heart of democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters."*[95]

59 The right of freedom of expression of the press is not protected for the sake of the broadcasters (and nor for the sake of telecommunications companies). It is in the interests of the public to be able to receive the information that is imparted through broadcasting. The right of the public to receive information and be informed lies at the heart of the constitutional protection of expression:

> *"The need for public information and awareness flows from the nature of our democracy. Public participation on a continuous basis provides vitality to*

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[93] Section 16(1)(b) of the Constitution of the Republic of South Africa.

[94] *South African National Defence Union v Minister of Defence & Another 1999 (4) SA 469 (CC),* at para 7. This approach has been consistently applied in a range of subsequent freedom of expression cases such as: *S v Mamabolo 2001 (3) SA 409 (CC),* para 37; *Islamic Unity v Independent Broadcasting Authority and Others 2002 (4) SA 294 (CC),* para 26*; Khumalo v Holomisa 2002 (5) SA 401 (CC),* para 21*; Laugh it Off Promotions CC v SAB International (Finance) BV t/a SabMark International (Freedom of Expression as Amicus Curiae) 2006 (1) SA 144 (CC),* paras 45 – 47*; South African Broadcasting Corp Ltd v National Director of Public Prominent and Others 2007 (1) SA 523 (CC),* paras 23 – 24*.*

[95] *South African National Defence Union* at para 7.

democracy. This was also recognized by the House of Lords in McCartan Turkington Breen (A Firm) v Times Newspapers Ltd that "[t]he proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring." A vibrant and independent media encourages citizens to be actively involved in public affairs, to identify themselves with public institutions and to derive the benefits that flow from living in a constitutional democracy. Access to information and the facilitation of learning and understanding are essential for meaningful involvement of ordinary citizens in public life."[96]

59.1 The Supreme Court of Appeal has made clear that it is the rights of the public that are affected when expression is limited:

"It is important to bear in mind that the constitutional promise of a free press is not one that is made for the protection of the special interests of the press. . . . 'Press exceptionalism – the idea that journalism has a different and superior status in the Constitution – is not only an unconvincing but a dangerous doctrine.' The constitutional promise is made rather to serve the interest that all citizens have in the free flow of information, which is possible only if there is a free press. To abridge the freedom of the press is to abridge the rights of all citizens and not merely the rights of the press itself." [97]

60 The constitutional guarantee of freedom of expression is of paramount importance because it forms part of a "*web of mutually supporting rights."* [98] It is integral to the exercise and protection of other constitutional rights such as freedom of religion, belief and opinion, dignity, association as well as the rights to vote and assemble.[99]

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[96] *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) at para 28.

[97] *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* 2007 (9) BCLR 958 (SCA) at para 6 (emphasis added).

[98] *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC), para 27.

[99] *Islamic Unity v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC), para 24 citing *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC), para 8.

61 This court has emphasised the critical role played by the media and broadcasting services in advancing the right to freedom of expression in the following cases:

61.1 In *South African Broadcasting Corporation,* this court asserted that:

> *'Everyone has the right to freedom of expression and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom on information are respected. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate.'*[100]

61.2 In *Islamic Unity Convention,* this court stated:

> *"In the context of broadcasting, freedom of expression will have special relevance. It is in the public interest that people be free to speak their minds openly and robustly, and, in turn, to receive information, views and ideas..."*[101]

62 The High Court has emphasised the critical function of FTA broadcasters – the SABC in particular – in the context of the constitutional guarantee to freedom of expression in *SOS Support Public Broadcasting Coalition and Others.*[102] In that case, the court was required to determine two applications concerning the constitutionality and lawfulness of the powers that the Minister exercises in respect of the Directors of the SABC board. In deciding the matter, the court asserted that '*the freedom to receive or impart information or ideas relates to the right of the SABC to communicate without*

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[100] *South African Broadcasting Corp Ltd v National Director of Public Prominent and Others* 2007 (1) SA 523 (CC), para 24.

[101] *Islamic Unity v Independent Broadcasting Authority and Others 2002 (4) SA 294 (CC),* para 35.

[102] *SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others; SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others* [2017] ZAGPJHC 289.

interference, but also the right of the broader public to have access to the broadcast media."[103]

63 The High Court also emphasised the particular importance of FTA broadcasters - especially the SABC as the country's public broadcaster – in providing information to the majority of the population which includes the poor and most uneducated members of our society. It stated:

> *"The SABC has a unique role and responsibility to play as the public service broadcaster. The high rates of illiteracy in the country, the limited distribution and cost of newspapers and the cost of subscription television makes SABC the primary source of information for the majority of South Africans."*[104]

64 The High Court made it clear that it is the state that has the duty to ensure that the public has access to television.[105]

65 In light of the above, it is clear that the general public has a right to freedom of expression which includes the right to receive vital television content. In this regard, FTA broadcasters play a particularly important role since they are able to provide information and televised content to the poorest members of our society due to their free distribution basis. It is through FTA services that the poor, "*who are particularly vulnerable"* and whose *"needs require special attention*", [106] are able to access televised news, current affairs, sport, public service announcements, informal knowledge building

[103] Id, para 31.

[104] Id, para 40.

[105] Id, para 53 citing the European Court of Human Rights in the case of *Manole a.o v Moldova* application no. 13936/02 of 17 September 2009.

[106] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46, para 36.

and educational content provided by the SABC, e-tv and the FTA community TV broadcasters.[107]

66 Where the public and particularly the poor and most vulnerable members of our society are denied access to crucial FTA content, their right to freedom of expression and their right to receive information guaranteed by section 16(1)(b) of the Constitution is infringed. This is the inevitable consequence of the government's decision to expedite the completion of digital migration and effect ASO by 31 March 2022.

67 As we have explained above, it is established on the facts that millions of indigent South Africans will be left without any access to television for an indeterminate period of time as a result of the state's haste to implement the ASO. We submit that this constitutes a severe infringement of the rights of millions of South Africans to freedom of expression and to receive information through FTA services guaranteed by section 16(1)(b) of the Constitution.

68 There is no justification for this infringement. Given the millions who will be left without access to FTA services come 30 June 2022, it is inconceivable that the country is "ready" for the completion of digital migration. Pressing ahead with a fast-tracked implementation of the country's BDM policy and the proposed ASO date will result in a severe infringement of the rights of millions of the most vulnerable South Africans. They will be left without access to news, current affairs, public service announcements, and educational content.[108]

[107] MMA & SOS FA, p411 para 78.

[108] MMA & SOS FA, p411 paras 78 -79.

69 The Constitution does not permit the state to implement policy in a manner that results in impermissible infringements of rights in the Bill of Rights, no matter how laudable the aims of the policy. Implementation of policy in this way amounts to conduct inconsistent with the Constitution, which is invalid.[109] The courts are obliged to declare any conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency.[110]

70 Vodacom contends that the method by which the state has chosen to implement the date of ASO is executive action which is beyond the scope of judicial scrutiny.[111]

70.1 This proposition is not sustainable under our Constitution. At least since *TAC*, this court has made clear that it is appropriate for the courts to assess executive conduct, including policy and the implementation of policy, which breaches rights in the Bill of Rights:

> *"[98] This Court has made it clear on more than one occasion that, although there are no bright lines that separate the roles of the Legislature, the Executive and the Courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation. This does not mean, however, that Courts cannot or should not make orders that have an impact on policy.*
>
> *[99] The primary duty of Courts is to the Constitution and the law, 'which they must apply impartially and without fear, favour or prejudice'. The Constitution requires the State to 'respect, protect, promote, and fulfil the rights in the Bill of Rights'. Where State policy is challenged as inconsistent with the Constitution, Courts have to consider whether in formulating and implementing such policy the State has given effect to its constitutional*

[109] Section 2 of the Constitution.

[110] Section 172(1)(a) of the Constitution.

[111] Vodacom's AA to MMA & SOS, p1773 para 14.

obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution to say so. Insofar as that constitutes an intrusion into the domain of the Executive, that is an intrusion mandated by the Constitution itself."[112]

70.2 This Court held that government's refusal to provide Nevirapene to prevent mother-to-child HIV transmission was unreasonable and constituted a failure to respect, protect, promote and fulfil the rights the right to health care services, food and water and social security in the Bill of Rights. As a result, the Court was obliged to declare the decision invalid.[113]

70.3 In *Dladla*, this Court again made it clear that any attempt by the state to implement policy using means which infringe fundamental rights will be held to be invalid and set aside.[114]

71 The approach of the state respondents is particularly impermissible given that there are obvious less restrictive means available to the state for achieving the laudable outcomes sought to be obtained by digital migration. A properly managed extended date for ASO will not result in a rights infringement of this nature, severity and scale. And it need not result in interminable delays for digital migration.[115]

72 The limitation of rights which has resulted from the state respondents' chosen manner of implementing the ASO is not authorised by any law of general application. Without more, it is unlawful and invalid.[116] Accordingly, the government's decision to expedite

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[112] *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC) at paras 98-99.

[113] *TAC* at paras 99-100.

[114] *Dladla and Others v City of Johannesburg and Another* 2018 (2) SA 327 (CC) paras 47 – 51.

[115] Intervenors' RA to Vodacom's AA p2044 para 11.

[116] *Dladla* at para 52.

the completion of digital migration and effect ASO by 31 March 2022 violates the rights of millions of South Africans guaranteed by section 16(1)(b) of the Constitution and cannot be justified.

AN IMPERMISSIBLE RETROGRESSIVE MEASURE

73 The result of the rush to implement ASO is to remove existing access to free-to-air television broadcasts which gives effect to the right to expression.

73.1 Millions of indigent South Africans presently rely solely upon analogue broadcasts in order to receive free-to-air television broadcasts.

73.2 If the state had implemented an efficient and effective digital migration plan, it might have been possible for these indigent South Africans to obtain a STB in time. They would have been able to continue to receive FTA television broadcasts upon implementation of the date of ASO. However, the state did not conduct such a plan.

73.3 Switching off analogue transmissions in these circumstances will result in millions losing their existing access to FTA television and being plunged into television darkness for an indeterminate period.

74 This constitutes an interference with existing access to a fundamental right. This Court has held that such interference constitutes an impermissible retrogressive measure.

74.1 The state has a negative duty not to interfere with existing access to fundamental rights. In *Grootboom,* this court affirmed the following statement of the United Nations Committee on Economic, Social and Cultural Rights:

"'Nevertheless, the fact that realisation over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for State parties in respect of the full realisation of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, <u>any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources</u>."[117]

74.2 In *Juma Musjid*[118] this court explained that interference with existing access to a fundamental right constitutes a breach of a negative duty:

"Breach of this obligation occurs directly when there is a failure to respect the right, or indirectly, when there is a failure to prevent the direct infringement of the right by another or a failure to respect the existing protection of the right by taking measures that diminish that protection."[119]

75 Although the courts' consideration of retrogressive measures and impermissible breaches of negative duties has occurred primarily in the context of socio-economic rights, we submit that the prohibition on retrogressive measures applies with equal force in the context of other fundamental rights in the Bill of Rights. That this must be correct is made clear by section 7(2) of the Bill of Rights which provides that:

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[117] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 45, emphasis added.

[118] *Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amici Curiae)* 2011 (8) BCLR 761 (CC)

[119] *Juma Musjid* at para 58.

"The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

76 Any retrogressive measure which actively harms or undermines existing access to a fundamental right would constitute a breach of the duty to respect, protect, promote and fulfil the rights in the Bill of Rights and, at the very least, would require very careful consideration and justification.

77 In this matter no such justification has been offered.

IRRATIONALITY

Failure to investigate impact and an unreasonable deadline

78 As we have explained above, it is established on the papers that millions of indigent South Africans will be plunged into television blackout as a result of the state's rush towards the ASO date.

79 Astonishingly, neither the Minister nor ICASA has any idea how many South Africans will be affected.

79.1 It is clear from the answering affidavit filed on behalf of the Minister that neither the Minister nor ICASA has ever conducted any form of survey, investigation or research into the extent of the impact of its decision upon the expression and access to information rights of South Africans.[120]

79.2 The decision was taken in complete ignorance of its impact on fundamental constitutional rights.

[120] Minister AA to e.tv p1038 para 251.

79.3 The Minister confirmed this in a public interview given after the High Court judgment was handed down.[121]

80 It therefore seems that the state has no idea how many people will be without television as a result of its chosen date.

81 This court has held that a failure to consider a factor of this kind during the process leading to a decision may render both the process and the decision resulting from it irrational and unlawful.

82 The effect of such a failure is clearly illustrated in the case of the *Democratic Alliance v The President.*[122] In that matter:

82.1 The President appointed Mr Simelane as National Director of Public Prosecutions. In doing so, the President did not consider the Ginwala Commission's criticisms of Mr Simelane's evidence.[123]

82.2 It was common cause that the appointment constituted executive action and the standard of review was that of rationality. The President was accordingly required to establish that the means employed to make the appointment was rationally connected to the purpose for which the power had been conferred.[124]

82.3 This court held that both the process followed in reaching a decision and the decision itself must be rational.[125]

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[121] MMA & SOS application for direct access p2498 para 36.2.

[122] *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC).

[123] *DA v President* at paras 6 and 11.

[124] *DA v President* at para 12.

[125] *DA v President* at para 34.

82.4 Under the heading "Rationality and ignoring relevant factors", this court explained how a failure to take into account relevant factors rendered the process leading to a decision irrational:

> *"If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the means to achieve the purpose for which the power was conferred. And if that failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole. There is therefore a three-stage enquiry to be made when a court is faced with an executive decision where certain factors were ignored. The first is whether the factors ignored are relevant; the second requires us to consider whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and the third, which arises only if the answer to the second stage of the enquiry is negative, is whether ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational.*
>
> *I must explain here that there may rarely be circumstances in which the facts ignored may be strictly relevant but ignoring these facts would not render the entire decision irrational in the sense that the means might nevertheless bear a rational link to the end sought to be achieved. A decision to ignore relevant material that does not render the final decision irrational is of no consequence to the validity of the executive decision. It also follows that if the failure to take into account relevant material is inconsistent with the purpose for which the power was conferred, there can be no rational relationship between the means employed and the purpose."*[126]

83 As a result, where a decision of this kind is reviewed on the basis that the process leading to it was irrational, the question is to be answered by determining three issues:

83.1 First, whether the factors ignored were relevant;

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[126] *DA v President* at paras 39 and 40.

83.2 Second, whether ignoring those factors is rationally related to the purpose for which the power is conferred;

83.3 Third, whether ignoring those factors colours the entire process with irrationality.

84 In this matter, this three-stage test is plainly met.

84.1 First, the Minister ignored the impact of the determination of the ASO date on the rights of millions of indigent South Africans. In our constitutional democracy this is a highly relevant and material factor.

84.2 Second, the Minister's failure to consider this information is not rationally related to the purpose of the power.

84.3 Third, the failure to consider the expression and information impacts of the decision colour the entire process with irrationality and has produced an unconstitutional outcome.

85 As this court explained in *DA v President*, conducting this analysis does not entail breaching the doctrine of separation of powers.[127]

86 The irrationality of the process adopted by the Minister was compounded and exacerbated by her decision on 5 October 2021, without any notice to anyone and without prior consultation, to set a final three-week deadline for registration for assistance with a STB.

[127] *DA v President* paras 41 – 45.

87 The effect of that decision was to ensure that millions of indigent South Africans would not be able to register in time and have no adequate or reasonable opportunity to register for assistance in time.

88 All those who were unable to comply with the unreasonable and unlawfully imposed three-week deadline would find themselves out in the cold for at least three to six months.

Failure to offer any reasons

89 As we have explained above, at best for the respondents, millions of indigent South Africans will be plunged into television darkness for at least three to six months after the date of ASO. This is a significant constitutional harm and a clear limitation of the rights of freedom of expression and access to information.

90 Because the decision to determine ASO has been reviewed for its rationality, this court is required to assess whether there is a rational connection between the decisions sought to be reviewed and the purposes they aim to achieve. To assess this in the context of a review of executive action, this court must look at the reasons offered for the decision because:

90.1 A decision which is not founded upon reason is arbitrary and is accordingly unconstitutional and irrational. This court has held that:

"arbitrariness is inconsistent with the rule of law which is unconstitutional".[128]

[128] *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC) at para 24.

90.2 It is well established that "*rationality entails that the decision is founded upon reason - in contradistinction to one that is arbitrary*."[129]

91 The Minister has failed to provide any reason for:

91.1 Announcing on 5 October 2021, without any advance warning, that there was a hard three-week deadline to register for assistance for a STB;

91.2 Choosing the end of March 2022 (and now the end of June 2022) as the date of ASO.

92 If the state had put up cogent and compelling reasons for these decisions, this court *might* find that the decisions were rational, reasonable and justifiable limitation of fundamental rights. However, despite filing hundreds of pages of answering affidavits before the High Court, neither the Minister nor ICASA offered any justification at all for either of these decisions.

93 There is no substantive justification at all in the papers for either of these decisions. The most that the Minister has done is to tell the court that further delays are bad and that it is, in general, urgent that the spectrum be freed up for the benefit of all South Africans.[130] There is no specific justification either for the choice of the end of March 2022 as the date of ASO or for the October 2021 imposition of a final three week deadline to register.

94 We submit that the true reason for the selection of the end of March date was twofold:

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[129] *Minister of Home Affairs and Others v Scalabrini Centre and Others* 2013 (6) SA 421 (SCA) at para 65.

[130] Minister AA to e.tv p1029 para 222.2 and p1075 para 415.

94.1 First, the President announced in his State of the Nation Address that ASO would occur by the end of March 2022 and the Minister then retrofitted the process to achieve that date to fit with the date the President chose.[131]

94.2 Second, ICASA wished to conduct the spectrum auction, which it could only do once it cleared various interdicts and other litigation obstacles preventing it from doing so.

94.3 In the absence of any cogent justification offered for the ASO date or the three-week deadline, the decisions are arbitrary and irrational.

95 As a result, the ASO date selection had nothing to do with the state of readiness of the country. The state did not even bother to investigate how many millions of South Africans had migrated by that date.

DIRECT ACCESS AND URGENCY

96 The Minister does not oppose the granting of leave to appeal, only the merits of e.tv's and MMA and SOS's applications.[132] The Minister agrees that the applications must be determined urgently.[133] ICASA opposes the applications on the merits, and in respect of direct access and urgency.[134]

97 The application is urgent:

[131] Minister AA to e.tv p1035 para 243; 1081 para 445; 1070 para 385.

[132] Minister AA in direct access applications p2567 para 10.

[133] Minister AA in direct access applications p2567 para 8.

[134] ICASA AA in direct access applications p2545 para 4.

97.1 The order of the High Court extended the ASO date to 30 June 2022 – a mere two months away. ICASA says it has already begun to issue licences and expects successful spectrum auction bidders to pay their purchase and licence fees by 7 May 2022, with the provisional assignment of spectrum coming to an end on 30 June 2022.[135]

97.2 Unless the matter is determined urgently, an indeterminate number of people will be plunged into television darkness for an indeterminate period. The implementation of the ASO date is irreversible.[136]

97.3 The High Court held that the matter was urgent.[137]

98 For direct access to be granted, proof of exceptional circumstances, in the form of sufficient urgency or public importance, and proof of prejudice to the public interest or the ends of justice and good governance, must demonstrably be established.[138] The nature of exceptional circumstances will depend on the facts of each case, but often include urgency, prospects of success on appeal, the public interest and the saving in time and costs.[139]

98.1 This appeal involves only constitutional issues – the impact on the expression rights of millions of South Africans requiring government assistance to continue receiving access to FTA television broadcasts and the lawfulness of

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[135] ICASA AA in direct access applications p2560 para 47.

[136] MMA & SOS application for direct access p2520 para 70.4.

[137] MMA & SOS application for direct access p2519 para 70.1.

[138] *United Democratic Movement v Speaker, National Assembly and Others* 2017 (5) SA 300 (CC) at para 23.

[139] *Public Protector v Commissioner for the South African Revenue Service and Others* 2022 (1) SA 340 (CC) at para 16.

the process conducted by the Minister leading to the determination of the ASO date.[140]

98.2 It is undisputed that there are no material disputes of fact in the matter.[141]

98.3 This appeal raises critical issues of the utmost public importance – the right to freedom of expression enshrined in section 16 of the Constitution, and the lawfulness of a government process which will severely limit the existing rights of millions of South Africans who face the very real prospect of being plunged into television darkness for an indeterminate period of time.[142]

REMEDY

The review relief

99 In paragraph 2.3 of the notice of motion[143], MMA and SOS sought an order that, to the extent that the Minister had determined the date of ASO, declaring that determination unlawful and reviewing and setting it aside.

100 In terms of section 172 of the Constitution, a court deciding a constitutional matter within its power:

100.1 Must declare that conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency;[144] and

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[140] MMA & SOS application for direct access p2518 paras 68.1 and 68.3; not addressed in Minister AA; denied in ICASA AA p2548 para 13.

[141] MMA & SOS application for direct access p2518 para 68.2; not addressed in Minister AA or in ICASA AA.

[142] MMA & SOS application for direct access p2519 paras 69.1 and 69.2; not addressed in Minister AA or in ICASA AA.

[143] NOM p376 para 2.3.

[144] Section 172(1)(a)

100.2 May make any order that is just and equitable.[145]

101 It is established that the Minister's chosen method of implementation of ASO, and in particular, the selection of the ASO date of the end of March 2022, is unlawful and unconstitutional. Accordingly, the Court should declare invalid the Minister's determination of the ASO date. We submit the High Court ought to have done so.

102 The state respondents contended before the Full Court that the review relief was incompetent because the decision to determine the ASO had not yet been finally taken at the time that the notice of motion was issued. They contended that the review was not ripe. This defence is untenable.

102.1 First, it is clear that the Minister's delay in gazetting the ASO date was a contrivance designed to stymie and defeat the litigation. It was always clear that the state had chosen the end of March as the date of ASO. The formalistic step of gazetting a decision which had long since been taken does not render the decision immune from review.

102.2 Second, at best for the state, the objection is that at the time the notice of motion was issued, the matter was not ripe, but by the time the matter was heard in the High Court it had become ripe. After the review was launched and the applicants had filed their heads of argument, but before the review was heard, the Minister gazetted the date and placed it before the full court (which was disclosed in the Minister's heads of argument).[146] The date was indeed 31 March 2022. Even the Minister acknowledged that once that

[145] Section 172(1)(b)

[146] Minister's heads of argument before the High Court Caselines p021-225 para 6. The announcement was made on 28 February 2022 in Government Notice No. 1804 in GG 45984.

determination happened its rationality and reasonableness could be evaluated.[147]

102.3 Third, the SCA rejected a similar defence in *Sneller*.[148] In that matter a tenderer had been excluded from a tender process, but the decision had not yet been communicated to it. It nonetheless brought a review of the decision.

102.4 The SCA, per Plasket JA held that:

> *"[20] Generally speaking, whether an administrative action is ripe for challenge depends on its impact and not on whether the decision-maker has formalistically notified the affected party of the decision or even on whether the decision is a preliminary one or the ultimate decision in a layered process. Many examples spring to mind but one will suffice. If, for instance, a liquor board cancelled a trader's liquor licence without informing him or her, and the police then took steps to close the premises or seize the trader's stock, I have no doubt that the decision would be ripe for challenge the moment those steps were threatened. To suggest that the trader is without a remedy and is precluded from protecting his or her rights until the liquor board has communicated the decision to him or her only has to be stated to be rejected. Ultimately, whether a decision is ripe for challenge is a question of fact, not one of dogma."*[149]

103 We submit the review relief ought to have been granted by the High Court and ought to be granted by this Court.

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[147] Minister AA to e.tv p1118 para 648.2.

[148] *Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman, State T ender Board v Sneller Digital (Pty) Ltd and Others* 2012 (2) SA 16 (SCA).

[149] *Sneller* at para 20.

The consequential just and equitable relief

104 The critical question then is what constitutes an appropriate just and equitable remedy. This court has established the following principles in respect of relief granted under section 172(1)(b) of the Constitution:

104.1 What is just and equitable depends on the circumstances of each case.[150]

104.2 The default position requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented.[151]

104.3 The court must provide effective relief for infringements of constitutional rights.[152] In *TAC*, this court held that:

> *"Where a breach of any right has taken place, including a socio-economic right, a Court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case. Where necessary this may include both the issuing of a mandamus and the exercise of supervisory jurisdiction."*[153]

104.4 In the exercise of this wide remedial power, this Court has highlighted the need for courts to be pragmatic in crafting a just and equitable remedy.[154]

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[150] *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae)* (No 2) 2003 (1) SA 495 (CC) at para 115.

[151] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* 2014 (4) SA 178 (CC) ("Allpay II") at para 30.

[152] *Allpay II* at para 42.

[153] *Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC)* at para 106.

[154] *Electoral Commission v Mhlope & Others* 2016 (5) SA 1 (CC) at para 132.

105 There is no doubt that this Court has ample and flexible remedial power to design a remedy which appropriately balances the competing issues at stake and resolves the true issues between the parties. [155]

106 In *Electoral Commission*[156] this court held that:

> *"Section 172(1)(b) clothes our courts with remedial powers so extensive that they ought to be able to craft an appropriate or just remedy even for exceptional, complex or apparently irresoluble situations. And the operative words in this section are "an order that is just and equitable". This means that whatever considerations of justice and equity point to as the appropriate solution for a particular problem, may justifiably be used to remedy that problem. If justice and equity would best be served or advanced by that remedy, then it ought to prevail as a constitutionally sanctioned order contemplated in section 172(1)(b).*[157]

107 MMA and SOS seek the following just and equitable relief:

107.1 First, before the Minister determines a date for ASO, there must be a process of consultation, including with MMA and SOS.[158]

107.2 Second, before ASO is completed, the Minister must comply with her constitutional obligations to provide those South Africans presently reliant on analogue broadcasting with alternative means to access terrestrial broadcasting.[159]

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[155] *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC).

[156] *Electoral Commission v Mhlope & Others* 2016 (5) SA 1 (CC).

[157] Id, para 132.

[158] NOM p375 para 2.1.

[159] NOM p375 para 2.2.

107.3 Third, the Minister must file a report with the High Court to explain the steps taken to provide those alternative means.[160]

108 We submit that the relief sought by MMA and SOS constitutes just and equitable relief aimed at remedying the constitutional deficiencies in the state respondents' approach to ASO.

108.1 It does not seek to prevent ASO for an indeterminate period of time. It merely seeks to ensure that, before ASO is concluded, the Minister has conducted a proper consultation process in order to establish the extent of the impact of her decision and make adequate alternative arrangements for those currently reliant on analogue access to FTA television.

108.2 There is no reason why compliance with these requirements should take months or years. A lawful consultation can be conducted quickly, provided it is properly advertised and efficiently organised. If the Minister's averments under oath about the extent of the nation's readiness are true, making adequate alternative arrangements for those who need it will not be a difficult task.

108.3 Requiring the Minister to comply with her constitutional obligations before finalising the ASO process is the only effective way to prevent the breaches of the right of freedom of expression from occurring and becoming irreparable. If this relief is not granted, millions of indigent South Africans will be plunged into an information vacuum for an indeterminate period of time.

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[160] NOM p376 para 2.4.

109 In relation to the relief requiring the Minister to report to the High Court on the steps taken to satisfy these obligations:

109.1 This is not unduly onerous or a breach of the separation of powers. As Budlender and Roach emphasise, such reporting duties "*should not be seen as a punishment of government for defiance of the Constitution"* but are *"simply a means of ensuring effective compliance with the Constitution, which must be the core concern of the courts*."[161]

109.2 The SCA has held that reporting obligations can help protect the most vulnerable:

> *"It goes without saying that the refugees and asylum seekers encountered here are amongst those who are most in need of protection. They do not have powerful political constituencies and their problems, more often than not, are ignored by government. Previous orders of our courts appear to have done little to make their problem visible and to cause the relevant authorities to comply with their obligations…. Given the intransigence on the part of the relevant authorities, it thus seems important to provide a remedy to the respondents that is both effective and meaningful."*[162]

109.3 In *Mwelase*,[163] this court echoed these principles, albeit in a different context. The Court affirmed that "*[t]he vulnerability of those who suffer most from these failures underscores how important it is for courts to craft effective, just and equitable remedies, as the Constitution requires them to do.*" It added that in such "*cases of extreme rights infringement, the ultimate boundary lies at court control of the remedial process. If this requires the temporary, supervised oversight of*

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[161] 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable?' (2005) 122 *SALJ* 325 at 350.

[162] *Minister of Home Affairs and Others v Somali Association of South Africa and Another* 2015 (3) SA 545 (SCA) at para 37.

[163] *Mwelase and Others V Director-General, Department of Rural Development And Land Reform And Another* 2019 (6) SA 597 (CC).

administration where the bureaucracy has been shown to be unable to perform, then there is little choice: it must be done."[164] In such cases, the "*bogeyman of separation of powers concerns*" should not cause courts to shirk their constitutional responsibility to grant effective remedies to protect constitutional rights.[165]

110 We accordingly submit that a proper case has been made out for the relief sought in MMA and SOS' notice of motion.

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6 May 2022

[164] Ibid at para 49.

[165] Ibid at para 51.

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