IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 51159/2021

In the matter between

e.tv (PTY) LTD	Applicant
MEDIA MONITORING AFRICA	First Intervening Applicant
SOS SUPPORT PUBLIC BROADCASTING	Second Intervening 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

E.TV'S HEADS OF ARGUMENT

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Glossary of terms

Parties

e.tv – e.tv (Pty) Ltd is the applicant

ICASA – Independent Communications Authority of South Africa, is the second respondent

MMA – Media Monitoring Africa, is the first intervening applicant

The **Minister** – the Minister of Communications and Digital Technologies is the first respondent – unless otherwise indicated no distinction is drawn between the various different holders of the office in the periods discussed in this matter

SOS – SOS Support Public Broadcasting is the second intervening applicant

Vodacom – Vodacom (Pty) Ltd is the sixth respondent

Terms

ASO – analogue switch-off, the switching off of the analogue signal utilised for television broadcasting

ASO date – the date of analogue switch-off, determined and gazetted by the Minister, in terms of the Digital Migration Regulations, which brings an end to the dual illumination period and digital migration process

Digital migration process – the transition from analogue broadcasting to digital broadcasting, which will end on the ASO date determined and gazetted by the Minister in terms of the Digital Migration Regulations

DTT – digital terrestrial television, land-based (terrestrial) television broadcasting of television signal in a digital format

Dual illumination period – the period that commenced on the date that digital terrestrial television was switched on (1 February 2016) and which will end on the ASO date as determined and gazetted by the Minister

Set top box – a device necessary to receive digital television (broadcasting) signal on a standard analogue TV

Legislation

Digital Migration Regulations – promulgated by ICASA in terms of GN 1070 in *GG* 36000 of 14 December 2012

The **ECA** or **Electronic Communications Act** – the Electronic Communications Act 36 of 2005

PAJA – the Promotion of Administrative Justice Act 3 of 2000.

A. INTRODUCTION AND OVERVIEW

1. At its heart, this case concerns millions of indigent and vulnerable South Africans[1] who are reliant on analogue television broadcasting to access news, information and entertainment. The Minister[2] now seeks hurriedly and unreasonably to "*switch off*" their access. In so doing, the Minister is rendering Government's digital migration process unfair, irrational and unreasonable. She is violating her constitutional obligations, engaging in retrogressive steps which deprive millions of South Africans of their rights, and breaching Government's own public promises to assist indigent South Africans.

2. This case is not about holding up the important process of migration needlessly: it is about ensuring that the process does not come at the real expense of millions of the country's population.

3. The digital migration process by its very nature is the process of migrating our nation and its people to the devices that will allow them to access digital television, once analogue television is switch-off.

4. In the Minister's unreasonable haste, more than **8 million** indigent South Africans, who are reliant on the Government to migrate them, and who have been

[1] The Minister's affidavit puts the number at 2.5 million households – relying on StatsSA data, the Minister records that there are 3.75 million households eligible for Government assistance, and that of those 3.75 million households, 1,2 million had registered and would be provided with a box by 31 March 2022. This means that some 2.5 million qualifying households will not be provided a set top box before the migration happens. (Minister's AA, paras 256-259; Caselines 009-79 – 009-80). According to StatsSA, there are approximately 3,3 individuals per household in South Africa (Intervening Applicants' RA, para 9; Caselines 019-6). This means that approximately 8 250 000 indigent people will be left without access to free to air television services.

[2] The Minister of Communications and Digital Technologies.

promised the necessary social assistance[3] (Government-provided-set-top boxes to access digital television), are now to be left behind, while the wealthier members of our society migrate into a new digital future. That is neither constitutionally permissible nor reasonable. It is not how digital migration of a society is supposed to work, certainly not when measured against the standards of the Constitution.

5. No true digital *migration* of South Africa will have occurred, if more than 8 million South Africans are left cut-off, without access to this new digital future, and stranded with their old analogue televisions that can no longer receive broadcasts.

6. To avoid this unconstitutional state of affairs e.tv (supported by MMA and SOS) seeks relief that will make certain that this digital migration process is not rushed to completion recklessly but is finalised under direction of this Court in a way that ensures that the Minister meets her constitutional obligations.

7. In particular, e.tv seeks (a) declaratory relief pertaining to the minimum requirements that must be met by the Minister prior to "switching off" analogue television;[4] (b) relief directing the Minister to report to the Court regarding the

[3] Our Constitutional Court has heralded that: "One of the signature achievements of our constitutional democracy is the establishment of an inclusive and effective programme of social assistance. It has had a material impact in reducing poverty and inequality and in mitigating the consequences of high levels of unemployment. In so doing it has given some content to the core constitutional values of dignity, equality and freedom" (see para 1 of Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening) (CCT48/17) [2017] ZACC 8; 2017 (5) BCLR 543 (CC); 2017 (3) SA 335 (CC) (17 March 2017)). As to the nature of social assistance, "[s]ocial assistance is customarily defined as a benefit in cash or in-kind, financed by the state (national or local) and usually provided on the basis of a means or income test." Howell, F., 2001, 'Social Assistance – Theoretical Background', in Ortiz, 'Social Protection in the Asia and Pacific', p 258. (available – https://think-asia.org/handle/11540/5503) .

[4] NOM, prayers 2 and 3; Caselines 001-2 and 001-3.

steps that have been taken to ensure, inter alia, that members of the public who are currently reliant on analogue broadcasting services are provided with access to set-top boxes to enable them to continue to be in a position to access free-to-air broadcasts without subscription or charge following digital migration, as the Government promised it would do.[5]

8. It bears emphasis, that the state and organs of state, such as the Minister, only exist to give practical expression to the constitutional rights of citizens and are obliged to ensure that the aspirations held out by the Bill of Rights are realised.[6] Therefore, the Courts are duty bound to insist that organs of state do so and remain accountable to those on whose behalf the public powers and functions are exercised and performed.[7]

9. That is what e.tv, MMA and SOS ask the Court to do in these proceedings, in order to ensure that the Minister's public powers and functions are exercised and performed constitutionally, for the protection of millions of South Africans.

10. In summary, the Minister's unreasonable conduct and inaction find their context in the digital migration process. This process began over a decade ago. But it has moved in fits and starts, and stalled for long periods. Yet now, after years of governmental inaction the Minister is rushing in haste to "complete" digital migration by 31 March 2022. But, as we explain, the Minister had failed to take the reasonable and adequate steps to ensure that millions of indigent South Africa are not left behind. Instead of consulting interested parties and the public

[5] NOM, prayers 2 and 3; Caselines 001-2 and 001-3.
[6] Mashongwa v PRASA 2016 (3) SA 528 (CC) at para 25.
[7] Khumalo and Others v Holomisa [2002] ZACC 12; 2002 (5) SA 401 (CC) (**Khumalo**) para 29.

about the process and the timelines, and without conducting any analysis to determine how many South Africans would be left behind by her decision, the Minister raced the country towards the 31 March 2022 deadline, and sprung on an unsuspecting public 31 October 2021 as the date for registration to receive a free set-top box. The Minister's actions are plainly unconstitutional, unreasonable, irrational, and unfair. She has failed to consult properly with the public in relation to both the date for analogue switch-off, and the belated announcement to impose an early cut-off date for the indigent to register for Government installed set top boxes – which the Government has repeatedly committed to provide to *all* indigent households. Now, on account of the registration cut-off – imposed with no more than three weeks' notice (and for the majority of beneficiaries much less, if any notice) – the Minister intends to provide less than one third who qualify with the required set top boxes (1.2 million out of 3.7 million).[8]

11. Absent Court intervention to discipline the process, the Minister's conduct will lead to the retrogressive removal of millions of indigent people's rights, inter alia, including to freedom of expression, currently enjoyed through access to analogue broadcasting.

12. We proceed in these heads of argument, in Part B, to contextualise why the relief sought is necessary by dealing with the relevant legal framework and the process of digital migration from 2006 to date.

13. Thereafter, in Part C, we turn to the Minister's constitutional obligations. We

[8] Minister's AA, paras 256-259; Caselines 009-79 – 009-80.

highlight the requirements of section 7(2) of the Constitution: the Minister must take reasonable and effective steps to respect, protect, prompt and fulfil constitutional rights, and the Minister may not take steps that deprive persons of their rights, unless those steps are reasonable and justifiable. We deal with the ***KZN Principle***,[9] which binds the Government to its public promises, seriously and lawfully made. We then set out the requirements of *meaningful* consultation.

14. Next, in Parts D and E, we show how the analogue switch-off process that the Minister has embarked upon fails in material and meaningful ways to comply with these obligations.

15. Finally, in Part F, we deal with the relief that e.tv seeks, and demonstrate that both the declaratory and reporting relief is necessary and appropriate in the circumstances.

B. THE DIGITAL MIGRATION PROCESS

16. The facts pertaining to the digital migration process are largely common cause and are set out by e.tv[10] and the Minister[11] in their respective affidavits. Rather than simply repeating those facts, we provide a brief introduction to explain the nature of spectrum and what the move from analogue to digital broadcasting entails. We will then tell the story of digital migration in South Africa through three lenses:

[9] KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal 2013 (4) SA 262 (CC).
[10] FA, para 67 and following; Caselines 001-36.
[11] Minister's AA, para 49 and following; Caselines 009-16.

16.1. The years of dithering by the Government;

16.2. The public promises regarding the provision of set top boxes as a material predicate for a lawful and constitutionally-appropriate migration process; and

16.3. The current state of play – the scramble, the indigent analogue viewers that will be left behind, and why spectrum for mobile telecommunications operators can continue to be licensed.

What is spectrum?

17. The Electronic Communications Act defines radio frequency spectrum as "*the portion of the electromagnetic spectrum used as a transmission medium for electronic communications and broadcasting.*"[12] This is the portion of the electromagnetic spectrum having a frequency below 3000 GHz.

18. Radio frequency spectrum is a limited or finite resource because, given present technology, there is only a finite portion available for beneficial uses at any one time, and only one entity can utilise a given frequency at a time, otherwise there will be interference.[13]

19. Given its scarcity (and value) spectrum must be managed in the public interest. Unrestricted use of radio frequency spectrum would result in chaos. Moreover, given that it is a finite resource, its use must be managed to ensure the greatest

[12] Section 1 of the ECA.

[13] Minister of Telecommunications and Postal Services v Acting Chair, Independent Communications Authority of South Africa and Others; Cell C (Pty) Ltd v Acting Chair, Independent Communications Authority of South Africa and Others and Others [2016] ZAGPPHC 883 (30 September 2016) (**Minister of Telecommunications**) at para 11.

benefit for society as a whole. The US Supreme Court recognised these principles more than 50 years ago in its landmark decision in ***Red Lion Broadcasting Co v FCC***[14] and they were reiterated in this Court by Sutherland J (as he then was) in ***Minister of Telecommunications***.[15]

20. To define it in simple terms, digital migration is a process of moving (migrating) from the use of analogue forms of broadcasting to digital ones. At the end of the digital migration process, which terminates on the analogue switch off date determined by the Minister, all analogue television broadcasting will cease.[16] When this occurs, e.tv's current allocation of the necessary analogue frequency spectrum for its analogue broadcasting will come to an end. There will be no more analogue broadcasts of e.tv's channel or any other channels.

The Digital Migration Process – more than a decade of dithering

21. The process of digital migration commenced some 14 years ago in 2006,[17] and has been ongoing (in the Minister's words) for "*quite some time*"[18] – 16 years to be exact. The original aim was for the process to be completed in 2011, but the programme suffered what the Minister has described as "*serious setbacks during the technology negotiation processes*".[19]

22. The next date proposed for the completion of the digital migration process was

[14] Red Lion Broadcasting Co v FCC 395 U.S. 367 (1969) 375 – 376, 387 – 389.

[15] Minister of Telecommunications supra at para 11.

[16] As provided in Regulation 3(6) of the Digital Migrations Regulations, "[E]ach terrestrial television broadcasting service licensee shall ensure that the analogue broadcast signal of its existing television channel or channels is switched off by the last day of the dual illumination period." The dual illumination period ends on the date of analogue television switch-off as determined and published by the Minister (see Regulation 1, read with Regulation 3(1)).

[17] FA, para 67; Caselines 001-36.

[18] Minister's AA, para 9; Caselines 009-6.

[19] FA, para 67; Caselines 001-36.

the ITU-set date for Region 1 of June 2015, and published in the 2008 Broadcasting Digital Migration Policy (gazetted in September 2008).[20] The 2015 deadline (together with numerous later deadlines) was also missed by the Minister and ICASA. In its founding affidavit in the Auction Review application, filed on 29 January 2021, e.tv submitted that the digital migration process had "*ground to a halt*". This was not denied by ICASA in its answering affidavit in Part B (the interdict).[21]

The Digital Migration Regulations

23. In December 2012, ICASA promulgated the Digital Migration Regulations.[22] The purpose of the regulations is to regulate the digital migration (the transition from analogue broadcasting to digital broadcasting) of the existing television channels and to prescribe the conditions for the assignment of channel capacity for the purposes of digital migration.[23]

24. The Regulations require "*progressive dual illumination of the SABC channels, e.tv channel, and M-Net channels during the dual illumination period to achieve the phased digital migration of those channels in the whole of the Republic*."[24]

25. As explained in the Digital Migration Regulations, dual illumination "*means the simultaneous analogue broadcasting and digital broadcasting of an existing television channel on a simulcast basis*" and, the "*dual illumination period*" is "*the period commencing on the date of Digital Terrestrial Television switch-on, as*

[20] No. 31408 Government Gazette, 8 September 2008.
[21] FA, para 70; Caselines 001-37.
[22] GN 1070 in *GG* 36000 of 14 December 2012.
[23] Regulation 2, read with definitions in Regulation 1.
[24] Regulation 3(3).

determined and published by the Minister and ending on the date or dates of analogue television switch-off as determined and published by the Minister".[25] The dual illumination period commenced on 1 February 2016.[26]

26. From 1 February 2016, e.tv, SABC and other formerly analogue-only television stations (including a number of community stations) have broadcast both via analogue and digital means. This means that a portion of the television audience has been accessing such broadcasts digitally, and another portion via analogue. Upon the analogue-switch off date, only digital broadcasts will be available. Currently 36% of the television audience in South Africa, who are mostly indigent and reliant on the Government to provide them with set-top boxes, still access television solely through analogue broadcasting.[27]

27. The process for analogue switch-off is set out in the Regulations. The Regulations make it clear that it is the *Minister* who is the relevant statutory decision maker, and no other member of the executive. It is the Minister that must determine the date for analogue switch off, and must publish that date in the gazette.[28] That brings an end to the digital migration process.

28. At the time of drafting these heads of argument, the Minister has not yet gazetted the switch-off date, although as we set out below under the heading "*the scramble to switch-off*", the Minister appears to be conducting herself *as if* the date is set – even though the legal requirements for that determination have not

[25] Regulation 1.
[26] As gazetted by the then Minister of Communication in Gazette No. 39642 of 01 February 2016.
[27] FA, para 152; Caselines 001-62.
[28] Regulation 3(1) provides 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."

been met.

The public promises

29. Throughout the 16-year process of digital migration, the Government and the various incumbent Ministers have faced the fact that many millions of South Africans cannot afford to migrate to digital, without social assistance. For that reason, the Government repeatedly and publicly committed to the provision of set-top boxes (or other means of accessing digital broadcasts) for those who are reliant on analogue broadcasting and cannot afford to self-migrate *before* the analogue switch off takes place.

Government policy to provide digital access to "all citizens" as an essential tool to meet "poverty reduction goals"

30. In the 2008 Broadcasting Digital Migration Policy,[29] the Minister of Communications acknowledged as a "*key policy decision*" that "*as a means to achieve universal service and access in digital terrestrial broadcasting, basic STBs will be made affordable*" and ICASA undertook that "*access to public broadcasting services by all South Africans, regardless of their economic status, remains a fundamental principle that should continue to be upheld in the digital broadcasting era*".[30] The Policy records further:

> "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 government services for all citizens, especially those who thus far have

[29] Annexure PR24 to the FA; Caselines 001-230.

[30] P. 21 and 22 of the 2008 Broadcasting Digital Migration Policy; Caselines 001-230.

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."

31. We emphasise: as a means to *"meet our poverty reduction goals*", the Government is committed to "*bridging the digital divide*" for the poorest TV-owning households. It is, therefore, clear that the Government's commitment to provide set top boxes for indigent households, is meant as a form of social assistance, consonant with the Government's obligations under section 27 of the Constitution. Indeed, as we indicate below, the Government has made it clear that those who qualify for set top boxes are social grants beneficiaries and those earning below a certain threshold.

32. This Policy has been amended over time, but the commitment to providing set-top boxes to the poorest in society remains (and has in fact strengthened from a proposed subsidy to a commitment that set-top boxes will be provided at no charge to those who qualify). In the 2012 amendment,[31] the "*Universal Service and Access Fund*" was introduced, and the Government's commitment was recorded as follows:

"2.1.4 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. This support by Government should be seen as part of its commitment to bridging the digital divide in South Africa. The Government has therefore decided, as mandated by section 88 (1) (a) of the Electronics Communications Act (ECA), to subsidise poor TV households through the Universal Service and Access Fund (USAF)…"

[31] Annexure PR25 to the FA; Caselines 001-233.

33. In the Amendment of Broadcasting Digital Migration Policy published by the Minister on 18 March 2015, the hallmark of a successful digital migration was described as: "*Universal access, the availability and accessibility of broadcasting services to all citizens are a key component of successful digital migration.*"[32]

34. This underlines the crucial theme of this entire case: one cannot have a successful and constitutionally compliant digital *migration* of South Africa, if millions of South Africans are not digitally migrated, but are left behind.

35. The Government was furthermore clear that its commitment in this regard was not to leave anyone behind, but rather to be inclusive of all those who qualified for assistance. The 2015 Amendment to the Broadcasting Digital Migration Policy records further:

> "2.1.3 … In order for households to continue to receive television services on their current analogue TV sets after the analogue signal is switched-off, set-top boxes (STBs), which convert the digital signals into analogue signals, are required. The total TV-owning households in South Africa are estimated at 13 million, of which approximately 65 per cent rely exclusively on free-to-air broadcasting services".[33]

Government's continued public promises in the media and to the public

36. Consistent with these policy instruments, the Government has over the past eight years repeatedly made public promises and issued statements and assurances that it will provide free set-top boxes to enable those who cannot afford to purchase them to access free-to-air programming via digital broadcasting.[34]

[32] Annexure PR27 to the FA; Caselines 001-274.
[33] Annexure PR27 to the FA; clause 5; Caselines 001-306.
[34] Annexure PR29 to the FA; Caselines 001-308.

37. Indeed, in the "Broadcasting Digital Migration Factsheet" currently available on the Government's official website, the Government once against undertakes to "*provide free STB* ***to more than 5 million poor household television owners***".[35]

38. In particular, the Government has confirmed that it will provide set top boxes to those households that are dependent on social grants or earn R3500 per month or less.[36] For instance, in a press release on 21 October 2021 in relation to applying for Government set top boxes, it stated that: "*Qualifying households do not have to pay anything for the set-top box — it is free…..If you receive a SASSA grant, you do not need to bring proof of income. Proof that you receive a SASSA grant is adequate…..If you are a SASSA beneficiary and you have a working television set, remember that you qualify for the subsidised set-top box*."[37]

39. In the Minister's Media Statement dated 5 October 2021, released on 6 October 2021, the Minister affirmed her commitment to universal access to digital services prior to analogue switch off, and she acknowledged that without an STB people would not be able to receive their broadcasts. The Minister states:

> "To give effect to a successful Digital Migration and Analogue Switch-off processes, we have to ensure that everyone who needs to migrate from analogue to digital is ready to do so and are (sic) not negatively affected by the Switch-Over from Analogue to digital. The Analogue Switch-off messages will scroll on

[35] Annexure PR28 to the FA; Caselines 001-308. See "Broadcasting Digital Migration Factsheet" available https://www.gov.za/sites/default/files/bdm-fact-sheet.pdf, accessed on 14 February 2022.

[36] See Government's announcements released by the South African Post Office on 21 October 2021, Annexure PRA1 to Replying Affidavit, Caselines 020-68; May 2021 Press releases, Annexure PR29; Caselines 001-313 and 001-314; June 2021 news article, PR29, Caselines 001-315 (initially the threshold was set in some documents as R3200, now it has been confirmed as R3500).

[37] PRA1 to e.tv's RA, Caselines 020-68, our emphasis.

analogue TVs with dates, please ensure that you migrate before the set dates to continue receiving Television services."[38]

The Government's public promises before this Court

40. Even before this Court, the Minister repeats these promises. The answering affidavit contains the following undertakings:

40.1. "*Government's undertakings to make devices/STBs available to qualifying households is (sic) well documented*".[39]

40.2. "*Government has committed to assist the poorest TV-owning households to obtain STBs to enable them to receive DTT. The Minister and Department intend to ensure that all qualifying households receive STBs*".[40]

40.3. "*Government has not and will not be leaving any South Africans behind*".[41]

Conclusion on the public promises

41. These promises, that "*everyone*" who currently receives analogue broadcasts will be given the means to migrate "*before the set dates*", that the digital migration process "*will not be leaving any South Africans behind*", and consequently that "*all qualifying households receive STBs,* were seriously and lawfully made in line with the Government's stated policy, and consistent with the Government's constitutional obligations to take reasonable measures to ensure that those that

[38] Minister's Media Statement, para 4.1, PR17, Caselines 001-217.
[39] Minister's AA para 666; Caselines 009-161.
[40] Minister's AA para 199, Caselines 009-62.
[41] Minister's AA para 375, Caselines 009-109.

require social assistance receive it.[42]

42. In the circumstances, it was always clear that the provision of set-top boxes is a self-assumed condition publicly made by the Government to ensure that affected viewers who cannot afford to migrate without Government assistance will first be provided with the necessary means to continue watching television *before* the switch-off occurs. It is, in any event, in our constitutional and developmental state, a necessary and reasonable step in order for the Government to meet its obligation to respect, protect, promote and fulfil the fundamental rights of indigent South Africans.

43. It is a duty that the Government has already confirmed before the Constitutional Court, with the Court recording "*Set top boxes will be required for the foreseeable future until television sets with the technology to unscramble digital signals are accessible to all.* ***These boxes will thus be needed by the financially under resourced, for as long as television sets with signal unscrambling capabilities are beyond reach***."[43]

The current state of play

44. After years of dithering, on 6 October 2021, the Minister made two announcements:

44.1. First, that a cut-off date for the registration for set-top boxes which the Government had promised to provide to indigent viewers of analogue

[42] See section 27(1), read with section 27(2), of the Constitution.

[43] Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others [2017] ZACC 17; 2017 (9) BCLR 1108 (CC) (8 June 2017) para 9, emphasis added.

television, would now be imposed, and that this cut-off date was set for three weeks later, at 31 October 2021 (***the STB registration cut-off date***). This meant that any person who failed to register by 31 October 2021, would not receive a set-top box or the means to access digital television prior to the switch-off date;

44.2. Second, that the analogue switch-off date was planned for 31 March 2022.

45. After *16 years* of failed promises, this announcement was made just *three weeks* before the STB registration cut-off date and just 5 months before the planned switch-off date and in the following circumstances:

45.1. It is common cause that on the Minister's current analogue switch-off programme (with a planned blackout date of 31 March 2022) there will be a large number of indigent South African households who will not, by this date, have received the requisite set top box from the Government to enable them to continue to receive their free-to-air broadcasts after analogue switch-off.

45.2. The Minister states that as of 31 October 2021, the belatedly set STB cut-off date, only 1.29 million households out of approximately 3.75 million households who qualify, had registered[44] (less than a third: meaning that almost **2.5 million households will be left behind**);

45.3. There is no debate that, for at least these **2.5 million indigent South**

[44] Minister's AA para 211; Caselines 009-65.

African households (representing some **8 million South Africans**),[45] the analogue switch off is a retrogressive step: they will lose their current access to information via these free-to-air broadcasts;

45.4. Similarly, there is no dispute that the households that are predominately affected are the poor, for they are reliant on the Government to provide and install free set top boxes in order to receive digital television, once analogue broadcasting is switched off. And, of course, the Constitutional Court has emphasised that the poor are particularly vulnerable and their needs require special attention.[46] The Court has also recognised that ensuring that constitutionally compliant decisions are made about the allocation of public benefits reflects our nation's commitment to ensuring that poor people are treated as equal members of society.[47]

46. There has been an attempt in Vodacom's and ICASA's defence of the Minister's decisions (and to some extent that of the Minister) to suggest that the rush to complete digital migration and switch off all analogue transmission is necessary to remove analogue broadcasters from spectrum (in the IMT700 and IMT800 bands) in order to allocate the spectrum to the mobile network operators. But, as we demonstrate next, the choice between analogue broadcasting and spectrum allocation is a false dichotomy. Moreover, for the reasons we discuss in Parts C to D, the Minister's actions and threatened actions are simply inconsistent with her constitutional obligations. Constitutional obligations,

[45] Intervening Applicants' RA, para 9; Caselines 019-6; e.tv RA, para 19.3; Caselines 020-10.
[46] Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46 para 36.
[47] Khoza para 74.

especially to the indigent and vulnerable, may not be sacrificed for the sake of expediency.

The false dichotomy

47. The highwater mark of Vodacom's and ICASA's case (and to some extent that of the Minister) before this Court is that the migration *must* be completed in order to free up additional spectrum so that ICASA's auctioning of spectrum to mobile telecommunication companies (*the ITA auction*) can proceed and so that the mobile operators can obtain more spectrum.

48. But this is wrong for at least three reasons.

48.1. First, the migration process is not (as the respondents would have this Court believe) a zero-sum game. The analogue switch-off is not a *sine qua non* for the ITA auction to proceed, and it is possible to allocate additional spectrum to the mobile network operators *without* first switching off all analogue transmissions. Indeed, there is (a) significant spectrum outside the IMT700 and IMT800 bands that can and is being auctioned and will be immediately available to mobile network operators;[48] (b) much of the IMT700 and IMT800 bands have already been or are being cleared ahead of ASO because SABC has voluntarily agreed to switch off its transmitters (and all of Multichoice's transmitters were switched off by 2018);[49] and (c) the comparatively few (when compared with the SABC) transmitters that e.tv has in the IMT700 to IMT800 bands which are the

[48] e.tv RA, para 22.2,2; Caselines 020-16.
[49] e.tv RA, para 22.2,2; Caselines 020-16.

subject of the ITA auction could be migrated to transmit analogue broadcasting below the ITM700 band.[50] Indeed, this is precisely the process that e.tv has suggested to the Minister, but to which it has not had even the courtesy of a response from the Minister;[51]

48.2. Second, the mobile network operators have already been allocated (in November 2021) significant additional spectrum, which alleviates Vodacom's alleged "*pinch*".[52] This spectrum has been allocated on a provisional basis, but ICASA's ability to do so, including in the IMT700 and IMT800 bands (which are also currently used by broadcasters), demonstrates that there is already additional spectrum available for use by the mobile network operators in these bands that can be (and has been) allocated;[53]

48.3. Third, Vodacom's argument is a cynical one which is impermissible in our constitutional democracy. Essentially, Vodacom argues that those who are reliant on analogue broadcasting (overwhelmingly the poor) are simply less important and should make way for those who utilise high-speed mobile data (overwhelmingly the rich) to have ever more and ever faster data. Of course, the entities that will benefit the most from this trade-off are the mobile network operators themselves, and particularly Vodacom, which is by far the largest (and the dominant) provider of mobile services in South Africa. While mobile network operators want to push through the

[50] e.tv RA, para 22.2,2; Caselines 020-16.
[51] e.tv RA, para 60; Caselines 020-39.
[52] e.tv RA, para 130; Caselines 020-63.
[53] e.tv RA, para 130; Caselines 020-63.

door to reach the spectrum their shareholders and users desire, our Constitution does not permit them or anyone else to do so callously by trampling over the indigent and vulnerable who rely on that spectrum to access analogue TV for their news, sport, weather, and entertainment.[54]

49. The simple point is this: digital migration can and should happen. But it must happen in a constitutionally complaint and appropriate manner. That requires that millions of vulnerable South Africans are in fact digitally migrated before analogue switch off, by the Government giving them set top boxes to access digital television, rather than leaving them behind. In our constitutional and developmental state, nothing less is acceptable – and that is what the Government repeatedly over years promised to do.

50. Against this backdrop, we turn now to the Minister's constitutional obligations under section 7(2) of the Constitution, the *KZN Principle*, and the duty to consult *meaningfully*.

C. THE MINISTER'S CONSTITUTIONAL OBLIGATIONS

The Minister's constitutional obligations

51. The Constitution sets high standards for the exercise of public power by state institutions and officials.

52. Section 1(a) of the Constitution states that one of its founding values is "human dignity, the achievement of equality and the *advancement* of fundamental human

[54] e.tv RA, para 22.2.4; Caselines 020-16.

rights and freedoms".[55]

53. Section 7(2) also requires the state to "respect, protect, promote and fulfil the rights in the Bill of Rights."

54. The obligation to "*respect*" rights prohibits all organs of state from interfering with or violating any constitutional right unless that interference can be justified in terms of section 36(1) of the Constitution – the limitations clause.[56]

55. In ***Jaftha***, the Constitutional Court held that while it was not necessary in that case "*to delineate all the circumstances in which a measure will constitute a violation of the negative obligations imposed by the Constitution*", a proper understanding of the constitutional right in question (the right to adequate housing) meant that "*at the very least, <u>any measure which permits a person to be deprived of existing access to adequate housing, limits the rights protected in section 26(1). Such a measure may, however, be justified under section 36 of the Constitution</u>*." [57]

56. Thus, retrogressively depriving the public of the past enjoyment of a right, such as access to housing, or in the present matter, access to public broadcasting (which facilitates the enjoyment of various fundamental rights, which we discuss below), will be unconstitutional, unless it can be justified under section 36 of the Constitution (the limitation would have to be in terms of a law of general application and be reasonable and justifiable).

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[55] Emphasis added.
[56] Mlungwana v S 2019 (1) BCLR 88 (CC); 2019 (1) SACR 429 (CC) para 42.
[57] Jaftha v Schoeman, Van Rooyen v Stoltz 2005 (2) SA 140 (CC) (***Jaftha***) para 34, emphasis added.

57. However, the section 7(2) "*obligation goes beyond a mere negative obligation not to act in a manner that would infringe or restrict a right. Rather, it entails positive duties on the State to take deliberate, reasonable measures to give effect to all of the fundamental rights contained in the Bill of Rights*."[58]

58. As the Constitutional Court pointed out, *"[i]mplicit in s 7(2) is the requirement that the steps the State takes to respect, protect, promote and fulfil constitutional rights must be reasonable and effective*."[59]

59. In ***Metrorail***,[60] the Constitutional Court explained that what constitutes reasonable measures will always be circumstance-dependent. O'Regan J enumerated various factors which bear on this analysis:[61]

> "Factors that would ordinarily be relevant would include the nature of the duty, the social and economic context in which it arises, the range of factors that are relevant to the performance of the duty, the extent to which the duty is closely related to the core activities of the duty-bearer - the closer they are, the greater the obligation on the duty-bearer, and the extent of any threat to fundamental rights should the duty not be met as well as the intensity of any harm that may result. The more grave is the threat to fundamental rights, the greater is the responsibility on the duty-bearer."

60. In summary, in terms of section 7(2), the Minister bears positive obligations to effectively manage communications in South Africa and to take reasonable steps to promote, protect and fulfil rights in the Bill of Rights, including the right of freedom of expression. Moreover, she also bears negative obligations not to

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[58] Glenister v The President of the Republic of South Africa and Others 2011 (3) SA 347 (CC) (***Glenister***) para 102 (minority), read with paras 177, 178, and 189 (majority). See also Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC) (**Metrorail**) paras 66 to 72.

[59] Glenister para 189, emphasis added.

[60] Metrorail para 88.

[61] Metrorail para 88.

infringe rights while doing so, by taking any retrogressive steps – at least not in a way which is unreasonable or unjustifiable under the limitations clause.[62]

61. Importantly, before this Court there is no debate that the Minister is bound by section 7(2) obligations – indeed, the Minister expressly recognises this in her answering affidavit, where the Minister states: "*e.tv says that the Minister has positive obligations under section 7(2) of the Constitution. The Minister agrees with this*".[63]

62. Similarly, the Minister not only accepts her constitutional obligations, but also accepts that those obligations require the Minister to ensure that households reliant on analogue broadcasting (consisting, currently, of more than 3 million indigent households - that is the 3.75 million qualifying households, less the approximately 560 000 that have already received set top boxes, representing over 11 million people) are not left behind. Indeed, the Minister tells the Court that: "*The Minister intends to discharge her constitutional obligations in making sure that households that rely on analogue broadcasting are able to receive digital broadcasting*."[64]

63. She recognises too that to create a situation where the number of indigent households that require a set-top box before migration is undercounted "*would be reckless and precipitate a crisis, something that Government has no intention to do*."[65]

[62] Glenister at para 177 and 189 (majority) and paras 105-106 (minority).
[63] Minister's AA para 662; Caselines 009-162.
[64] Minister's AA para 560; Caselines 009-142.
[65] Minister's AA para 623. Caselines 009-153.

64. It is accordingly through the lens of section 7(2) and the Minister's commitment to ensure "*that households that rely on analogue broadcasting are able to receive digital broadcasting*" (in light of the *KZN principle* which we discuss in the next section), that the relief sought by e.tv, supported by the MMA and SOS, and the opposition of the Minister, ICASA and Vodacom, are to be viewed.

65. The Minister's actions threaten a number of rights of those who are dependent on analogue broadcasting.

66. The first is the right to freedom of expression:

66.1. The right to freedom of expression is enshrined in section 16 of the Constitution.[66]

66.2. The importance of freedom of expression – including the right to receive expression – as part of the constitutional project in South Africa has been emphasised on many occasions by the Constitutional Court.[67]

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[66] Section 16 provides: "(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."

[67] See South African National Defence Union v Minister of Defence and Another 1999 (4) SA 469 (CC) at para 7; S v Mamabolo (E TV and Others Intervening) 2001 (3) SA 409 (CC) at para 37; and Islamic Unity Convention v Independent Broadcasting Authority and Others 2002 (4) SA 294 (CC) at paras 25-30. See also the minority judgment of Mokgoro J in 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) at paras 25-27:
"But my freedom of expression is impoverished indeed if it does not embrace also my right to receive, hold and consume expressions transmitted by others. Firstly, my right to express myself is severely impaired if others' rights to hear my speech are not protected. And secondly, my own right to freedom of expression includes as a necessary corollary the right to be exposed to inputs from others that will inform, condition and ultimately shape my own expression. Thus, a law which deprives willing persons of the right to be exposed to the expression of others gravely offends constitutionally protected freedoms both of the speaker and of the would-be recipients."

66.3. In *Islamic Unity v Broadcasting Complaints Commission (Islamic Unity)*,[68] citing *S v Mamabolo (Mamabolo)*,[69] the Constitutional Court stated:

> "Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression — the free and open exchange of ideas — is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed."

66.4. The Constitutional Court also held that: "*Where the state extends the scope of regulation beyond expression envisaged in section 16(2), it encroaches on the terrain of protected expression and can do so only if such regulation meets the justification criteria in section 36(1) of the Constitution*."[70]

66.5. More recently, in ***Qwelane***,[71] the Constitutional Court opined that the right to "*freedom of expression has a particularly important role" "given the historical stains of our colonial and apartheid past".*[72] It endorsed the view that, given our country's intolerant and suppressive past, the right to free speech must be *"treasured, celebrated, promoted and even restrained*

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[68] Islamic Unity v Broadcasting Complaints Commission (Islamic Unity) [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) para 24.

[69] S v Mamabolo [2001] ZACC 17; 2001(3) SA 409 (CC) para 37.

[70] Islamic Unity, fn 11 para 32.

[71] Qwelane v South African Human Rights Commission and Another [2021] ZACC 22; 2021 (6) SA 579 (CC); see too Premier of the Western Cape Province v The Public Protector & Another (771/2020) [2022] ZASCA 16 (7 February 2022).

[72] Qwelane para 75.

with a deeper sense of purpose and appreciation".[73]

66.6. In ***South African National Defence Union v Minister of Defence and Another***, it was held that:

> "Freedom of expression lies at the heart of a 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."[74]

66.7. Instead of ensuring protection, promotion and fulfilment of the right of freedom of expression, inclusive of the right to receive information, and of equality, the Minister's actions would be retrogressive: divesting millions of South Africans (and in particular the poor) of the access they currently enjoy to free-to-air broadcasting;

67. Second, <u>the related rights to dignity and political rights</u>:

67.1. The right to freedom of expression is not self-standing: it is a gateway right to the achievement of many other rights and freedoms in the Constitution.

67.2. Thus, in ***Khumalo v Holomisa***,[75] the Constitutional Court stated:

> "Freedom of expression is integral to a democratic society for many reasons. It is constitutive of the dignity and autonomy of human beings.

[73] Qwelane para 75, quoting with approval from Economic Freedom Fighters v Minister of Justice and Correctional Services [2020] ZACC 25; 2021 (2) SA 1 (CC) para 2.

[74] South African National Defence Union v Minister of Defence and Another 1999 (4) SA 469 (CC) ("***SANDU***") at para 7.

[75] Khumalo and Others v Holomisa [2002] ZACC 12; 2002 (5) SA 401 (CC) at para 22.

> Moreover, without it, the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled.
>
> The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press 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 of 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."

67.1. The related rights that are given effect to through the right of freedom of expression, including a number of so-called political rights (such as the right to participate in elections),[76] would be violated and threatened by the Minister's actions.

68. Third, administrative and legality rights to reasonable, rational, and procedurally fair decision-making, inasmuch as the Minister's decision making, as demonstrated below, is occurring in a manner that is unfair, irrational and unreasonable and is being taken without having regard to the necessary steps required to properly implement the process.[77]

69. Fourth, the principles of openness and accountability that form the bedrock of our constitutional democracy.[78] Those principles have been expressed forcefully by the Constitutional Court. Justice Sachs articulated this explicitly in his concurring judgment in ***Matatiele Municipality v President of the Republic of***

[76] FA, para 13; Caselines 001-16.

[77] See the discussion of these rights below under heading: *The Minister's duty to consult*, and Parts C and D.

[78] See sections 1(d), 41(1), and 195(1)(f) and (g) of the Constitution. The sum of these provisions, among others, is to confirm what the Constitutional Court has called "a culture of openness and democracy". Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd H 2001 (4) SA 501 (SCA) para 7; Minister of Education v Harris 2001 (4) SA 1297 (CC) paras 9 – 11. See also Brümmer v Minister for Social Development and Others 2009 (6) SA 323 (CC) para 63.

South Africa and others.[79] He stated:

> "[T]he Constitution requires candour on the part of Government. What is involved is not simply a matter of showing courtesy to the public and to the courts, desirable though that always is. It is a question of maintaining respect for the constitutional injunction that our democratic government be accountable, responsive and open. Furthermore, it is consistent with ensuring that the courts can function effectively, as section 165(4) of the Constitution requires. …
>
> The notion that "government knows best, end of enquiry", might have satisfied Justice Stratford CJ in the pre-democratic era. It is no longer compatible with democratic government based on the rule of law as envisaged by our Constitution. …
>
> As this case demonstrates, far from the foundational values of the rule of law and of accountable government existing in discreet categories, they overlap and reinforce each other. Openness of government promotes both the rationality that the rule of law requires, and the accountability that multi-party democracy demands. In our constitutional order, the legitimacy of laws made by parliament comes not from awe, but from openness."[80]

70. The Minister's conduct, of refusing to respond to e.tv's six letters asking for clarity about the process, of keeping the public in the dark about the digital migration process and then rushing the deadline for registration on three weeks' notice, and then of failing to provide clarity about the process going forward – including on the ASO dates, and when or how the ASO will be determined in keeping with the requirements of the law – are all failures of these principles.

71. Fifth, the Minister's conduct threatens the proper fulfilment of the Government's over-arching duty under section 27 of the Constitution to ensure social assistance – including in the form of financial support – for those who cannot

[79] 2006 (5) SA 47 (CC).

[80] Paras 107, 109 and 110. See also Ngcobo J at para 84.

support themselves.

71.1. In the same way that section 27 requires the state to take reasonable measures to ensure the progressive realisation of these rights (and not to take steps that are retrogressive),[81] in this case that duty is accentuated for the Government when it comes to the indigent and their access to information, particularly where the Government has publicly promised to socially assist the poor to access STBs to enable to them to receive digital television.

71.2. There can be no doubt that those are part of a vulnerable group in society and, in the circumstances of the present case, are worthy of constitutional protection.[82] As the Constitutional Court has cautioned: decisions about the allocation of public benefits – in this case the means to access digital television broadcasting – reflect the extent to which poor people are treated as equal members of society.[83]

71.3. Of course, the section 27 right is not self-standing and is intrinsically linked to the achievement of other rights in the Constitution. As the Constitutional Court has recognised the Government's provision of social assistance, "*has had a material impact in reducing poverty and inequality and in mitigating the consequences of high levels of unemployment. In so doing it has given some content to the core constitutional values of dignity,*

[81] Jaftha para 34.

[82] Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development [2004] ZACC 11; 2004 (6) SA 505 (CC) at para 74.

[83] Khosa para 74.

equality and freedom."[84]

The KZN principle and why it is engaged

72. The doctrine that a state organ will be bound by its seriously and lawfully made public promises has become known as the "*KZN Principle*". The KZN principle recognises that a seriously and lawfully made promise by the state to make a payment or to do something is enforceable against the state when it would be legally and constitutionally unconscionable for the state to renege on that promise. The undertaking to provide set-top boxes to the millions of households who are not otherwise able to access free-to-air broadcasting services falls within the KZN principle. A breach of a publicly made promise would also be a breach of the fundamental principles of accountable, open, and transparent government, as well as the obligation in section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights.

73. In the light of the obligations under section 7(2) (discussed above) and the various rights (including section 16) and constitutional principles (including open and transparent government) implicated, together with the policies, statements, undertakings and facts set out above, the promise by the Government that analogue switch-off will not occur unless and until those who cannot otherwise afford access to digital broadcasting have been provided with set-top boxes, is one which is enforceable.

74. It would be legally and constitutionally unconscionable at this stage for the

[84] Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening) [2017] ZACC 8; 2017 (3) SA 335 (CC) at para 1 (**Black Sash**).

Government to renege on that promise as it appears intent to do, particularly given that the purpose of the promise is to ensure that the indigent rights under section 16 of the Constitution are met, and given the provision of the set top box to indigent households (social grant beneficiaries and those that earn R3500 or less) is evidently a form of social assistance[85] in keeping with the Government's obligations under section 27 of the Constitution.

75. There, the provincial government published a notice about a subsidy that it would pay independent schools for the coming year. It published the notice to assist independent schools in preparing their budgets—a similar reliance-based purpose to the Minister's promises that those who are reliant on analogue broadcasting will not be left behind.[86] The provincial government later informed schools of a 30% decrease in the subsidy. Independent schools sued to enforce the provincial government's "*promise to pay*", emphasising, like e.tv does, their reliance on the promise.[87]

76. The Court held the provincial government to its promise. The Court recognised that the notice "*clearly constituted an undertaking by the department to pay the schools*".[88] The undertaking was enforceable not because it amounted to a contract.[89] Rather, it was binding because it was "*seriously given, in the expectation that it would be relied upon*".[90] Though the provincial government was not obliged to pay a subsidy, once it promised to pay one, the "*negative*

[85] "Social assistance is customarily defined as a benefit in cash or in-kind, financed by the state (national or local) and usually provided on the basis of a means or income test." Howell ibid.
[86] KwaZulu-Natal Joint Liaison Committee at para 3.
[87] KwaZulu-Natal Joint Liaison Committee at para 16.
[88] KwaZulu-Natal Joint Liaison Committee at para 30.
[89] Pretorius at para 30.
[90] KwaZulu-Natal Joint Liaison Committee at para 37.

rights of … learners — the right not to have their right to a basic education impaired — [was] implicated."[91] It was also important that, like the undertaking to sign the tripartite agreement to facilitate funding from a third-party funder, the "*notice itself clearly envisaged that the schools would prepare their budgets in reliance on it*" and that they would "*incur expenditure relying on its terms*."[92]

77. The Court held that the notice "*created a legal obligation unilaterally enforceable at the instance of those who were intended to benefit from its promise*."[93] The Court recognised the "*sound principle of our constitutional law*" that a public official "*who lawfully promises to pay specified amounts to named recipients cannot unilaterally diminish the amounts to be paid after the due date for their payment has passed*."[94] In reaching this conclusion, reliance and expectations were at the centre of the Court's reasoning: it is "*impossible to tailor behaviour and expectations to a promise made in relation to a period that has already passed*."[95]

78. More recently, the Constitutional Court reaffirmed the *KZN* principle as a self-standing source of government obligations. It is "*not based on a breach of the right to just administrative action … but on far more fundamental misconduct by the state*."[96] That conduct is "*unconscionable when measured against the constitutional standard of reliance, accountability and rationality*."[97]

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[91] KwaZulu-Natal Joint Liaison Committee at para 45.
[92] KwaZulu-Natal Joint Liaison Committee at para 46.
[93] KwaZulu-Natal Joint Liaison Committee at para 48.
[94] KwaZulu-Natal Joint Liaison Committee at para 52.
[95] KwaZulu-Natal Joint Liaison Committee at para 65.
[96] Pretorius at para 30.
[97] Pretorius at para 30.

79. Organs of state should be well aware of, and held to, the *KZN* principle. For instance, in ***Mpungose***,[98] Vahed J in applying the *KZN* principle emphasised that the ability of the party relying on the promise to "*tailor behaviour and expectations to a promise*" is fundamental to the rationality standard that informs the principle of unconscionable state conduct.[99]

80. The *KZN* principle obliges the Minister to honour her promises, like the promise to provide set top boxes to all those who need them and particularly all qualifying indigent households. These were made as recently as the press release of 6 October 2021 and in her affidavits before this Court. These each "*clearly constituted an undertaking*" that was "*seriously given, in the expectation that it would be relied upon*". And like paying subsidies, once the Minister has undertaken to do so, it is "*unconscionable*" for the Minister to go back on an express promise when measured against the constitutional standard of reliance, accountability and rationality.

81. The Minister in fact reiterates in these proceedings that "*Government has not and will not be leaving any South Africans behind.*"[100] And the Minister confirms that "*Government has committed to assist the poorest TV-owning households to obtain STBs to enable them to receive DTT. The Minister and Department intend to ensure that all qualifying households receive STBs*."[101] Moreover, the Minister emphasises that the Government accepts that it bears the "*responsibility for the provision of STBs" to "qualifying indigent households*" and that "*Government has*

[98] Mpungose Traditional Council and Others v MEC for Education, KZN Province and Others (11279/2017P) [2019] ZAKZPHC 45; [2019] 3 All SA 817 (KZP) (17 July 2019) (**Mpungose**)
[99] Mpungose at para 132.
[100] Minister's AA para 375; Caselines 009-109.
[101] Minister's AA para 199; Caselines 009-60.

never reneged on this commitment and is in the process of fulfilling it."[102]

82. Yet, inconsistently, the Minister (a) appears to believe it is acceptable nevertheless to proceed with analogue switch off even while millions of these qualifying indigent households do not have set top boxes and will lose access; and (b) now appears to say that the Government's promises are not necessarily binding and were not absolute (the Minister claims that "*Government's commitment never extended to the impossible assurance that every single qualifying household (whether registered or not) will receive a STB before ASO*)".[103]

83. The KZN principle does not permit this change of stance – it requires that once the Government publicly and seriously promised to ensure that "*it will not leave any South African behind*"[104] – the Minister's words, not e.tv's – it is bound to this promise.

84. For these reasons, e.tv seeks to hold the Government to its own policies and undertakings in terms of the declaratory and reporting relief sought. This, in addition to the constitutional obligations flowing from section 7(2) (discussed above), and the duty to consult (discussed below), provide the basis for the granting of the relief sought.

The Minister's duty to consult

85. e.tv relies on its right to be consulted in relation to the impugned decision, given

[102] Minister's AA para 581; Caselines 009-146.
[103] Minister's AA para 199; Caselines 009-60.
[104] Minister's AA para 199; Caselines 009-60.

the impact of the decision on e.tv's rights, and the special position which e.tv holds as an incumbent licensee and analogue broadcaster. In addition to its own rights, e.tv submits that the Minister had a broader obligation to consult the public, and other interested and affected parties (including those reliant on the Government to provide set-top boxes, public interest organisation, such as MMA and SOS), and to do so meaningfully – both around the imposition and timing of the STB cut-off date (31 October 2021) and about the analogue switch-off date, and if it wished to renege from its public promise, previously and repeatedly heralded as a policy position adopted by the Government.

86. This Court has already confirmed that the Minister may only determine the analogue switch-off date after the conclusion of a process of public engagement with affected parties.[105]

87. This obligation to consult, which has already been recognised by this Court, arises within the following constitutional framework:

87.1. Section 33 of the Constitution, given effect to by PAJA, requires that administrative action be lawful, reasonable and procedurally fair.

87.1.1. Administrative action, is action which is administrative in nature (the focus being the nature of the action not the identity of the

[105] Minister of Telecommunications para 59, quoted with approval by this Court in Telkom SA Soc Limited and Another v Independent Communications Authority of South Africa and Others [2021] ZAGPPHC 120 (8 March 2021).

functionary),[106] which has the *capacity* to affect rights;[107]

87.1.2. The Minister's determination of the analogue switch-off date, in terms of the Digital Migration Regulations, and her actions concomitant thereto (including an imposition of a cut-off date for qualifying households to register for set-top boxes), are administrative actions.

87.1.3. We say this because the ASO determination is administrative in nature. It has nothing to do with whether there will be a digital migration process, that is already set out and required by the Digital Migration Regulations. It deals with the much more practical issue of when the appropriate date is to switch off all analogue transmission.

87.1.4. The determination of the ASO date evidently has the capacity to affect a number of rights detailed above and below including the right to free expression; political rights; the right to dignity and, in relation to the promise to provide set-top boxes to "*bridge the digital divide*" [108] between the haves and the have-nots, and the right to social assistance, not to mention the rights of

[106] See Permanent Secretary of the Department of Education and Welfare, Eastern Cape, & another v Ed-U-College (PE) (Section 21) Inc 2001 (2) SA (1) (CC) at para 18.

[107] See Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others 2005 (6) SA 313 (SCA) at paras 23-24 (relied upon and approved in Joseph and Others v City of Johannesburg and Others 2010 (4) SA 55 (CC), para 27, and AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others 2014 (1) SA 604 (CC) (***AllPay I***) para 60.

[108] P. 21 and 22 of the 2008 Broadcasting Digital Migration Policy; Caselines 001-230.

broadcasters to continuing making use of analogue spectrum.

87.1.5. Were this Court, nevertheless, to find that the Minister's ASO determination is not administrative in nature, then in any event it is the exercise of public power, which must comply with the principle of legality.

87.2. The principle of legality, flows from the rule of law, enshrined in section 1(c) of the Constitution. In terms of the principle of legality, all exercises of public power – including the Minister's determination of the ASO date pursuant to the Digital Migration Regulations - must be substantively and procedurally rational.[109] Our courts have recognised that there are circumstances in which rational decision-making calls for interested persons to be heard in a wide range of contexts. [110]

87.3. For instance, in ***Scalabrini***, the Supreme Court of Appeal held, as regards the Director General's failure to consult with specially interested parties:[111]

> "In this case the Director-General was pertinently aware that there were a number of organisations – including the Scalibrini Centre – with long experience and special expertise in dealing with asylum-seekers in Cape Town. His representative, Mr Yusuf, had In addition, however, I consider that he could not achieve the statutory purpose without obtaining the views of the organisations representing the interests of asylum seekers. His decision obviously would affect asylum seekers. The information available to the DHA internally and through the SCRA might tell

[109] Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others 2013 (6) SA 421 (SCA) (***Scalabrini***) para 68; Democratic Alliance v President of South Africa and Others 2013 (1) SA 248 (CC) para 34; Democratic Alliance v President of the Republic of South Africa 2012 (1) SA 417 (SCA) para 66; Albutt v Centre for the Study of Violence and Reconciliation 2013 (1) SA 248 (CC) ("Albutt") paras 50-1; and Minister of Justice and Constitutional Development v Chonco 2010 (4) SA 82 (CC) ("Chonco") paras 12 and 36.

[110] Ibid.

[111] Scalabrini at para 69.

> the DG what he needed to know concerning the DHA's operational procedures, its capabilities and its history of operational problems in Cape Town but would not give him the perspective (or the full perspective) from the asylum seekers' side. This perspective appears to me to have been of obvious importance in reaching a rational conclusion as to whether or not an RRO in Cape Town was needed."

87.4. In the premises, the SCA held that it was "*irrational to take the decision without such consultation, because of the special knowledge of the person or organisation to be consulted, of which the decision maker is aware*."

87.5. In ***Earthlife Africa***,[112] which involved a review of the determination by the Minister of Energy, with NERSA's concurrence, to procure a significant quantity of new nuclear generation capacity, the Court accepted that a decision-maker who knows that a party has special expertise or a special interest will certainly call upon that party to give input, particularly where the decision is important and far reaching.[113] Bozalek J and Baartman J went on to hold that NERSA had "*failed to explain, for one, how it acted in the public interest without taking any steps to ascertain the views of the public or any interested or affected party*."[114] The Court therefore held "*NERSA's decision fails to satisfy the test for rationality based on procedural grounds alone*."[115]

87.6. These principles apply *a fortiori* to the present case where e.tv is the incumbent analogue licensee which the Minister plans to "switch-off", and

[112] Earthlife Africa Johannesburg and Another v Minister of Energy and Others [2017] ZAWCHC 50; 2017 (5) SA 227 (WCC) (***Earthlife Africa***).
[113] Earthlife Africa para 50.
[114] Earthlife Africa para 50, emphasis added.
[115] Earthlife Africa para 50.

where the MMA and SOS, amongst others, act in the public interest in relation to access to free-to-air broadcasting, when on the Minister's approach millions of indigent South African's will be left without access to free-to-air broadcasting.

87.7. In this current matter it is telling, given that the precipitous move to switch-off analogue transmission (and the linked STB registration cut-off date) will significantly and disproportionality affect the indigent households reliant on the Government to provide set top boxes, that the Minister has not consulted with them, or any of their representatives, at all. Nor has she consulted with organisations such as the MMA and SOS who act in the public interest.

87.8. Furthermore, there has been a fundamental departure from the Government's expressed public promises around the preceding policy position on the provision of set-top boxes as a prior condition precedent for a lawful migration. This departure was not consulted on with (or notified to) MMA and SOS or the public. In other words, there was no consultation at all with affected parties in relation to this fundamental change to the approach of the Government to a critical feature of the digital migration process. Yet it has been long established that a departure from a policy, or a change of that policy, triggers the right to a hearing.[116] The

[116] See Tettey and Another v Minister of Home Affairs and Another 1999 (3) SA 715 (DCLD); Winckler v Minister of Correctional Services 2001 (2) SA 747 (C); Combrink and Another v Minister of Correctional Services and Another 2001 (3) SA 338 (DCLD) 343; Attorney-General of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629 (PC); HWR Wade and CF Forsyth Administrative Law 10th Edition (2009) at 457. See further Head of Department : Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another 2010 (2) SA 415 (CC) (concerning the question whether the HoD may

Constitutional Court put it this way in Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State-Aided School: Eastern Transvaal 1999 (2) SA 91 (CC) at para 41:

> "[c]itizens are entitled to expect that government policy will ordinarily not be altered in ways which would threaten or harm their rights or legitimate expectations without their being given reasonable notice of the proposed change or an opportunity to make representations to the decision-maker".

88. So consultation was necessary, because of these multiple and adverse impacts upon rights and expectations. Of course, "*consultation*" may not be a mere formality. Our law makes clear that consultation and the right to make representations or have a hearing require more than merely formalistic interactions. In this Court, Mojapelo DJP in ***S v Smit***,[117] after summarising the key principles, flowing from the case law,[118] concluded that: "*It is clear from the aforegoing that consultation cannot be a mere formal process. It has to be a genuine and effective engagement of minds between the consulting and the consulted parties. A mere formalistic attempt to consult does not constitute*

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lawfully revoke the function of the governing body of a public school to determine its language policy and confer the function on an interim committee appointed by him). See para 92, by Moseneke DCJ:

> "I must add, for the sake of completeness only, that even if the HoD had the power to set up the committee under section 25, his conduct would not have satisfied the procedural fairness requirements. He did not hear out the governing body before concluding that it had ceased or failed to determine a language policy and that an interim committee should be appointed to exercise the function. **The governing body had no part in identifying the members of the committee nor did they get the opportunity to make any submissions to it before it made the decision to alter the language policy. It follows that their determination of a new language policy is afflicted not only by the lack of power of the HoD to appoint it, but also by the procedural lapses I have alluded to**."

[117] 2008 (1) SA 135 (T).

[118] At pgs 152-3, including the English decision of *Sinfield and Others v London Transport Executive* [1970] 2 All ER 264 (CA).

consultation."[119]

89. Similarly, in ***Merafong,***[120] the Constitutional Court stated the requirements for consultation as being "*the free expression of views and the willingness to take those views into account*".[121]

90. One of the most extensive expositions (which is oft quoted)[122] on the requirements for proper consultation is found in ***Magoma v Sebe NO and Another*** 1987 (1) SA 483 (Ck), where the meaning of "consultation" was considered in the context of s 2 of the Administrative Authorities Act 37 of 1984 (Ck). Pickard J after an exhaustive consideration of what consultation requires, considering dictionary definitions, and South African and English case law, came to the following important conclusions:

> "*However convinced the empowered authority may be at the outset, of the wisdom or advisability of the intended course of action, he is obliged to constrain his enthusiasm and to extend a genuine invitation to those to be consulted and to inform them adequately of his intention and to keep an open and receptive mind to the extent that he is able to appreciate and understand views expressed by them; to assess the views so expressed and the validity of objections to the proposals and to generally conduct meaningful and free discussion and debate regarding the merits or demerits of the relevant issues. So receptive must his mind be that, if sound arguments are raised or other*

[119] At pg 153.
[120] Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others 2008 (10) BCLR 969 (CC).
[121] Supra at para 54.
[122] See eg Robertson & Another v City of Cape Town; Truman-Baker v City of Cape Town 2004 (5) SA 412 (C).

*relevant matters should emerge during consultation, he would be receptive to suggestions to amend or vary the intended course to the extent that at least a possibility exists for those with whom he consults to persuade him to alter his intentions if not to abandon them***.**"[123]

91. As it was put by the English Courts: the requirements of a fair consultation are as summarised in the case of ***R v Brent London Borough Council, ex p Gunning*** (1985) 84 LGR 168:

"First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third, that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals."[124]

92. There is a further and critical feature of consultation in this case, given the impact on the indigent public by moving away from the public promise of the Government in respect of set-top boxes as a predicate for any lawful migration. That feature is explained by the UK Supreme Court in ***R (on the application of Moseley) v Haringey London Borough Council*** [2014] UKSC 56, a case where a benefit previously provided to the public was reduced.[125] As ***Moseley*** helpfully

[123] Our emphasis.

[124] Para 25.

[125] Until 1 April 2013 central government operated a Council Tax Benefit ('CTB') scheme whereby residents in local authority areas in England were granted relief from paying council tax on a means-tested basis, for which the local authorities were reimbursed in full. For the year 2013-2014, reimbursement to each local authority was fixed at 90% of the sum it had received in the previous year and each local authority was required to devise its own Council Tax Reduction Scheme ('CTRS') to

illustrates for our purposes in respect of the sham consultation in issue in this case:

> "Fairness is a protean concept, not susceptible of much generalised enlargement. But its requirements in this context must be linked to the purposes of consultation. In R (Osborn) v Parole Board [2013] UKSC 61, [2013] 3 WLR 1020, this court addressed the common law duty of procedural fairness in the determination of a person's legal rights. Nevertheless the first two of the purposes of procedural fairness in that somewhat different context, identified by Lord Reed in paras 67 and 68 of his judgment, equally underlie the requirement that a consultation should be fair. First, the requirement "is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested" (para 67). Second, it avoids "the sense of injustice which the person who is the subject of the decision will otherwise feel" (para 68). Such are two valuable practical consequences of fair consultation. <u>But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society. This third purpose is particularly relevant in a case like the present, in which the question was not "Yes or no, should we close this particular care home, this particular school etc?" It was "Required, as we are, to make a taxation-related scheme for application to all the inhabitants of our Borough, should we make one in the terms which we here propose?</u>" (our emphasis).

93. In addition to these obligations, there is a particular and peculiar obligation on the Government to follow a fair process where the effect of governmental action is to deprive persons of an *existing* service – in this case, the right to freedom of

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provide relief from council tax to those whom it considered to be in financial need. It was a requirement that each local authority consult interested persons on its CTRS in draft form before deciding on a final scheme.

The Respondent published a draft CTRS on 29 August 2012 under which it was proposed that the shortfall in central government funding would be met by a reduction in council tax relief of between 18% and 22% for all CTB claimants in Haringey other than pensioners. The consultation document for Haringey residents explained the reduction in funding, and stated "That means that the introduction of a local [CTRS] in Haringey will directly affect the assistance provided to everyone below pensionable age that currently receives [CTB]." There was no reference to other options for meeting the shortfall, for example by raising council tax, reducing funding to council services or deploying capital reserves. The consultation document also included a questionnaire asking how the reduction in relief should be distributed as among CTB claimants. Following the consultation exercise, the Respondent on 17 January 2013 decided to adopt a CTRS under which the level of council tax relief was reduced by 19.8% from 2012-2013 levels for all claimants other than pensioners and the disabled.

The Appellant was a resident of Haringey who until 1 April 2013 had be€n in receipt of full CTB, and thereafter had to pay 19.8% of full council tax. She successfully challenged the introduction of the scheme on the basis of a failure by the Respondent properly to consult.

information given effect to in the provision of access to free-to-air television.

94. The nature of this obligation was emphasised by the Constitutional Court in **Joseph**.[126] The primary issue in that case was whether the applicants were entitled to procedural fairness before a decision was taken to terminate their electricity supply. Unanimously reversing the decision of the High Court, and ordering the reconnection of the supply, the Constitutional Court highlighted that, in the light of the rights that were given effect to through the provision of the electricity (including housing and dignity), the applicants were entitled to procedural fairness in the exercise of the right. The Court explained:

> "when City Power supplied electricity to Ennerdale Mansions, it did so in fulfilment of the constitutional and statutory duties of local government to provide basic municipal services to all persons living in its jurisdiction. When the applicants received electricity, they did so by virtue of their corresponding public-law right to receive this basic municipal service. In depriving them of a service which they were already receiving as a matter of right, City Power was obliged to afford them procedural fairness before taking a decision which would materially and adversely affect the right".[127]

95. The requirements for meaningful and fair consultation are also illustrated by another decision by this Court, in ***Hospital Association of South Africa***.[128] The case arose from an attempt by the Minister of Health and the Director General to set a National Health Reference Price List ("NHRPL"), which purported to be a non-binding pricing guideline, but had a significant impact on the industry without

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[126] See Joseph and Others v City of Johannesburg and Others 2010 (4) SA 55 (CC) at par 34; Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae) 2005 (1) SA 530 (CC) at par 38.

[127] Joseph at para 47.

[128] The Hospital Association of South Africa Ltd v The Minister of Health 2010 (10) BCLR 1047 (GNP); [2011] 1 All SA 47 (GNP).

properly consulting with affected stakeholders. The NHRPL was set aside by this Court (which decision was not appealed by the Department of Health). This Court found that the Department had failed properly to understand (or commit to understanding) the service delivered or the goods supplied and the true cost associated therewith and the importance of getting the coding right. This Court was forthright in its criticism.

> "[154] The Director-General failed to respond timeously to the proposal submitted by HASA [the Hospital Association of South Africa] in relation to the alternative methodology. In so doing, he effectively barred HASA from making any submission in relation to either the 2009 or 2010 NHRPL. The correspondence reveals a consistent failure on the part of the Director-General to engage meaningfully with, or to listen to submissions from, or thereafter, to provide reasons and rational responses to the proposals submitted by and on behalf of HASA. The process of interaction on the part of the Director-General could best be described as one of disdain for and disregard of the rights of HASA.
>
> [155] This conduct on the part of the Director-General, and his subsequent publication of an RPL in the face of these attempts by HASA to be heard, tainted the process and the subsequent publication of an RPL with procedural unfairness such that the entire process and the resultant publication falls to be reviewed and set aside."

96. In the present case, the Minister was well aware that there are persons and entities (such as e.tv, MMA and SOS, and the members of the public who are reliant on analogue broadcasting and the Government's provision of set-top boxes) with a special interest in the digital migration process (in particular, those most directly affected, namely the indigent, who are reliant on the Government to provide set-top boxes). In the circumstances, the Minister was under a constitutional obligation to utilise a procedurally fair and rational process giving affected persons the opportunity to submit their views and present relevant facts and evidence, and to do so with an open and responsive mind. The Minister was required to consult *meaningfully* and take account of e.tv's and the public's views.

97. As we have discussed in Part C, she failed to do so. As we explain, there was no consultation *at all* in relation to the 31 October 2021 cut-off date for registration for set-top boxes. There was no consultation at all regarding the change in government policy to provide set-top boxes as a prior predicate condition for migration to occur without a deleterious impact on the poor. And in relation to the analogue switch-off date, the process of consultation was, at best, a sham. In the words of Sutherland J, this failure was "*reckless*" and "*irrational*".[129]

98. As we explain in Part D, the Minister's failures in this regard are made worse by the fact that e.tv asked for an opportunity to consult with the Minister and to be appraised of the Minister's plans no fewer than six times through letters sent before these proceedings were launched, but these requests were simply ignored and the Minister proceeded to go ahead and take the decision without taking into account e.tv's views and e.tv's rights. The Minister effectively indicated that she would *not* consult with e.tv and would see e.tv in court.

D. THE LACK OF PROPER CONSULTATION

99. In this portion of the heads of argument, we demonstrate how the duty to consult properly and meaningfully, as outlined above, has not been met in respect of:

99.1. Consultation around the STB registration cut-off date; and

99.2. Consultation around the analogue switch-off date.

100. We demonstrate that the Minister has played (and continues to play) possum

[129] Minister of Telecommunications at para 59.

with the public, with interested parties such as e.tv, MMA and SOS and with this Court regarding the date of analogue switch-off. The consultations that have been held have been a sham, with a predetermined outcome, and the Minister has failed to give adequate notice of or reasons for her decisions.

101. This is all contrary to established legal principle in respect of fair and meaningful consultation as summarised in Part C.

102. In the present instance, there was nothing to prevent the Minister during a proper consultation process from notifying the public and stakeholders that a change to the public promise (of set-top boxes being made available to the indigent before digital migration occurred) was on the cards, or that a three-week notice period was about to be introduced for registration to receive a set-top box, or that 31 March 2022 was the date to be set for ASO. It was necessary for the Minister to do so, since the path that the Minister was about to follow would have a very serious impact on not one, but three "democratic principle[s] at the heart of our [South African] society", namely, that the Government must take all reasonable and effective measures to protect the poor from retrogressive steps, that the right to receive broadcasting is a fundamental right to receive information, and that the receipt of that information is critical to political expression and democratic debate.

103. As we show next, in the present case, there has been no procedural fairness, and the public were left in the dark entirely, both from the point of consultation, and in terms of the loss of viewership for the 8 million South Africans who could not register in time.

e.tv's repeated requests to be meaningfully consulted – all ignored

104. Shortly after the Minister had admitted that the digital migration process had "*ground to a halt*", during the negotiations around the Order in the ITA auction litigation in August 2021, the Minister and ICASA both began to speak to the need to "*fast-track*" the digital migration process.[130]

105. Accordingly, on 2 September 2021, e.tv addressed correspondence to the Minister and ICASA flagging its concerns regarding talks during negotiations of "*fast-tracking*" the digital migrations process and highlighting the unlawfulness and unworkability of the Minister's proposed course of action of "*fast-tracking*" the digital migration process without adequately ensuring that the substantive and procedural requirements of such process have been met.[131] e.tv further reminded the Government of its public promises to provide set-top boxes to those who are reliant on analogue broadcasting as a predicate before any lawful migration could occur. The Minister was requested to provide an undertaking that she would undertake a public consultation process with all affected parties, including as to the date of the 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.[132]

106. The Minister failed to respond substantively to e.tv's letter, or to provide the undertaking sought.[133]

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[130] See correspondence of 2 September 2021, PR6; Caselines 001-143.
[131] Correspondence of 2 September 2021, PR6; Caselines 001-143.
[132] Correspondence of 2 September 2021, PR6; Caselines 001-143.
[133] FA, para 85; Caselines 001-42.

107. On 8 September 2021, as a result of the Minister's failure to respond and to give the required undertaking, e.tv filed its amended notice of motion and Further Supplementary Affidavit in the Auction Review proceedings, in which it sought relief which closely mirrors that which is sought in these proceedings.[134]

108. e.tv continued to seek clarity, understanding and a commitment from the Minister regarding a) the process for digital migration and b) whether the Minister accepts the procedural and substantive minimum requirements for a lawful digital migration process. e.tv addressed no fewer than six letters to the Minister,[135] calling upon the Minister to provide clarity and give an undertaking that the process followed would be lawful.

109. The Minister failed to respond substantively to any of the letters.

110. The Minister thus refused to provide e.tv with a clear answer as to (i) what process was being followed; (ii) what effect the process had on e.tv's ability to transmit analogue signal; (iii) how those without the means to access digital transmission were to be catered for; (iv) and the reasons for any such decision.

111. The Minister's response was eventually (on 10 October 2021) to indicate that she would not engage in correspondence with e.tv, but would provide the relevant answers and information in her answering affidavit in these proceedings.[136]

112. However, the answering affidavit filed in these proceedings provides no

[134] FA, para 86; Caselines 001-42.
[135] These letters appear as PR6 Caselines 001-143; PR8 Caselines 001-160; PR9 Caselines 001-166; PR11 Caselines 001-181; PR13 Caselines 001-191; and PR16 Caselines 001-210;
[136] Minister's letter of 10 October; PR18; Caselines 001-220.

explanation whatever for the Minister's obfuscatory conduct in this regard, let alone a justification. The Minister acknowledges receiving the letters, expresses no regret at failing to answer them despite six entreaties directed to her by a party that was clearly affected by the process and which was highlighting the risk to the public, and still fails to engage at a meaningful level with e.tv's concerns and proposals, despite promising to do so.

113. The Minister's conduct is precisely of a piece with the conduct of the Director-General of Health in ***Hospital Association of South Africa***, which, as we discussed previously, this Court held tainted the entire process with procedural unfairness. Indeed, just as in the current situation, in that matter the "*Director-General failed to respond timeously to the proposal submitted by HASA in relation to the alternative methodology*", the correspondence revealed "*a consistent failure on the part of the Director-General to engage meaningfully with, or to listen to submissions from, or thereafter, to provide reasons and rational responses to the proposals submitted by and on behalf of HASA*", and "*process of interaction on the part of the Director-General could best be described as one of disdain for and disregard of the rights of HASA*."[137] This is precisely how the Minister has unconstitutionally treated e.tv, and the public, whose rights e.tv also sought to highlight in its correspondence.

The media statement and announcement of precipitous switch-off

114. Instead of consultation and forewarning, on 6 October 2021, the Minister issued a "Media Statement on the Broadcast Migration and Analogue Switch-Off

[137] Hospital Association of South Africa para 50.

Plan"[138] (dated 5 October 2021) which confirmed publicly that the Minister:

114.1. had committed to a 31 March 2022 date because this is the date that was announced by the President during his 2021 State of the Nation Address; and

114.2. undertook to assist beneficiary households (earning less than R3500 per month) with installation of set top boxes "*to ensure universal migration*";[139] and

114.3. committed to ensuring that "*everyone who needs to migrate from analogue to digital is ready to do so and are (sic) not negatively affected by the switch-over from analogue to digital"*.[140]

115. While giving the nod to those public promises, they were broken on the ground: since on the Minister's own version and in the numbers contained in the statement of 5 October 2021, there are at least **2.5 million** households (some **8 million** indigent South African) who are dependent on analogue broadcasting but who have not registered by 31 October 2021 as part of the "*switch-over*" process, and who will accordingly not have the set top boxes installed by the Government (with the necessary antennae) that will allow them now to access digital television services. Rather, come the analogue switch-off date they will be left with no access to television.

[138] PR17; Caselines 001-214.
[139] PR17; Caselines 001-214.
[140] PR17; para 4.1; Caselines 001-217.

116. According to the Minister:

116.1. There are around 3.75 million qualifying households (as per StatsSA 2018 data);[141]

116.2. From 2015 to 2021, only 1.184 million qualifying households have registered;[142] and

116.3. As at 6 October 2021, only 556 954 have been migrated.[143]

117. And against these low migration numbers – less than 1/3 of the people who qualify have registered, and less than half the number of registered people have actually been provided with the necessary digital equipment in the six years from 2015-2021 – the Minister records in her statement that the **cut-off date for connection before the analogue switch off is 31 October 2021**. Thereafter (so the proposal goes) if a household is not registered before 31 October 2021, they will "*only be connected within three (3) to six (6) months after the [Analogue Switch off]*".

118. There are accordingly two critical dates that were set by the Minister in the press release of 6 October 2021:

118.1. The 31 October 2021 cut-off date for indigent South Africans to register for a set-top box (what we refer to as the *STB registration cut-off date*); and

[141] PR17 para 2.1; Caselines 001-215.
[142] PR17 para 2.2; Caselines 001-215.
[143] PR17 para 2.2; Caselines 001-215.

118.2. 31 March 2022, which is the date the Minister is targeting for analogue switch-off (albeit that, as we discuss, the Minister has not formally determined and gazetted 31 March 2022 as the analogue switch off date).

119. Both of these dates were set without any meaningful consultation with those affected by them. We deal with these in turn.

The Minister's failure to consult around the STB registration cut-off date

120. On 6 October 2021, the Minister announced, for the first time, that there would be a cut-off date for qualifying households to register in order to receive set top boxes prior to the analogue switch-off date. And she set that cut-off date on 31 October 2021, mere weeks away.

121. The imposition of the registration cut-off date, and setting 31 October 2021 as the date, were decisions made without consultation, without notice, and without reference to the parties currently using the relevant spectrum, without consulting the public who are currently reliant on set top boxes and without engaging with these parties regarding the practicalities of the proposed dates, or the public that will be affected by those dates, including because of the effective change in the Government's public promises around ensuring that set-top boxes would first be available before switch off.

122. The Minister does not seek to suggest otherwise. The announcement came out of the blue on 6 October 2021. This was plainly constitutionally impermissible, being unreasonable, unfair and irrational.

The Minister's failure to consult around the switch-off date

123. In relation to the date for analogue switch-off, there is an inherent contradiction in the Minister's answering affidavit:

123.1. The Minister states that "*engagements are still ongoing*", that no analogue switch-off date has been finally determined and that "*the Minister will promulgate the ASO date at the moment that she identifies as both opportune and appropriate*".[144]

123.2. Despite this, the majority of the Minister's affidavit is devoted to attempting to justify the Minister's decision to drive towards a switch-off date of 31 March 2022.

124. The Minister wishes to have her cake and eat it: she says that she has not determined the switch-off date, but in substance and effect she has. She has effectively committed the country to this date, but without formally making a determination under the Digital Migration Regulations of the ASO date and gazetting this as she is required to do. For instance, at times in the Minister's affidavit it is alleged that those who registered after 31 October 2021, will only receive their boxes "*three to six months <u>after 31 March 2022</u>*",[145] at other times it is stated that it "*3 to 6 months <u>after ASO</u>*".[146] This shows, that in truth, in the Minister's mind, and *de facto*, 31 March 2022 is the analogue switch-off date. But yet, it may be – given the obfuscation – that the Minister is secretly keeping

[144] Minister's AA, para 29; Caselines 009-11.
[145] Minister's AA para 275; Caselines 009-82; see also para 211.5, Caselines 009-65.
[146] Minister's AA paras 165.7.2 Caselines 009-52, 179 Caselines 009-56, 213.4 Caselines 009-67.

her options open for setting a later date for ASO.

125. The Minister's attempt to sit on the fence is unavailing. By straddling two positions simultaneously, she is guilty of a lack of transparency and accountability. That itself is fatal to the legality of her position – Government is not permitted to govern by opacity or through a haze of confusion. But assuming that she wishes to embrace both positions simultaneously, there is unlawfulness on either count, aside from a lack of transparency:

125.1. *Either* she *has, in substance and effect,* determined the analogue switch-off date – even if not yet formally proclaimed.

125.2. *Or* the Minister has not yet determined the date and her mind remains open, while Minister's entire approach is aiming at, and locking everyone into, a date that she has not yet decided upon.

126. Either of these positions is unlawful, and underlines the need for the declaratory relief sought.

127. In either event, there has been no meaningful consultation with e.tv or other interested and affect parties, including those reliant on the Government to provide set top boxes.

128. To be meaningful, the Minister was required rationally to take into account e.tv's submissions, and in particular, in relation to the harm that will be suffered should the analogue switch off take place without taking adequate steps to ensure that those who are currently reliant on analogue broadcasting are not cut off from

such broadcasting. Despite e.tv raising these concerns time and again, e.tv has never in any of these consultations, in correspondence, or in the answering affidavit had a proper answer as to the basis on which the Minister's decision (in particular the rush to the 31 March 2022 deadline, and imposition of an inexplicable 31 October 2021 cut-off date to register for set-top boxes) can be justified in the light of these retrogressive effects on the rights of access currently enjoyed by millions of South Africans who by reason of their indigence make use of analogue television. As the cases discussed above, including *Hospital Association of South Africa*, demonstrate, this renders the Minister's conduct irrational and procedurally unfair.

129. The date of 31 March 2022 was set without reference to the parties currently using the relevant spectrum, and without engaging with these parties regarding the practicalities of the proposed dates, or the public that will be affected by those dates, or the change of the public promise that would be occasioned thereby, given that the 31 March 2022 date (and its lock-step, 31 October 2021) would leave millions of South Africans without set-top boxes before switch-off occurred.

130. There was no public consultation process that included soliciting and considering the views of the millions of poor South Africans who are now facing an imminent loss of access to television news and broadcasting. Neither MMA nor SOS were consulted.

131. Any suggestion that the Minister's digital migration "Steercom" provided an avenue for consultation, is devoid of merit. Aside from the fact that MMA and SOS and the public were not included in those meetings, there was no

meaningful opportunity to change the Minister's mind. This is illustrated by the fact that e.tv was given an opportunity to comment on the Minister's plan and to present its own plan – but then only two days *after* the Minister had finalised her own plan and presented it to the public,[147] confirming that it was effectively a sham opportunity.

132. Moreover, the Minister repeatedly indicates that she is aiming towards 31 March 2022 as the completion date for digital migration, because that is the date that the President set in his State of the Nation Address in 2021. The Minister records that to meet the Presidential deadline, she has already ensured that SABC analogue transmitters have been switched off in certain provinces and are being switched off in others[148] and she has hastily imposed a cut-off to register for set top boxes. This demonstrates an impermissible fettering of discretion by virtue of acting under dictation,[149] or "*taking directions*" which envisages a decision which appears to have been made by the authorised administrator but has in fact been made at the dictation of an unauthorised administrator.[150] In this regard, the Minister has exhibited an "*attitude of subservience*" to the President's dictates, which is unlawful.[151]

133. In any event, the Minister's continual reference to the 31 March 2022 as the date set by the President, demonstrates that, in direct violation of the obligation to

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[147] The Minister directed that e.tv's plan (PR23 to the Founding Affidavit, Caselines 001-233) was to be presented on 1 October 2021 *after* the Minister's plan received Cabinet approval on 29 September 2021 – see annexure PR14 Caselines 001-197.

[148] See e.g. Minister's AA para 243 Caselines 009-75, para 385 Caselines 009-110, para 416 Caselines 009-115, and para 445 Caselines 009-121.

[149] See section 6(2)(e)(iv) of PAJA and *Tantoush v Refugee Appeal Board* 2008 (1) SA 232 (T) para 81.

[150] Hoexter, Administrative Law, 3rd ed, p. 377.

[151] See *Hofmeyer v Minister of Justice* 1992 (3) SA 793 (W) at 123C.

consult with an open mind, the Minister had a closed mind.

134. In all the circumstances, the Minister's apparent selection of 31 March 2022 has been set without fulfilling the requirements of meaningful consultation.

135. That date – which the Minister is effectively treating as the analogue switch-off date – is not a date that represents the outcome of meaningful public consultation with all stakeholders (broadcasters, mobile network operators, the public reliant on analogue broadcasting, public interest NGOs such as MMA and SOS, community broadcasters, and the like), to determine when it was feasible and reasonable for analogue switch-off to occur. Rather, that is the date, because that is the date that was referred to by the President in his State of the Nation Address[152] in February 2021, absent any consultation with interested and affected parties; and more importantly, absent any power by the President to require the Minister to follow his dictates. Indeed, this Court has confirmed that policies (and *a fortiori* high-level policy statements like the State of the Nation Address) cannot constrain the exercise of a discretion or detract from a duty conferred by a statutory provision.[153]

136. Therefore, the Minister has repeatedly appeared to fetter her discretion by blindly adopting and driving towards a date, not of her own choosing, and critically, not determined after consultation.[154] This is unlawful.

137. To the extent that the Minister's assertions that the date has *not* in fact been

[152] See e.g. Minister's AA para 243 Caselines 009-75 and para 445 Caselines 009-121.
[153] Comair Ltd v Minister for Public Enterprises & others 2016 (1) SA 1 (GP) para 44.3.
[154] Minister's AA para 243 Caselines 009-75, para 385 Caselines 009-110, and para 445 Caselines 009-121.

determined are accepted, then the Minister's approach is similarly unlawful, and the Minister's process of consultation and affidavits are entirely misguided, unreasonable and irrational. That is because it means the Minister is aiming at, and locking everyone into, a date that she has not yet decided upon, but which date has already had serious and detrimental impacts upon rights. This conduct is entirely unreasonable and contrary to the Minister's constitutional obligations in terms of section 7(2) of the Constitution and to adopt a fair and rational process.

138. It is also palpably contrary to the rule of law: section 36(1) of the Constitution says that "the rights in the Bill of Rights may be limited only in terms of a **law** of general application". That is why there is a clear process that the Minister is required to follow under the law – and as articulated by Sutherland J in this Court in ***Minister of Telecommunications*** – in order to "determine" the ASO date. The Minister is not permitted to limit the rights of millions of South Africa on the basis of an undetermined, yet-to-be-determined, or possibly-determined date. The Government and its ministers govern by law and limit rights by law, not by opaque determinations (dressed up as policy or otherwise) that may or may not be final.[155]

[155] See Sachs J in *Minister of Education v Harris* 2001 (4) SA 1297 (CC) held (at para [10]), citing the SCA in Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd 2001 (4) SA 501 (SCA): "*In the light of the division of powers contemplated by the Constitution and the relationship between the Schools Act and the National Policy Act, the Minister's powers under s 3(4) are limited to making a policy determination and he has no power to issue an edict enforceable against schools and learners. Yet the manifest purpose of the notice is to do just that*." (emphasis added). See also *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* (CCT 103/12) [2013] ZACC 25; 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC) (10 July 2013) at para 217 onwards,

E. THE MINISTER'S FAILURE TO MEET CONSTITUTIONAL OBLIGATIONS

139. As we noted, section 7(2) of the Constitution not only requires that the Minister must not act in such a way as to limits rights in the Bill of Rights (unless that limitation is reasonable and justifiable). But it also requires that she takes positive steps to respect, protect, promote and fulfil constitutional rights. These steps must be "*reasonable and effective*." As the Minister in charge of the communication portfolio of the state, ensuring reasonable and effective steps to respect, protect, promote and fulfil the right to freedom of expression is one of the Minister's primary constitutional roles. She is accordingly held to a high standard in this regard.

140. In this section of the heads of argument, we demonstrate how the Minister has not met her constitutional obligations through the lens of five questions. The questions and their answers demonstrate, cumulatively and individually, that the Minister has breached her negative obligations (her actions will violate rights in ways that are not reasonable and justifiable) and has failed to fulfil her positive obligations (she has failed to take steps that are reasonable and effective, to respect promote and fulfil constitutional rights) flowing from section 7(2).

Question 1: Is it reasonable to leave millions of indigent people behind?

141. The first, and primary, question arising from the Minister's conduct is the following: *Is leaving people, and the poorest and most vulnerable in our society, behind in these numbers (more than 8 million) reasonable?*

142. There are currently 17.1 million households in South Africa, of which 15.9 million

have television sets.[156] It bears repeating: even on the Minister's own numbers, there are 2.5 million households (some 8 million people) of some 3.75 million qualifying indigent households, who require, but will not be provided with set top boxes prior to the analogue switch off date.[157]

143. There is thus an imminent and immediate loss of access for millions of poor and vulnerable viewers to free-to-air broadcasting.

144. Of course, there is also a concomitant loss of viewership to free-to-air broadcasters if there is no adequate platform to host the approximately 55% of analogue viewers (which is as high as 60% for SABC3 for the period January 2021 to August 2021).[158]

145. The Government's promise to provide qualifying indigent households with free set-top boxes was evidently meant to ensure that the millions of South Africans reliant on analogue broadcasting who could not afford the costs of migrating themselves, would be assisted by the Government.

146. It is unreasonable and retrogressive now to nevertheless proceed to switch off analogue television, when 2.5 million of these qualifying households do not have set-top boxes.

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[156] FA, para 153 Caselines 001-62.

[157] The Minister's affidavit puts the number at 2.5 million households – relying on StatsSA data, the Minister records that there are 3.75 million households eligible for Government assistance, and that of those 3.75 million households, 1,2 million had registered and would be provided with a box by 31 March 2022. This means that some 2.5 million qualifying households will not be provided a set top box before the migration happens. (Minister's affidavit, paras 256-259; Caselines 009-79 – 009-80). According to StatsSA, there are approximately 3,3 individuals per household in South Africa (Intervening Applicants' Replying Affidavit, para 9; Caselines 019-6). This means that approximately 8 250 000 indigent people will be left without access to free to air television services.

[158] Founding Affidavit, para 155; Caselines 001-62.

147. In particular, the millions of South Africans' freedom of expression rights (as discussed above) are unreasonably violated by the Minister's precipitous switch-off inasmuch as instead of ensuring protection, promotion and fulfilment of the right of freedom of expression, inclusive of the right to receive information, and of equality, the Minister's actions are retrogressive: divesting millions of South Africans of the access they currently enjoy to free-to-air broadcasting.

148. The precipitous switch-off will accordingly not only affect the right to freedom of expression, but also the related rights that are given effect to through the right of freedom of expression, including a number of political rights (such as the right to participate in elections) and to securing transparency and accountability, and the right to dignity.

149. Moreover, by proceeding with analogue switch-off while millions of qualifying households (including, in particular, social grants beneficiaries) do not have set-top boxes, in breach of the promises made to them, the Minister would be acting in a way that fails to protect, promote, and fulfil the right to social assistance in section 27.

150. In all of the circumstances above, it is unjustifiable and unreasonable for the Minister to embark on a precipitous and unnecessary switch-off process, which will leave *8 million* South Africans without access to television broadcasting.

Question 2: Was the limited notice of the STB registration cut-off reasonable?

151. The second question is: *Was it reasonable for the Minister to give three weeks' notice or less of the closing deadline for registration for set top boxes at the end*

of October 2021?

152. As set out above, on 6 October 2021, the Minister, without prior consultation, and almost no notice, imposed a cut-off date of 31 October 2021 for South Africans that qualify for set-top boxes to register. Those who did not register in time will not have set-top boxes installed prior to the analogue switch-off date. They would then be left without access to any public, free-to-air or any other broadcasting. By this imperious deadline, imposed unilaterally (without any consultation) and unreasonably (the timelines are screamingly inappropriate, and the antithesis of reasonable), in one fell swoop the Minister has ensured that "*qualifying households*" (the indigent and vulnerable) were in fact disqualified.

153. Even the Minister accepts that by now imposing a cut-off point of 31 October 2021, many indigent South Africans will be left in the dark. The Minister tells us that only 1.29 million households,[159] of approximately 3.75 million eligible households (those earning less than R3500 per month),[160] had registered by that date. Each household represents approximately 3.3 individuals, and hence the result: almost 2.5 million indigent households that will be left behind, representing almost 8 million people who will be left without access.

154. This cut-off date was, therefore, set in the following circumstances, each of which is unreasonable:

154.1. First: the registration date was set, despite no ASO date having been determined (that is what the Minister contends in her answering affidavit),

[159] Minister's AA para 211.5 ; Caselines 009-66 (1 228 879 households to be exact).
[160] Minister's AA para 211.1; Caselines 009-65.

and hence there was and remains an unknown but potentially very lengthy period between 31 October 2021 and the outer limits of "3 to 6 months after ASO", precisely because ASO is not legally determined and factually uncertain;

154.2. Second: the date for registration was set on three weeks' notice (or less, as discussed below);

154.3. Third: no interested and affected parties were consulted on the Minister's proposal to impose a cut-off date for registration, and to make that date 31 October 2021; and

154.4. Fourth: the unilateral cut-off date, and the short notice provided in respect of the cut-off, has resulted in a staggering **two-thirds** of the qualifying households having ***not*** been registered in time (some 2.5 million of approximately 3.75 million households).

155. In light of this, these are the issues: was it reasonable for the Minister, without notice, to (a) set a deadline by which indigent households had to register; and then (b) to set that deadline for only three weeks later?

156. Given the purpose of providing set top boxes to qualifying households – "*to bridge the digital divide*" [161] between the rich and the poor, and so as to ensure "*universal migration*"[162] – the Government's actions were clearly unreasonable and indeed irrational. The Minister's affidavit makes this clear. The Minister

[161] P. 21 and 22 of the 2008 Broadcasting Digital Migration Policy; Caselines 001-230.
[162] Minister's AA para 211.1; Caselines 009-65.

baldly claims that the 31 October cut-off date was not arbitrary or irrational.[163] Yet the Minister provides not a single reason, let alone a rational or reasonable explanation for why this early date was selected, and what the legitimate purposes could have been in setting it so early, especially given that no ASO date had (or has) yet been set.

157. The public campaign to encourage registration and announce a cut-off date only began after 6 October 2021[164] (after years of Government inaction). An unsuspecting public was thus visited with a notice out of the blue: leaving the public at best 3 weeks to understand the import of what was being conveyed, and take the appropriate action to get registered. This was the first time that Government indicated that there was a deadline by when registration would be required, absent which a set top box would not be installed before ASO, meaning the qualifying indigent households would be left without access.[165] But unreasonably, this public campaign, which only started after 6 October, set the deadline as 31 October – barely three weeks after the commencement of the public campaign. There is simply no reason given for this. There can be no reasonable basis therefor, especially given the years of delay in progressing digital migration.

158. The unreasonableness is compounded by the following.

158.1. The 6th of October was simply when the Minister announced the start of

[163] Minister's AA para 527; Caselines 009-136.

[164] The press release is dated 5 October, although it appears to have been circulated on 6 October 2021. See PR17, Caselines 001-214.

[165] Minister's AA para 155.7 read with 155.5 Caselines: 009-48; see also See para 349, Caselines 009-104; and AA30, Caselines 010-502.

the campaign and the cut-off date for the first time in a Ministerial press release. This does not mean that on this day most or even a significant number of qualifying households would have known about the sudden imposition of the cut-off date. Indeed, the annexures to the Minister's affidavits make it clear that the Department of Communication's public announcements advising people of the cut-off date which were to run at the end of SABC radio broadcasts only began to run on 11 October 2021.[166]

158.2. And it appears that many of the announcements scrolling on TV only began as late as 18 October, with the Minister only being interviewed on radio platforms between 20 and 29 October.[167]

158.3. Banner messages advising of the need to register were distributed or published on 27 and 29 October (days before the cut-off).[168]

158.4. Of course, one does not know at what point after these dates, if at all, qualifying households in fact became aware of the urgent need to register. But it is evident that the majority would have had almost no notice of the sudden imposition of a deadline, or that it would occur mere days later.

159. Unsurprisingly, the Minister's unreasonable conduct achieved a dramatically unreasonable result: it reduced the number of qualifying households that knew

[166] See AA31 (the Minister tells us that "AA31" is the Department's Communications' Strategy that shows the ways in which the Department informed the public about the BDM and the ASO). Minister's AA para 359; Caselines 009-106.
[167] See AA31, Caselines 008-529 to 008-534.
[168] See AA31, Caselines 008-537.

or were able to register timeously and thus retrogressively removed them from being able to access the television they had previously enjoyed.

160. During the month of October 2021 (the final month before the cut-off for registration), only 58 902 out of the *millions* of households that remain reliant on analogue broadcasting registered for a set top box. This is confirmed by the South African Post Office, which was the organ of state tasked with administering and managing the registration process.[169]

161. The Minister agrees that to create a situation where the number of indigent households that require a set-top box before migration is undercounted "*would be reckless and precipitate a crisis, something that Government has no intention to do*."[170]

162. But that is exactly what she has done. By dint of the Government's actions, millions are being left behind – they are social grants beneficiaries and those that earn no more than R3500 per month. It is hardly likely that any, let alone the majority, would have any means to afford to "self-migrate", by purchasing a digital TV and installing the necessary antennae, or a satellite box and dish (possibly with a DSTV subscription). That must be so on the Government's own understanding of the STB policy: recall that it is predicated on the fact that self-migration cannot happen for people earning this little, hence the promise to financially support them to do so. Without that financial support, expensive digital TVs or satellite boxes and dishes are the only options because there are no DTT

[169] E.tv's RA para 38; Caselines 020-24.
[170] Minister's AA para 623; Caselines 009-153.

set top boxes (to receive digital terrestrial television) available in retail outlets. So, it is only those who registered (and while government's limited stock lasts) who will potentially be able to obtain these set top boxes, and those that didn't will be left behind.

162.1. Indeed, the Minister's own 6 October 2021 press release made clear that only 10.5 million of the 14 million television households had yet been able to self-migrate.[171] This means that the remaining 3.5 million are mostly made up of the, at least, 2.5 million indigent households that are still in need of set top boxes from Government, and who will be left behind on the Minister's current plan.

162.2. Independent research confirms that currently 36% of the population is wholly reliant on analogue terrestrial signal to access television.[172]

163. For these reasons too the Minister's actions fail to live up to her constitutional obligations.

Question 3: Was it reasonable to set the STB registration cut-off date before determining the ASO date?

164. The third question, which is linked to the previous question, is whether it was reasonable to determine and impose a STB registration cut-off date in circumstances where there is (at least on the Minister's own version) no final

[171] PR17 para 2.2; Caselines 001-215.

[172] FA para 151 and 152; Caselines 001-61; MMA and SOS FA para 62.1 005-34, read BRC's CEO's confirmatory affidavit paras 1 to 4, Caselines 005-469; and MMA and SOS RA para 44; Caselines 019-268

switch-off date?

165. Or put differently, was it reasonable to race the poorest of South Africans to register by 31 October 2021 (especially on almost no notice) – and for them to face the risk of being left behind if they did not register – when the ASO date itself is not firmly in place?

166. The answer, in our constitutional democracy – where the Government owes the poor and vulnerable more, not less, concern – is an emphatic “no”.

167. This is especially so in circumstances where the STB registration cut-off was announced and set some 4 months ago, and yet, as we stand at the time of preparing these heads of argument, the Minister has still made no final gazetted determination of the analogue switch off date. If such announcement was not imminent, why then the rush to close registrations?

168. The Government announcement of a deadline for STB registration was too short, without consultation, without proper notice, and without any reasonable study, planning or research which explained why that 31 October date had to be set or what the potential risks or consequences would be to the population by setting it.

169. The unreasonableness of the Minister’s decision is compounded by the fact as discussed in relation to the previous reasonableness question, that shows that the majority of the public would have had no, or almost no, notice of the sudden imposition of a STB cut-off date, or that it fell mere days later.

170. Thus, the majority of people were unable or unaware of their need to register. Certainly, by 31 October 2021 it is unlikely that it came to the attention or notice of most people. They, therefore, did not realise that they were about to be left without the means to access any public broadcasting.

171. Therefore, the cut-off date for the registration for a set top box of 31 October 2021 was irrational, arbitrary and unreasonable.

172. Moreover, there was no need or constitutionally reasonable basis to set the October date (nor does the Minister provide one) since, if the Minister is to be taken at her word, the date for analogue switch off has not yet been determined. It might be in March; it might be in July or it might be in December or it might be later. In those circumstances, there was no rational basis to impose a ridiculously short deadline of 3 weeks (with most people having far less, if any, notice) to require the millions who are still reliant on analogue broadcasting to register.

173. If the Minister is correct on her one version (that no date has been determined for ASO), then South Africans were sent sprinting, when the date for the marathon was not yet set.

Question 4: Is it reasonable to leave millions of indigent South Africans without access for half-a-year or longer?

174. The fourth question is whether it is reasonable for the Minister to leave millions of indigent South Africans without television access (now in the region of 8 million who did not meet the out-of-the-blue imposed deadline of 31 October) in the dark for at least up to half-a-year, if not longer?

175. The Minister suggests that if those who qualify for set top boxes register even after 31 October 2021, they may still thereafter receive set top boxes, but this would only be three to six months after the ASO date.

176. The Minister has provided no further details in this regard.

177. Given:

177.1. the fact that only 572 255 beneficiary households have been successfully provided with STBs;[173]

177.2. the undisputed global chip shortage which will impact on the manufacturing and supply of STBs to the South African market;[174] and

177.3. the Minister's failure and / or refusal to specify exactly when the ASO date will be,

the promised "three to six month" period is a chimera that could well stretch much longer than that.

178. And of course, the Minister has, even before the promulgation of any ASO date,

[173] See 'Media Statement by the Minister of Communications and Digital Technologies, Ms Khumbudzo Ntshavheni on the broadcast digital migration and analogue switch-off plan implementation update', dated 24 Nov 2021. The statement is attached as annexure MR20 to the intervenors' consolidated RA to the Minister and ICASA's AA, Caselines p 019-210. The Minister's AA to the intervention application also references the same figures at para 22, Caselines p 011-7.

[174] Intervenors' FA, para 40.2, Caselines p 005-22, read with the supporting affidavit of Mr Stander, Caselines p 005-423. The Minister does not deny the existence of the global chip shortage or the fact that it will impact on the manufacturing of STBs but contends that the intervening applicants are '*unnecessarily over-exaggerating...its impact on STB manufacturing in the context of the numbers actually received and the number of households that have already migrated,'* para 50, Caselines p 001-12.

been engaging in the progressive switch-off by province of SABC transmitters. Yet, the Minister only guarantees that those who registered for set top boxes by the STB cut-off date (31 October 2021) will receive set top boxes before the ASO date. But the Minister says that the ASO date has not yet been formally determined. Thus, for the 670 000 households who registered prior to 31 October 2021, they may, depending on which province they are in, already have lost access to SABC, but will only receive set top boxes at some point before the yet to be gazetted ASO date. Similarly for millions who have not registered, or registered after the STB cut-off date, the Minister only aims to provide them with STB three to six months after the ASO date (which means they might be without public broadcasting (in the form of SABC) for many more than six months).

179. But, linked with the previous discussions, given that no ASO date has yet been set, that no consultation occurred in relation to the need for setting a STB registration cut-off, and that almost no notice was given of the need to register, it is evident that the Minister's approach of leaving millions without access to television, which they currently enjoy, for months if not years, is unreasonable.

180. The unreasonableness is heightened, not only because it is evidently retrogressive, but because it directly and exclusively harms and treats with disdain the rights of millions of vulnerable South Africans. It also makes a mockery of serious and lawful promises made by the Government not to leave any who require assistance behind. Thus, trampling on the dignity, freedom and equality of the most vulnerable in our society, those reliant on the Government for social assistance, including in this case the provision of set top boxes. This is, with respect, constitutionally abhorrent and unconscionable.

Question 5: Is it reasonable not to promulgate an ASO date yet nevertheless to switch-off analogue transmitters?

181. The fifth question is: *whether it is reasonable for the Minister to decline to promulgate an analogue switch-off date* – which she is as required by the Regulations to do – *but nevertheless to switch-off analogue transmitters* (in particular all of SABC's analogue transmitters) *across the country*, particularly where that moment of switch off will leave vulnerable South Africans in the dark for an unknown period, and especially when millions of South Africans are still without the promised Government provided set top boxes?

182. The Minister's position is untenable: she says that she has not determined the switch-off date, but to all intents and purposes she has, and she has committed to this date, but without complying with the legally necessary prior step of gazetting the switch-off date. In this way the Minister attempts to ride two horses and keep her options open.

183. But taking the Minister at her word – if she has *not* determined the switch-off date, the Minister's actions are entirely arbitrary and unjustified: the Minister has engaged in highly prejudicial conduct – such as closing the date for set top box registrations to obtain a box prior to analogue switch off and driving to switch off analogue transmitters across the country – in circumstances where (a) the switch-off date has not even been decided; and (b) millions of indigent South Africans have not yet been provided with set top boxes.

184. Indeed, **670 000 households** that registered prior to the unilaterally imposed, 31

October 2021 STB cut-off date, still do not have set top boxes. The Minister suggests they will get them prior to ASO date. But already whole provinces (five at the date of these heads)[175] have had *all* SABC transmitters switched-off. In this regard, it took the Government **five years to install the first** 556 954 set-top boxes for those qualifying indigent households that registered.[176] Now the Minister says the Government can do 670 000 installations in little more than 5 months, all the while leaving more and more South Africans without access.

185. The Minister's assertions in this regard are difficult to credit. That is particularly so since she says she takes account of Vodacom's affidavit and expressly indicates that she associates with the averments in that affidavit, yet she does not dispute Vodacom's suggestion that the Government will *not* be able to meet the timeframes it sets (not only for the 670 000 who registered prior to 31 October, but also for the many more who register after the artificial 31 October 2021 cut-off).[177]

The conclusion: the Minister's actions are unconstitutional and unreasonable

186. Given the analysis of the Minister's conduct, through the rubric of the five questions we discussed above, it is clear that:

186.1. The Minister's conduct is retrogressive and in violation of section 7(2) of the Constitution.

[175] The most recent news article (of 8 February 2022) records that Limpopo was the 5th province to turn off its analogue SABC transmitters.
https://www.itweb.co.za/content/wbrpO7gYdYQqDLZn
[176] Minister's AA paras 265 -267; Caselines 009-79.
[177] Minister's AA paras 432 and 435; Caselines: 009-118.

186.2. Her actions are not reasonable and effective steps to ensure that the rights in the Bill of Rights are respected, protected, promoted and fulfilled.

186.3. Rather her actions threaten and limit the rights of millions of the most vulnerable in our society, and cannot be justified.

186.4. They also directly contradict the Government's serious and lawful promises to ensure that *all* qualifying households received set top boxes prior to the switch-off process beginning so that none are left behind.

187. In short, the Minister's actions if allowed to continue unchecked will mean that we will not achieve digital migration in South Africa. Rather we will achieve a divided society with only the wealthy members of our society able to migrate, and millions of the indigent are left stranded and cut-off from the access to broadcasting they previously enjoyed.

188. In the next Part we explain how this Court can avert such an unconstitutional outcome.

F. APPROPRIATE RELIEF

189. In its notice of motion, e.tv sought three related sets of prayers:

189.1. The first set of prayers are declaratory in nature. They seek to clarify and determine the minimum requirements that must be met for any lawful and constitutionally-compliant digital migration process to occur ("**the minimum requirements**"). These need to be met to ensure that those who are reliant on analogue transmission of broadcasting services have

been provided with appropriate means to continue to access e.tv's services and those of the other free-to-air broadcasters on a free-to-air basis. They further seek to clarify that the Minister is required to undertake a process of public consultation with affected parties, stakeholders and the public (including e.tv), and with Cabinet, regarding the date set for completion of digital migration, the dates for analogue switch-off/s to occur in the lead up to or in the completion of digital migration, and the manner in which the minimum requirements or any alternatives thereto will be satisfied.

189.2. The second set of prayers flow from the first. They seek review relief reviewing and setting aside any ASO date determination promulgated by the Minister. The review relief was sought only to the extent necessary. In terms of the binding Digital Migration Regulations, the digital migration process (which as defined in those regulations is "the transition from analogue broadcasting to digital broadcasting") will only be completed once final switch-off of analogue signal has occurred. In terms of the Digital Migration Regulations, the Minister must, by publication in the gazette, determine the date on which the final switch-off of analogue signal will occur. Self-evidently, the gazetting of the date for analogue switch off must occur well in advance of that date, not retrospectively. The Minister has not yet gazetted that date. Accordingly, there is (as at the time of drafting these heads of argument) no final *gazetted* decision to review. e.tv, accordingly, does not persist in seeking this relief. But of course, because of the lack of transparency about this aspect, it underlines the need for the first set of declaratory prayers, and the third set of prayers to

which we now turn.

189.3. The *third* set of prayers relate to the future. Given the Minister's unreasonable and unconstitutional conduct, coupled with her intentional and continued opacity to date in this regard (which violates the principles of open and accountable government), it important for this Court properly setting the "*rules of the game*" for the digital migration to occur and ensure that these are honoured. Therefore, e.tv seeks relief that requires the Minister to disclose and report back to the Court on how the Ministry has achieved the minimum requirements (or any reasonable alternatives thereto arising from the consultation referred to above), prior to the setting of any new date for digital migration's completion. e.tv thus seeks a directive that the Minister and ICASA report back to this Court within a period of one month (or such other period as the Court should so direct) to set out the steps which have been taken to ensure that the minimum conditions of the digital migration process are being met.

190. The Minister describes this relief as "*extraordinary*".[178] But as we now demonstrate, the relief sought is not only within this Court's powers, but it is justified on the facts and constitutionally appropriate and necessary. Indeed, this type of relief has often been granted by the courts in comparable circumstances.

191. Section 38 of the Constitution provides expressly that were there is a threatened violation of rights in the Bill of Rights the Court must grant appropriate relief,

[178] Minister's AA, para 17; Caselines 009-8.

which may include a declaration of rights.

192. As the Constitutional Court confirmed in ***Fose***: "*[a]ppropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief* ***may be a declaration of rights,*** *an interdict, a mandamus or* ***such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced****. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights*".[179]

193. This requires the court to act to protect and vindicate rights, for, as the Constitutional Court has stated, "*the defence of the Constitution - its vindication - is a burden imposed not exclusively, but primarily, on the judiciary. In exercising our discretion to choose between appropriate forms of relief, we must carefully analyse the nature of a constitutional infringement, and strike effectively at its source*."[180]

194. As the Constitutional Court also emphasised, in a statement that is particularly resonant in the current matter which effects millions of the indigent in our society: "*Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard*

[179] Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) para 19.

[180] Fose paras 95-6. See also Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others 2007 (6) SA 511 (SCA) at paras 25-8.

and are obliged to forge new tools and shape innovative remedies, if needs be, to achieve this goal."[181]

195. The Constitutional Court made clear in ***Metrorail***, flowing from section 38 of the Constitution, that a declaratory order may well be the constitutionally appropriate relief. As the Court emphasised, "*[a] declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values."*[182] *And as the Court went on to point out, "declaratory relief is of particular value in a constitutional democracy which enables courts to declare the law, on the one hand, but leave to the other arms of government, the Executive and the Legislature, the decision as to how best the law, once stated, should be observed*."[183]

196. In that matter, the Court employed that remedy, declaring the nature of the obligations on organs of state. It did so because, "*Metrorail and the Commuter Corporation denied, in error, that they bore obligations to protect the security of rail commuters. Given the importance of that obligation in the context of public rail commuter services, it is important that this court issue a declaratory order to that effect."*[184]

197. Similarly a threatened breach of constitutional rights, also engages this Court's jurisdiction to grant just and equitable relief in terms of section 172(1)(b)(ii) of the

[181] Fose para 69.
[182] Metrorail para 107.
[183] Metrorail para 108.
[184] Metrorail para 109.

Constitution.

198. Indeed, in ***Black Sash*** the Constitutional Court used its just and equitable power under section 172 to impose, *inter alia*, a wide range of reporting obligations on organs of state. It did this because in that matter the "*primary concern*" was "*the very real threatened breach of the right of millions of people to social assistance in terms of section 27(1)(c) of the Constitution. It is that threatened breach that triggers the just-and-equitable remedial powers the court has under section 172(1)(b)(ii) of the Constitution*."[185]

199. The same principles apply in this matter, where there is a real threatened breach of millions of indigent South Africans' right to continue having access to broadcasting and to receive set top boxes from the Government (which, as discussed above, is a form of social assistance, giving effect to section 27(1)(c) of the Constitution, promised to social grant beneficiaries and those whose households earn R3500 per month or less).

200. Therefore, in our constitutional democracy, there is nothing "*extraordinary*" about the Court granting the declaratory and reporting relief where necessary to protect the violation of fundamental rights of millions. Rather it is the Court's constitutional mandate to do so. As the Constitutional Court has held: "*the courts are the ultimate guardians of the Constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of*

[185] Black Sash para 43

government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds."[186]

The declaratory relief is necessary

201. In this matter, the declaratory relief is necessary and appropriate given the contradictions that one finds in the Minister's actions and affidavit, and the unreasonableness, irrationality and unfairness of her conduct and threatened conduct.

202. Precisely because the Minister insists that she has not yet determined the date for analogue switch off, it is just and equitable and appropriate for this Court to make clear (as sought in prayer 2), that prior to doing so the Minister is required to undertake a process of consultation with affected parties regarding:

202.1. the date of the analogue switch-off date and the date for the completion of digital migration; and

202.2. 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 the determination by the Minister.

203. If the Minister has not determined the analogue switch-off date, and given that

[186] Glenister v President of the Republic of South Africa and Others [2008] ZACC 19; 2009 (1) SA 287 (CC) para 33.

she asserts that engagements with parties are ongoing,[187] then there can be no reasonable reason for the Minister to oppose this relief. It is thus appropriate and just and equitable given the Minister's failures properly to consult, which we detailed in Part D.

204. Similarly, given the contradictory and confusing comments made by the Minister, together with her unreasonable conduct or threatened conduct, in respect to whether those who are reliant on analogue broadcasting will be left without access, it is also just and equitable for this court to make clear (in terms of prayer 3) that the analogue switch-off date may not be proclaimed by the Minister unless and until the Minister has complied with her constitutional obligations and public promises to provide those South Africans who are presently reliant on analogue broadcasting with alternative means to access that broadcasting.

205. This is constitutionally necessary and just and equitable. The Minister has confirmed in her affidavit that:

205.1. "*Government has not and will not be leaving any South Africans behind*."[188]

205.2. "*Government's undertakings to make devices/STBs available to qualifying households is well documented*".[189]

205.3. "*Government has committed to assist the poorest TV-owning households to obtain STBs to enable them to receive DTT. The Minister and*

[187] Minister's AA para 29; Caselines 009-11.
[188] Minister's AA para 375; Caselines 009-109.
[189] Minister's AA para 666; Caselines 009-009-161.

Department intend to ensure that all qualifying households receive STBs".[190]

206. Moreover, the Minister has admitted that the minimum requirements for digital migration, which includes that "*members of the public who are currently reliant on analogue broadcasting services are provided with access to set-top boxes 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*", are important and must be complied with "***ahead* of the ASO**."[191]

207. The relief is constitutionally necessary, appropriate and just and equitable, because the Minister, while making the above commitments, has sought by her Plan and the steps taken to effect it, to act in a manner that is unreasonable and unconstitutional, and that would result in many millions of indigent South Africans being left without access (as we discuss below). These South African and their rights are very much under threat. Moreover, the history of digital migration, as discussed above, is one where, regrettably, the Government has repeatedly and consistently failed to live up to its promises. But the effect of a failure now is too great a cost and justifies the relief sought.

The need for reporting relief

208. The reporting relief (as per prayer 5) is specifically aimed at ensuring that the Minister keeps the Court and the public apprised of the steps that are being taken to ensure the following minimum requirements are complied with:

[190] Minister's AA para 199; Caselines 009-62.
[191] Minister's AA para 508; Caselines 009-132.

208.1. members of the public who are currently reliant on analogue broadcasting services are provided with access to set-top boxes 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;

208.2. adequately resourced call-centres are operational to process viewer queries sufficiently and effectively;

208.3. an effective viewer information campaign has been conducted; and

208.4. sufficient Sentech resources have been allocated transmitters.

209. The Minister does not deny that these minimum requirements apply. The Minister says "*e.tv appears to suggest that it originated the so-called minimum requirements.* ***These, as I have said, are part of what is important and to be finalised ahead of the ASO***."[192] So the Minister admits that these minimum requirements are important and must be finalised before analogue switch-off. If this is so, then she can have no objection to a declaration obliging the Minister to report to the Court, the parties, and the public on the steps being taken to comply fully with those minimum requirements given the continued lack of clarity and obfuscation from the Minister.

210. This is certainly constitutionally necessary given:

210.1. **There is still significant uncertainty in relation to how and what steps have and will continue to be implemented to ensure compliance with**

[192] Minister's AA para 508.

these minimum requirements: In particular, as indicated above, it is not clear whether the Government will in fact be able to install even the apparently guaranteed 670 000 boxes in the timeframes proposed by the Minister.[193] Nor does the Court know how many indigent households have registered in the months since 31 October 2021, and what steps will be taken to ensure they received boxes, without delay, and when they will in fact receive them.

210.2. **The significant delays in the completion of digital migration and the continued missing of targets by Government**: The Minister does not deny that there have been significant delays.[194] The Minister's affidavit shows a stop-start approach to digital migration and ensuring the public are aware of it, and have the necessary means to access digital broadcasting.[195] This has left the public and in particular the poor uncertain as to what was happening and when, and what was required of them, and why, or what would happen to their current access.

211. The Minister was asked repeatedly in correspondence to confirm whether she accepts these minimum conditions, and if she does not, in what respects.[196] She refused to respond and said that she would do so in her affidavit.[197] But the Minister's affidavit does not provide answers or clarity, and in fact confirms e.tv's fears that the process is being undertaken hastily and without compliance with

[193] In its most recent news release dealing with ASO, the Post Office ominously states that "*The goal is to install decoders at all the households that applied before 31 October 2021*". In other words, it is no longer a "*commitment*" but a "*goal*". (https://www.itweb.co.za/content/wbrpO7gYdYQqDLZn)
[194] See Minister's AA para 290.5.
[195] See e.g. Minister's AA 317, 345.
[196] FA paras 80 to 84, and 97 and 98; para 104; para 111.
[197] FA paras 85 and 99, 105, and 112.

the minimum requirements. Indeed, as we have shown above, the Minister's conduct has been fundamentally unreasonable and at odds with her constitutional obligations.

212. Similarly, in the Minister's affidavit there are many indications of what the Minister says will happen, but has not yet happened.[198] In addition, as set out above, there are credible concerns that the Minister's approach is not only unrealistic but unconstitutional. Coupled with the history of delays and false starts, in this crucial area of national importance with the threat of grave prejudice to the indigent and most vulnerable in our society, we submit that there is a clear basis for why there is a need for reporting and judicial oversight.[199]

G. CONCLUSION AND RELIEF SOUGHT

213. For all the above reasons, e.tv seeks the declaratory and reporting relief sought in its Notice of Motion, together with the costs of three counsel (although five were employed).[200]

[198] See e.g. Minister's AA para 294.

[199] As we previously highlighted, in the context of a failure by the government to properly provide social assistance, and the Constitutional Court's power to order a reporting back to the Court on steps to remedy that failure, see the order granted in Black Sash Trust. As a recent example of such relief following the Black Sash Trust example, see the order of the Full Court in Council for the Advancement of the South African Constitution and Others v The Ingonyama Trust and Others (12745/2018P) [2021] ZAKZPHC 42; 2021 (8) BCLR 866 (KZP); [2021] 3 All SA 437 (KZP); 2022 (1) SA 251 (KZP) (11 June 2021).

[200] Such costs are appropriate in a matter of factual and legal complexity of this matter. See Earthlife Africa para 144; Van Zyl and Others v Government of the Republic of South Africa and Others 2005 (11) BCLR 1106 (T) para 125; Van Zyl and Others v Government of the Republic of South Africa and Others 2008 (3) 294 (SCA) para 93. Such costs orders were also ordered, inter alia, in AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others 2014 (1) SA 604 (CC) para 98, and Helen Suzman Foundation v President of the Republic of South Africa and Others 2015 (2) SA 1 (CC) para 112.

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Chambers, 16 February 2021