IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 51159/21

In the intervention application of:

MEDIA MONITORING AFRICA	First Applicant
SOS SUPPORT PUBLIC BROADCASTING	Second Applicant

In the matter between:

e.tv (PTY) LIMITED	Applicant
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

In re:

CASE NO: 51159/21

e.tv (PTY) LIMITED	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
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WIRELESS BUSINESS SOLUTIONS (PTY) LIMITED t/a RAIN	Tenth Respondent
LIQUID TELECOMMUNICATIONS SOUTH AFRICA (PTY) LIMITED	Eleventh Respondent
SENTECH SOC LIMITED	Twelfth Respondent

INTERVENORS' HEADS OF ARGUMENT

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INTRODUCTION

1 Digital migration is the process of converting the broadcasting of television and radio from analogue to digital technology. It begins with the 'switching on' of digital transmission and ends with the 'switch off' of analogue transmission.

2 The digital migration process is highly complex. It involves a range of interdependent factors that must be carefully balanced. These include the need to ensure the migration process is implemented in a manner that preserves the constitutional rights of broadcasters and all citizens, particularly the poor and most vulnerable who rely on analogue television broadcasts.

3 The digital migration process has been underway for more than a decade and has suffered lengthy and persistent delays. The government missed its first target date for completion in 2011 and its second in June 2015. For the next five years, the government was completely silent on the completion date for digital migration and no date for analogue switch off (ASO) was ever announced.

4 Suddenly, in early 2021, the state decided that the completion of digital migration would be achieved by 31 March 2022. The result of rushing towards ASO on this date, without any adequate public consultation process or sufficient preparations, is that millions of South Africans who rely on analogue to access free to air broadcasting services (FTA) will lose that access for an indeterminate period of time.

5 FTA broadcasters play a critical role in our democracy. They are integral to the advancement and realisation of the constitutionally guaranteed right to freedom of expression which includes the right to receive or impart information or ideas. Due to their free distribution basis, FTA broadcasters are able to provide the poor and most vulnerable members of our society with access to televised content such as news, current affairs, public service announcements, informal knowledge building and educational content. Access to such content is, for many millions of South Africans, essential to be able to participate in our democracy.

6 Although the Minister seeks to create the impression that the country is ready for ASO and that the poor have been adequately catered for, this is not the case. At least 2.5 million indigent households - 8 250 000 indigent people - will be left entirely without access to FTA services at the end of March 2022 and in the immediate aftermath of ASO.

7 The Minister says that all indigent households who registered under the government subsidy scheme after 31 October 2021 (roughly 2.5 million households) will receive set top boxes (STBs) within 3 to 6 months of the proposed ASO date. Not only is this an admission by the Minister that some 8 250 000 people will lose access to FTA services for at least three months, but meeting this target is impossible given the manufacturing and supply constraints associated with STBs. Further, the Minister's assertion that there are only 800 000 STBs in stock amounts to a concession that the government cannot even cater for the 1 228 879 indigent households that had already registered by the end of October 2021.

8 Against this backdrop, MMA and SOS have sought to intervene in the proceedings launched by e.tv. They contend that the state's proposed 31 March 2022 date for the completion of digital migration constitutes an unjustifiable limitation of the rights of millions of South Africans (especially the poor) guaranteed by section 16(1)(b) of the Constitution. Moreover, the process followed by the state in determining the proposed 31 March 2022 date for ASO was irrational and unlawful for two primary reasons:

8.1 first, the state failed to consult with the general public and critical public interest organisations such as MMA and SOS on the proposed ASO date prior to its determination; and

8.2 second, the state has not investigated or assessed how many South Africans remain dependent on analogue and how many indigent households require assistance prior to deciding on the ASO date.

9 We address the following issues:

9.1 first, we set out the common cause facts in these proceedings;

9.2 second, we explain that MMA and SOS have a direct and substantial interest in this matter and should be granted leave to intervene in these proceedings;

9.3 third, we demonstrate that the government's proposed 31 March 2022 date for the completion of digital migration unjustifiably limits the rights of millions of South Africans to freedom of expression which includes the right to receive or impart information or ideas;

9.4 fourth, we explain why the proposed ASO date is irrational and unlawful; and

9.5 lastly, we address remedy.

COMMON CAUSE FACTS

10 The following material facts are common cause on the papers:

10.1 FTA television access is the primary mechanism by which the poor receive important information. [1]

10.2 In 2005, consultations were conducted under the auspices of the Digital Migration Working Group regarding digital migration in South Africa.[2]

10.3 The process of digital migration officially commenced in 2006 with the ITU Regional Communication Conference.[3] At this conference, the ITU determined that Region 1 countries (Africa, Europe, the Middle East and Iran) should migrate from analogue television to digital television by 17 June 2015.

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1 Intervenors' FA, para 43, caselines p 005-24. The Minister does not deny that FTA services is an important mechanism through which South Africans especially the poor receive vital television content at any point in the Minister's AA to the e.tv application or to the intervention application.

2 Minister's AA, para 76, caselines p 009-25. This is consistent with the Broadcasting Digital Migration Policy, issued in terms of section 3(1) of the Electronic Communications Act 36 of 2005, GN 958 in GG No 34108, dated 8 September 2008 ("BDM Policy of 2008"). The BDM Policy is attached to e.tv's FA as annexure PR 24, caselines 001-255.

3 e.tv's FA, para 67, caselines p 001-36. Minister's AA to the e.tv application admits this fact to the extent that it is consistent with the documents referred to in its answering papers, para 459, caselines p 009-123. This fact is also consistent with the supporting affidavit of Mr Petzer filed with the intervention application, para 28 caselines p 005-391.

10.4 Thereafter, the government began to formulate the Broadcasting Digital Migration Policy ("BDM Policy"). To this end, a public participation process was held in March and April 2007.[4]

10.5 In 2007, Cabinet approved the dual illumination period commencing on 1 November 2008.[5] The dual illumination period effectively marks the beginning of digital migration and involves the 'switching on' of digital broadcast transmission signals and the 'switching off' of analogue ones.

10.6 The BDM Policy was gazetted in September 2008. Under the BDM Policy of 2008, it was intended that South Africa complete its digital migration process by November 2011.[6]

10.7 The process was however delayed due to what the Minister has described as *'serious setbacks during the technology negotiation process.'* [7]

10.8 As a result, the BDM Policy was amended in 2012.[8] The 2012 Amended BDM Policy set the following targets:

10.8.1 the date contemplated for the completion of digital migration was the ITU set date of 17 June 2015; and

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4 Minister's AA to the e.tv application, para 49, caselines p 009-16. This is consistent with the BDM Policy of 2008, attached to e.tv's FA as annexure PR 24, caselines 001-255.

5 See for example BDM Policy of 2008, caselines p 001-255.

6 See for example the BDM Policy of 2008, p 12, caselines 001-25.

7 e.tv's FA, para 68, caselines p 001-36, read with annexure PR 17 (Media Statement by the Minister of Communications and Digital Technologies on the Broadcast Digital Migration and Analogue Switch-Off Plan, dated 5 October 2021), caselines p 001-214. Minister's AA to e.tv application admits this fact to the extent that it is consistent with the documents referred to in its answering papers, para 459, caselines p 009-123. This fact is also consistent with the supporting affidavit of Mr Petzer filed with the intervention application, para 45, caselines p 005-396.

8 Amendment of Broadcasting Digital Migration Policy issued under GG No. 31408 on 8 September 2008, published on 7 February 2012, GN 97 in GG No. 97 in GG. 35014 ("Amended BDM Policy, 2012"). The Amended Policy is annexure PR 25 to e.tv's FA, caselines p 001-284.

10.8.2 the government would endeavour to switch on DTT signal in the last quarter of 2012. [9]

10.9 The country subsequently failed to meet the targeted date of 17 June 2015. However, government did not seek an exemption at the 2015 World Radiocommunications Conference (WRC-15), so South Africa did not qualify for another extension.[10]

10.10 In December 2012, the Digital Migration Regulations were promulgated. [11] In terms of these Regulations, Regulation 3(1) provided that "*The switch-on and switch-off date of the digital and analogue broadcasting digital terrestrial signals will respectively be determined by the Minister of Communications in consultation with Cabinet.'*

10.11 Following the promulgation of these Regulations, there was inconsistency between the Digital Migration Regulations and the BDM Policy which set 2015 as the date for the completion of digital migration. After government failed to meet the 2015 deadline, the BDM Policy was amended a second time so that it was consistent with the Digital Migration Regulations and reflected that the Minister, in consultation with cabinet, would determine the switch on and switch off dates.[12]

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[9] e.tv's FA, para 69 caselines p 001-37. Minister's AA to e.tv application admits this fact to the extent that it is consistent with the documents referred to in its answering papers, para 459, caselines p 009-123. See also Amended BDM Policy, 2012, e.tv's FA, annexure PR 25, caselines p 001-274.

[10] e.tv's FA, annexure PR 17 (Media Statement by the Minister of Communications and Digital Technologies on the Broadcast Digital Migration and Analogue Switch-Off Plan, dated 5 October 2021), caselines p 001-214.

[11] ICASA's Digital Migration Regulations, GN 1070 in GG 36000, 14 December 2012 ("Digital migration Regulations"). The Regulations are annexed to e.tv's FA as PR 26, caselines p 001-285.

[12] Amendment of Broadcasting Digital Migration Policy issued under GG No. 31408 on 8 September 2008, published on 18 March 2015, GN 232 in GG No. 38583 ("Amended BDM Policy, 2015"). The Amended BDM Policy of 2015 is annexure PR 27 to e.tv's FA, caselines p 001-305.

10.12 The Minister gazetted 1 February 2016 as the commencement date for the dual illumination period.[13]

10.13 In February 2020, the Portfolio Committee on Communications raised concerns over the slow pace of implementation of the BDM Policy by the Department of Communications.[14]

10.14 On 11 February 2021, the President, in his State of the Nation address, announced that the completion of digital migration would take place by 31 March 2022.[15]

10.15 On 18 May 2021, the Director General for Communications noted that there had been "delays" and "challenges" in the installation of STBs and that equipment was destroyed during the service delivery protests in the Free State in April 2021.[16]

10.16 During 2021, the Minister established the Project Steering Committee ("Steercom") which consisted of broadcasters, Telkom, Sentech, USAASA, SAPO and SITA.

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[12] e.tv's FA, para 69 caselines p 001-37. Minister's AA to e.tv application admits this fact to the extent that it is consistent with the documents referred to in its answering papers, para 459, caselines p 009-123.

[13] In GN 97 of 1 February 2016 GG 39642. e.tv's FA, para 73, caselines p 001-38. The Minister's AA to e.tv application admits this fact to the extent that it is consistent with the documents referred to in its answering papers, para 459, caselines p 009-123.

[14] e.tv'a FA, para 158.2, caselines p 001-64. The statement (Parliament calls for acceleration of Implementation of Broadcasting Digital Migration dated 4 February 2020) is annexure PR 20 to e.tv's FA, caselines p 001-224. This fact not denied by the Minister in the AA to e.tv application, para 520, caselines p 009-135.

[15] A copy of the SONA address is attached to the intervenors 'consolidated RA to the Minister and Icasa's AA as annexure "MR 21", caselines p 019-214.

[16] e.tv's FA, para 158.3, caselines p 001-64. This is not denied by the Minister in the AA to e.tv application, para 521, caselines p 009-135.

10.17 The first Steercom meeting was held on 20 September 2021.[17] At this meeting, the Minister presented her integrated ASO plan for the implementation of the BDM Programme and advised that it would be completed by 31 March 2022.[18]

10.18 The plan proposed a managed integrated model with all media players. It further proposed that all households registered by 15 October 2021 would be connected during the ASO process and that households which registered after this date would be connected within 3 – 6 months. This date was later changed to 31 October 2021.[19]

10.19 On 29 September 2021, Cabinet held a meeting where the Minister presented the BDM and ASO plan. Cabinet approved the plan.[20]

10.20 On 30 September 2021, Cabinet published a statement indicating that:[21]

10.20.1 it was briefed on the country's BDM programme and that it approved the revised integrated analogue switch off implementation plan which is a schedule to complete digital migration in the remaining areas by 31 March 2022;

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[17] e.tv's FA, para 106, caselines p 001-49. This is consistent with the Minister's AA to the e.tv application, which references the steercom meeting in various places such paras 474 – 476 caselines p 009-126. See also e.tv's RA, para 67, caselines p 020-42.

[18] e.tv's FA, para 106, caselines p 001-49. This is consistent with the Minister's AA to the e.tv application, paras 134 – 152, caselines p 007-42 – 007-47. See also e.tv's RA, para 67 caselines p 020-42.

[19] Minister's AA to e.tv application, para 136, caselines p 007-43. This is consistent with annexure PR 17 to e.tv's FA which is the Media Statement by the Minister of Communications and Digital Technologies on the Broadcast Digital Migration and Analogue Switch-Off Plan, dated 5 October 2021), caselines p 001-214.

[20] Minister's AA to e.tv application, para 10, caselines p 009-7. This is consistent with e.tv's RA, para 67, caselines 020-42.

[21] e.tv FA, para 120, caselines 001-53. The statement (Statement on the virtual cabinet meeting of 29 September 2021) is attached to E.tv FA as annexure PR 14, caselines p 001-197.

10.20.2 '*South Africa is one of the countries in the world that have committed to expedite the digital migration project which will lead to a complete analogue switch-off in 2022';* and

10.20.3 'cabinet endorsed the collaborative approach adopted towards fast-tracking the finalisation of the migration of the whole country from analogue to digital.'

10.21 Steercom meetings were held on 1 October 2021,[22] 8 October 2021 and 22 October 2021.[23] All of these meetings were aimed at discussing government's plans regarding the completion of digital migration by 31 March 2022.

10.22 Technical Committee Meetings ("Techcomm") also took place in late 2021. These meetings concerned a number of issues relating to the completion of digital migration.[24]

10.23 Neither MMA nor SOS were invited to the Steercom meetings or the Tech Comm meetings.[25]

10.24 Significantly, on 5 October 2021, the Minister released a media statement which advised as follows:[26]

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[22] e.tv's FA, para 207, caselines p 001-85. Minister's AA to e.tv application, para 153, caselines p 007-47. There is no dispute on the papers that these meetings took place.

[23] Minister's AA to e.tv application, para 162, caselines p 007-50. There is no dispute that these meetings took place.

[24] Intervenors' RA, para 17.20, caselines p 019 – 21.

[25] Intervenors consolidated RA to Minister and Icasa's AA, para 17.19, caselines 019-20.

[26] The Media Statement by the Minister of Communications and Digital Technologies on the Broadcast Digital Migration and Analogue Switch-Off Plan, dated 5 October 2021 is Annexure PR 17 to e.tv's FA, caselines p 001-85.

10.24.1 it highlighted the delays in the completion of digital migration;

10.24.2 it indicated that, as per the President's SONA address, the Department is working hard to ensure that the goal date for the completion of digital migration is met through the implementation of the Digital Migration Plan that was approved by cabinet on 29 September 2021;

10.24.3 it referred to the government subsidy scheme to assist qualifying indigent households with STBs and indicated that, from 2015 to 5 October 2021, out of the estimated 3.75 million qualifying households, approximately 1.184 million qualifying households had registered;

10.24.4 it explained that cabinet had approved the adoption of the Managed Integrated Model; and

10.24.5 it highlighted the problem associated with the low numbers of households that had registered for STBs and advised that cabinet had approved a last call for registration with a cut-off date of 31 October 2021. Accordingly, qualifying households who registered on or before 31 October 2021 would be connected before the ASO whilst those that registered after 31 October 2021 cut-off would be connected within 3 – 6 months of ASO.

10.25 On 24 November 2021, the Minister issued another press statement which provided an update on the implementation of the broadcast digital migration and analogue switch-off plan. Significantly, the press statement

provided the following information on the government's subsidy scheme for STBs:[27]

10.25.1 as at the end of October 2021, 48 453 new registrations were recorded which brought the total number of registered indigent households to 1, 228, 879; and

10.25.2 a total of 572 255 beneficiary households have already migrated from the current total of 1, 228, 879.

10.26 These facts are to be read with the Minister's assertion in the answering affidavit that there are currently 800 000 STBs in stock.[28]

10.27 It is undisputed that there is a global chip shortage which will impact on the manufacturing and supply of STBs to the South African market;[29] and that STBs are currently unavailable for purchase in retail outlets such as Game and Makro.[30]

11 In light of the above, it is clear that:

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[27] 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.

[28] Minister's AA to e.tv application, para 166, caselines p 007-52.

[29] 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.

[30] Intervenors' FA, para 89.5.2, caselines p 005-43. The Minister's answering affidavit to the intervention application does not deny this fact.

11.1 Although the digital migration process has been underway since 2005, the process has suffered repeated delays with government failing to meet the targeted completion dates in the years 2011 and 2015.

11.2 Thereafter, the digital migration process suffered further delays. For an extended period of time, government failed to make meaningful progress towards its completion. Between 2015 and early 2021, no date for ASO was announced by the government.

11.3 Around 2020, the Portfolio Committee expressed concern over the persistent delay in the implementation of the BDM Policy.

11.4 Suddenly, in early 2021, the President announced that the date for the completion of the digital migration process was 31 March 2022. The President's announcement was given effect to in the subsequent steps taken by government as reflected in the managed integrated ASO plan for the implementation of the BDM Programme that was approved by cabinet, the Minister's media statements, the Steercom and TechComm meetings, the calls for registration of indigent households, the announcement of the cut-off date of 31 October 2021 for registration as well as the other steps referenced in the Minister's answering affidavit to the e.tv application.

11.5 Government held meetings, through Steercomm, aimed at engaging certain stakeholders on the Department's plan to implement the Managed Integrated Model and effect ASO by 31 March 2022. However, only broadcasters, Telkom, Sentech, USAASA, SAPO and SITA were invited to these meetings. TechComm meetings were also held where the completion of digital migration was discussed.

11.6 MMA and SOS were entirely excluded from these meetings and were not, at any stage, consulted on the proposed 31 March 2022 date for ASO. This is despite the fact that they are prominent public interest organisations that have been actively engaged in the digital migration process for more than a decade.

11.7 Members of the general public were also not invited to these meetings nor were they specifically consulted on the proposed 31 March 2022 date for the completion of digital migration.

11.8 There is nothing in the papers to suggest that the Department or the Minister have ever conducted their own assessment of how many people will be cut off from FTA services on 31 March 2022. As a result, the figures provided in the intervention application are not in dispute. The current position is that:

11.8.1 36% of the population remain reliant on analogue to access their FTA services.[31]

11.8.2 Only 1 228 879 indigent households had registered for STBs by the end of October 2021. Approximately 2.5 million indigent households who had not registered by 31 October 2021 will not receive STBs by 31 March 2022 and will not be able to access FTA services for at least 3 to 6 months.[32]

[31] This figure is based on the data provided by the Broadcast Research Council ("BRC") of South Africa. See intervenors' FA, para 62, caselines p 005-34 read with confirmatory affidavit of CEO of BRC, caselines p 005-469. The Minister's AA to the intervention application does not dispute this figure, paras 18 – 24, caselines p 011-6 – 001-7.

[32] Intervenors' consolidated RA to Minister and Icasa's AA, para 8, caselines p 019-6. Although the Minister contends that '*there is no merit to the contentions around households being left behind'* and

11.8.3 800 000 STBs is insufficient to satisfy the current number of indigent households that have registered under the government scheme. Once it is accepted that there is currently no stock of STBs in retail outlets and that there is a global chip shortage, it is inconceivable that government can deny that it will adversely impact on the number of STBs that will be manufactured in the period leading up to 31 March 2022 and in the immediate aftermath of ASO.

11.9 It is undisputed that FTA services play an important role in providing information to the public. Due to their free distribution basis, FTA services provide the poorest and most vulnerable members of our society with access to vital television content including televised news, current affairs, sport, public service announcements, informal knowledge building and educational content provided by the SABC, e-tv and the FTA community TV broadcasters.[33]

THE TEST FOR INTERVENTION

12 Rule 12 regulates the intervention procedure. It applies in motion proceedings by virtue of Rule 6(14).

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that '*the government will continue to assist households registering after 31 October 2021 within 3 – 6 months from ASO*', on the Minister's version only 1, 228, 879 households have registered. This makes it clear that only 1, 228, 879 households out of approximately 3.6 million will receive STBs by 31 March 2022. It is therefore common cause that 2.5 million will not receive STBs as at 31 March 2022. See Minister's AA to intervention application, paras 22 – 23, caselines p 011-7.

[33] Intervenors' FA, para 43, caselines p 005-24. The Minister does not deny that FTA services is an important mechanism through which South Africans especially the poor receive vital television content at any point in the Minister's AA to the e.tv application or to the intervention application.

13 An applicant for leave to intervene must show that it has a direct and substantial interest in the subject matter of the litigation, in the form of a legal interest that may be prejudicially affected by the judgment of the court.[34]

14 While an applicant for intervention must demonstrate that it has a right adversely affected or likely to be affected by the order sought, it is not required to satisfy the court at the stage of intervention that it will succeed. It need only make allegations which, if proved, would entitle it to relief.[35]

15 The Constitutional Court has held that where a party has shown a direct and substantial interest in the subject matter of a case, the court has no discretion. It is required to grant the intervention.[36]

16 The requirements for intervention must be read subject to the generous approach to standing adopted under section 38 of the Constitution. Section 38 grants standing to any party alleging the infringement of a right in the Bill of Rights acting in its own interest,[37] on behalf of another person who cannot act in their own name,[38] in the interest of a group or class of persons,[39] in the interest of the public[40] or as an association acting in the interest of its members.[41]

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[34] *SA Riding for the Disabled Association v Regional Land Claims Commissioner* 2017 (5) SA 1 (CC) para 9.

[35] Id.

[36] Id para 11; *Nelson Mandela Metropolitan Municipality v Greyvenouw CC* 2004 (2) SA 81 (SE) at 89B–C.

[37] Section 38*(a)*.

[38] Section 38(b).

[39] Section 38*(c)*.

[40] Section 38*(d)*..

[41] Section 38*(e)*

17 As O'Regan J held in *Ferreira v Levin*, in "*litigation of a public character*", broader and more generous principles regarding standing apply than at common law.[42] This approach – which includes a more generous approach to how standing may be *evidenced* – applies not only to litigation in the Constitutional Court, "*but to all Courts that are called upon to adjudicate constitutional claims*".[43]

18 In *Kruger*, the majority held that, in order to facilitate the protection of the Constitution, the generous approach to standing applies even when section 38 is not directly applicable.[44]

19 Thus, in litigation of a public or constitutional character, and especially where an infringement of the Bill of Rights is alleged, the range of interests upon which an intervening party might rely in contending for a direct and substantial interest, must be broadly construed.

MMA and SOS: direct and substantial interest

20 The intervening applicants are the following organisations:

20.1 MMA which is a non-profit organisation that monitors the media in South Africa and across the continent. It also implements successful media strategies and actively promotes principles of democracy and respect for human rights;[45] and

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[42] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) para 229.

[43] *Beukes v Krugersdorp Transitional Local Council and Another* 1996 (3) SA 467 (W) at 474E-H.

[44] *Kruger v President of Republic of South Africa and Others* 2009 (1) SA 417 (CC) para 23.

[45] Intervenors' FA, paras 31 – 32, caselines p 005-20.

20.2 SOS which is a civil society coalition that represents various civil society stakeholders committed to the broadcasting of public interest programming in accordance with the Constitution and the ECA. SOS also engages in the advancement of community broadcast media in South Africa.[46]

21 Given their focus on media and broadcasting related issues, both MMA and SOS have been alert to the issue of digital migration from the start of the process. They have consistently monitored its progress and have actively involved themselves where appropriate including through engagements with government and participating in litigation pertaining to digital migration.[47] The Constitutional Court has itself recognised that these organisations are '*non-profit organisations that campaign for access to high quality broadcasting that is in the public interest.*'[48]

22 Throughout the digital migration process, MMA and SOS have repeatedly raised concerns around the country's "readiness" for the completion of digital migration (including ASO) and have persistently lobbied for a properly managed process so that millions of indigent South Africans do not lose access to FTA services.[49]

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[46] Intervenors' FA, para 33-34, caselines p 005-20.

[47] Intervenors' consolidated RA to Minister and Icasa's AA, para 17, caselines p 019-9. SOS and MMA were parties to the litigation which challenged the legality of the amendment to the BDM Policy - *Electronic Media Network Limited and Others v e.tv (Pty) Ltd and Others [2017] ZACC 17.*

[48] *S.O.S Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation (SOC) Limited and Others (2019 (1) SA 370 (CC),* para 4.

[49] Intervenors' consolidated RA to Minister and Icasa's AA, para 7, caselines p 019-5 and para 17 (17.1 – 17.20), caselines p 019-10 – p 019-21.

23 These issues are at the heart of the present matter where e.tv seeks to challenge the Minister's decision to expedite the completion of the digital migration process on the basis that it is irrational, infringes on the constitutional rights of broadcasters and the general public and was not based on a proper process of consultation.

24 MMA and SOS have a direct and substantial interest in this matter. They clearly have standing to seek the substantive relief prayed for in their notice of motion in their own right, independently of e.tv. Their case is that the Minister's decision to expedite the completion of digital migration by 31 March 2022 is unlawful and violates section 16(1)(b) of the Constitution. It amounts to an unreasonable deprivation of the rights of indigent South Africans to receive information through FTA services which is guaranteed by section 16(1)(b) of the Constitution. It also constitutes a violation of the Minister's obligations under section 7(2) of the Constitution.

25 Accordingly, MMA and SOS bring this application:

25.1 in their own interest in terms of section 38(a) of the Constitution; and

25.2 in the public interest, in terms of section 38(d), in light of the fact that the proposed 31 March 2022 ASO date will impact on:

25.2.1 the country's FTA broadcasters; and

25.2.2 members of the public - especially the poor and most vulnerable - who remain reliant on analogue to access vital FTA content which includes: televised news, current affairs, sport, public

service announcements, informal knowledge building and educational content provided by the SABC, e-tv and the FTA community TV broadcasters.

The respondents' baseless opposition to the intervention application

26 The respondents' opposition to the intervention application is misconceived. Neither Vodacom nor the Minister deny that the intervening applicants have standing to seek the substantive relief contained in the notice of motion in their own right. However, they contend that the intervention application is without merit, it does nothing more than repeat the assertions made by e.tv and does not assist the court in resolving the issues between e.tv and the Minister. [50] The Minister and Vodacom have accordingly made out no case for refusing the intervention application, since, once the applicants have a direct and substantial interest in the relief they seek, the question of whether they will be of assistance to the Court in determining the issues between e.tv and the Minister is irrelevant.

27 Icasa contends that the intervenors have failed to satisfy the legal requirements for intervention and that the intervention application should be refused by this Court. [51] This is patently wrong.

28 As we have already demonstrated, MMA and SOS have a direct and substantial interest in the subject matter of this litigation and in the relief sought by e.tv. In

[50] Minister's AA to intervention application, para 8, caselines p 013-4. Vodacom's AA to intervention application, paras 30-32, caselines p 017-14 – p 017-15.

[51] Icasa's AA, para 9, caselines p 016-9.

this regard, we emphasise that MMA and SOS are in a similar position to that of Black Sash in the *Net1* decision in the SCA: [52]

28.1 The case concerned the question whether amendments to regulations promulgated under the Social Assistance Act 13 of 2004 prohibited all debit orders, stop orders or electronic fund transfers from the accounts of social grant beneficiaries held with Grindrod Bank. The applicants sought a declaratory order that the regulations did not have this effect.[53]

28.2 The Black Sash Trust sought leave to intervene on its own behalf and in the public interest and to be admitted as an *amicus curiae*.[54]

28.3 The High Court refused the application to intervene. It held that the relief sought by the intervenors went further than that sought by the applicant in the main application, and raised constitutional issues that were not relevant to the interpretation of the regulations.[55]

28.4 On appeal, no party sought to defend the High Court's approach to the intervention application. As the SCA explained, Black Sash "*clearly has an interest in protecting the poor and the vulnerable, including beneficiaries of social grants*",[56] had formed part of a task team investigating complaints of abuse, and had litigated regularly in respect of social grants.

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[52] *Minister of Social Development and Others v Net1 Applied Technologies South Africa (Pty) Ltd and Others* [2018] ZASCA 128 (27 September 2018).

[53] Id, paras 1-2.

[54] Id, para 6.

[55] *Net1 Applied Technologies South Africa (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2017] ZAGPPHC 150 (9 May 2017).

[56] Id, para 56.

28.5 Therefore, describing the intervention application as "*the least contentious aspect*" and the High Court's refusal as "*peculiar*", and having regard to Black Sash's role in relation to social grant beneficiaries, the SCA concluded that it was "*quite clear that it had a direct and substantial interest*" and that the application should have been granted.[57]

29 The position of MMA and SOS is no different. As prominent public interest organisations, they have been actively engaged in the digital migration process since inception and have persistently emphasised the rights of the poor and most vulnerable members of our society throughout the process.

30 To this end, MMA and SOS have made submissions on the legal framework and provided input to bodies such as Icasa and USAASA on critical issues relevant to the implementation of digital migration, they have engaged directly with former Ministers, they have published articles in newspapers aimed at highlighting critical public interest issues and assisting the public's understanding of the challenges associated with digital migration, they have participated in litigation pertaining to the digital migration process and, finally, have conducted roundtable workshops with various stakeholders.[58]

31 Clearly, MMA and SOS, as public interest organisations whose core focus is the media and broadcasting services, have an interest in this litigation which includes

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[57] Id, para 83.

[58] Intervenors' consolidated RA to Minister and Icasa's AA, para 17 (including 17.1 – 17.18), caselines p 019-0 – 019-20.

an interest in protecting the poor and vulnerable FTA viewers and the FTA broadcasters themselves.

32 Accordingly, MMA and SOS should be granted leave to intervene as co-applicants in these proceedings.

LIMITATION OF FREEDOM OF EXPRESSION

33 Section 16(1) of the Constitution provides that '*everyone has the right to freedom of expression'* which includes the '*freedom to receive or impart information or ideas.'*[59]

34 The Constitutional Court has repeatedly emphasised the importance of freedom of expression and its underlying values in the context of our constitutional democracy. In *South African National Defence Union,* the court stated the following: [60]

> *"Freedom of expression lies at the heart of democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that*

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

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

individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters."[61]

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

> *"The need for public information and awareness flows from the nature of our democracy. Public participation on a continuous basis provides vitality to democracy. This was also recognized by the House of Lords in McCartan Turkington Breen (A Firm) v Times Newspapers Ltd that "[t]he proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring." A vibrant and independent media encourages citizens to be actively involved in public affairs, to identify themselves with public institutions and to derive the benefits that flow from living in a constitutional democracy. Access to information and the facilitation of learning and understanding are essential for meaningful involvement of ordinary citizens in public life.''*[62]

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

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

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[61] *South African National Defence Union v Minister of Defence & Another 1999 (4) SA 469 (CC),* at para 7.

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

> *only if there is a free press. To abridge the freedom of the press is to abridge the rights of all citizens and not merely the rights of the press itself."* [63]

36 The constitutional guarantee of freedom of expression is of paramount importance because it forms part of a "*web of mutually supporting rights."* [64] It is integral to the exercise and protection of other constitutional rights such as freedom of religion, belief and opinion, dignity, association as well as the rights to vote and assemble.[65]

37 The Constitutional Court has also emphasised the critical role played by the media and broadcasting services in advancing the right to freedom of expression in the following cases:

37.1 In *South African Broadcasting Corporation,* the court asserted that:

> *'Everyone has the right to freedom of expression and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom on information are respected. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate."* [66]

37.2 In *Islamic Unity Convention,* the court stated:

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[63] *Midi Television* at para 6 (emphasis added).

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

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

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

> *"In the context of broadcasting, freedom of expression will have special relevance. It is in the public interest that people be free to speak their minds openly and robustly, and, in turn, to receive information, views and ideas..."*[67]

38 This Court has emphasised the critical function of FTA broadcasters – the SABC in particular - in the context of the constitutional guarantee to freedom of expression in *SOS Support Public Broadcasting Coalition and Others.*[68] In that case, the Court was required to determine two applications concerning the constitutionality and lawfulness of the powers that the Minister exercises in respect of the Directors of the SABC board. In deciding the matter, the Court asserted that '*the freedom to receive or impart information or ideas relates to the right of the SABC to communicate without interference, but also the right of the broader public to have access to the broadcast media.*'[69]

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

> *"The SABC has a unique role and responsibility to play as the public service broadcaster. The high rates of illiteracy in the country, the limited distribution and cost of newspapers and the cost of subscription television makes SABC the primary source of information for the majority of South Africans."*[70]

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

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

69 Id, para 31.

70 Id, para 40.

40 The Court made it clear that it is the state that has the duty to ensure that the public has access to television.[71]

41 In light of the above, it is clear that the general public have a right to freedom of expression which includes the right to receive vital television content. In this regard, FTA broadcasters play a particularly important role since they are able to provide information and televised content to the poorest members of our society due to their free distribution basis. It is through FTA services that the poor, "*who are particularly vulnerable"* and whose *"needs require special attention*", [72] are able to access televised news, current affairs, sport, public service announcements, informal knowledge building and educational content provided by the SABC, e-tv and the FTA community TV broadcasters.[73]

42 The general public and particularly the poor require access to this vital content as a necessary precondition for their effective and continuous participation in our democracy. It is also of paramount importance to the protection and advancement of other constitutional rights such as freedom of conscience, association, dignity and the rights to vote and to assemble.

43 Where the public and particularly the poor and most vulnerable members of our society are denied access to crucial FTA content, their right to freedom of expression and their right to receive information guaranteed by section 16(1)(b)

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

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

[73] Intervenors' FA, para 78, caselines p 005-39.

of the Constitution is infringed. This is the inevitable consequence of the government's decision to expedite the completion of digital migration and effect ASO by 31 March 2022.

44 Although the Minister seeks to persuade this Court that the state has adequately prepared for the completion of digital migration by 31 March 2022 and that indigent households will not be left behind, this is simply not the case:[74]

44.1 36% of the population are entirely reliant on analogue services to access FTA services.

44.2 According to Statistics South Africa, in 2018, there were approximately 3.75 million indigent households.[75]

44.3 The Minister recently announced that only 1 228 879 households had registered for the government STB subsidy scheme by the end of October 2021.

44.4 Given the Minister's assertions that only households that registered before 31 October 2021 will receive STBs by 31 March 2022, it is clear that 2.5 million indigent households will be left without access to FTA television as of 31 March 2022 and will have to wait at least 3 to 6 months on the Minister's version. However, the reality is that the affected members of the public will need to wait much longer than 3 to 6 months given that there is

[74] Intervenors' consolidated RA to Minister and Icasa's AA, para 9, caselines p 019-6-019-7.

[75] The Minister relies upon the Statistics South Africa 2018 data in her press statement on the Broadcast Digital Migration and Analogue Switch-Off Plan, dated 5 October 2021. This press statement is annexure PR 17 to e.tv's FA, caselines p 001-214.

a global chip shortage and most retail suppliers do not currently have stock of STBs.[76]

44.5 In addition, on the Minister's own version, there are only 800 000 STBs in stock. This is insufficient to satisfy the current number of indigent households that have registered under the government scheme. Those who are registered but do not receive STB's due to their being a shortage of STB's currently in stock, will have to wait until stock is replenished taking into account the world wide chip shortage and the fact that no retailers currently have stock of STB's.

45 Indigent households cannot afford digital television sets, subscription television contracts, DTH access boxes or broadband services even if live streaming were available for FTA television services.[77] The net effect is that if indigent households, who remain reliant on analogue transmitters, are unable to obtain a STB then there is simply no other mechanism through which they can access FTA services.

46 Where approximately 2.5 million indigent *households* - which equates to approximately 8 250 000 indigent *people* - will be left without access to FTA television by the end of March 2022, this constitutes a severe violation of the rights of millions of South Africans to freedom of expression and to receive information through FTA services guaranteed by section 16(1)(b) of the Constitution.

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[76] The intervenors' FA, para 89.5.2, caselines p 005-43.
[77] The intervenors' consolidated RA to the Minister and Icasa's AA, para 24, caselines p 019 – 23.

47 There is no justification for this infringement. Given the millions that will be left without access to FTA services come 31 March 2022, it is inconceivable that the country is "ready" for the completion of digital migration. Pressing ahead with a fast-tracked implementation of the country's BDM policy and the proposed ASO date will result in a severe infringement of the rights of millions of the most vulnerable South Africans. They will be left without access to news, current affairs, public service announcements, and educational content.[78]

48 The Constitution does not permit the state to implement policy in a manner that results in impermissible infringements of rights in the Bill of Rights, no matter how laudable the aims of the policy. Implementation of policy in this way amounts to conduct inconsistent with the Constitution, which is invalid.[79] The courts are obliged to declare any conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency.[80]

49 Vodacom contends that the method by which the state has chosen to implement the date of ASO is executive action which is beyond the scope of judicial scrutiny.[81]

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

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[78] Intervenors' FA, paras 78 -79, caselines p 005-39.

[79] Section 2 of the Constitution.

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

[81] Vodacom's AA to intervention application, para 14, caselines p 017-9.

> *"[98] This Court has made it clear on more than one occasion that, although there are no bright lines that separate the roles of the Legislature, the Executive and the Courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation. This does not mean, however, that Courts cannot or should not make orders that have an impact on policy.*
>
> *[99] The primary duty of Courts is to the Constitution and the law, 'which they must apply impartially and without fear, favour or prejudice'. The Constitution requires the State to 'respect, protect, promote, and fulfil the rights in the Bill of Rights'. Where State policy is challenged as inconsistent with the Constitution, Courts have to consider whether in formulating and implementing such policy the State has given effect to its constitutional obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution to say so. Insofar as that constitutes an intrusion into the domain of the Executive, that is an intrusion mandated by the Constitution itself."*[82]

49.2 The Constitutional Court went on to hold that government's refusal to provide Nevirapene to prevent mother-to-child HIV transmission was unreasonable and constituted a failure to respect, protect, promote and fulfil the rights the right to health care services, food and water and social security in the Bill of Rights. As a result, the Court was obliged to declare the decision invalid.[83]

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

[83] At paras 99-100

49.3 In *Dladla*, the Constitutional Court again made it clear that any attempt by the state to implement policy using means which infringe fundamental rights will be held to be invalid and set aside.[84]

50 It is especially clear that the approach of the state respondents is impermissible given that there are obvious less restrictive means available to the state for achieving the laudable outcomes sought to be obtained by digital migration. A properly managed extended date for ASO will not result in a rights infringement of this nature, severity and scale. And it need not result in interminable delays for digital migration.[85]

51 The limitation of rights which has resulted from the state respondents' chosen manner of implementing the ASO is not authorised by any law of general application. Without more, it is unlawful and invalid.[86]

52 Accordingly, the government's decision to expedite the completion of digital migration and effect ASO by 31 March 2022 violates the rights of millions of South Africans guaranteed by section 16(1)(b) of the Constitution and cannot be justified.

THE PROPOSED ASO DATE IS IRRATIONAL AND UNLAWFUL

53 As with all exercises of public power, to pass constitutional muster, the process leading up to the government's decision to complete digital migration and effect

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[84] At paras 47 – 51.

[85] Intervenors' RA to Vodacom's AA, para 11, caselines p 019-254.

[86] *Dladla and Others v City of Johannesburg and Another* 2018 (2) SA 327 (CC) at para 52

ASO by 31 March 2022, must be "*rationally related to the achievement of the objectives of the process*."[87]

54 The Constitutional Court has held that both the process by which a decision is made and the decision itself must be rational:

> *"The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitute means towards the attainment of the purpose for which the power was conferred."*[88]

55 In this instance, there is no disputing that it is in the interests of all South Africans that digital migration be completed due to the tremendous benefits it presents for our country. However, it could never be rational to pursue those laudable goals without first (a) consulting with the public and industry role players about the impact of the chosen date; and (b) at the very least, investigating how many South Africans will be left without access to television, and for how long, as a result of the chosen date.

56 At a bare minimum, in order to pass constitutional muster, the state respondents would have had to inform the public at large, as well the broadcasters, of its intended ASO date; to consider their representations and submissions

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87 *Albutt v Centre for the Study of Violence and Reconciliation, and Others* 2010 (3) SA 293 (CC) at para 51

88 *Democratic Alliance v President of South Africa and Others* 2012 (12) BCLR 1297 (CC) at para 36

concerning the proposed date; and to investigate the impact of the proposed date on the rights of expression of millions of indigent households. None of this has been done.

57 First, the state respondents did not engage in a proper process of consultation regarding the proposed 31 March 2022 date with the general public and critical public interest organisations such as MMA and SOS. Neither the public nor civil society organisations such as MMA and SOS were invited to the Steercom and/or TechComm meetings where the issue of the completion of digital migration was addressed. In any event, these meetings took place after the President's 2021 SONA announcement that the government was planning the completion of digital migration by 31 March 2022. They could therefore not have informed government's decision to achieve ASO by that date.

58 It is well-established that there are circumstances in which rational decision-making outside the ambit of PAJA requires specific interested parties to be heard. This has been made clear by both the Constitutional Court and SCA.[89] MMA and SOS are such interested parties. They have never been consulted about the proposed March 2022 date of ASO, despite having participated extensively in preceding consultations relating to digital migration.[90]

59 Second, the government respondents have failed to undertake the basic step of investigating the impact of their approach on constitutional rights:

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[89] *Minister of Home Affairs v Scalabrini Centre 2013 (6) SA 421 (SCA)*, paras 68 – 69; citing *Albutt v Centre for the Study of Violence and Reconciliation, and Others* 2010 (3) SA 293 (CC)

[90] Intervenors' consolidated RA to Minister and Icasa's AA, para 19, caselines p 019-21.

59.1 Government has never undertaken any investigation or assessment of how many South Africans remain dependent on analogue and how many indigent households would require assistance prior to announcing the completion date for digital migration. All the government seems to have done is to rely on outdated data from Statistics South Africa regarding the total number of indigent households in South Africa and its records of the number of households that had already registered for the government subsidy scheme.[91]

59.2 It therefore seems that the state has no idea how many people will be without television as a result of its chosen date. Given the vast number of South Africans who are solely reliant on analogue technology to receive FTA broadcasts, the historically low registration numbers associated with the subsidy scheme and the fact that our country is plagued with poverty and inequality, taking the decision without this knowledge could never be lawful or rational.

59.3 It was only on 5 October 2021 that the Minister announced that the cut-off date for registration for the government subsidy scheme would be 31 October 2021. This gave indigent households less than a month to register failing which they would have to wait at least 3 to 6 months from ASO to obtain STBs. Given the manufacture and supply constraints, the reality is that these households will likely be without STBs for much longer than 3 to 6 months.

[91] See for example E.tv's FA, annexure PR 17 (Media Statement by the Minister of Communications and Digital Technologies on the Broadcast Digital Migration and Analogue Switch-Off Plan, dated 5 October 2021), caselines p 001-214.

59.4 Accordingly, mere notice of the government's decision to expedite digital migration by 31 March 2022 through SONA and press statements issued by the Minister is not sufficient.[92] The government must do more to satisfy its constitutional obligations to adequately consult with the general public and civil society.

60 It cannot be contended that the haste to complete ASO is justified by any objective urgency. The government's determination of the 31 March 2022 date for the completion of digital migration must be understood in the context of the state's persistent delays spanning more than a decade. Although the digital migration process has been underway since 2008, it is the state that has repeatedly missed its targeted dates for completion. The last missed completion date was June 2015 at which point the state did not seek an exemption and the country did not qualify for another extension.

61 For the next five and a half years, the government was completely silent on the target date for the completion of digital migration and no date for ASO was ever announced. Suddenly, in early 2021 and after dragging its feet for several years, the government announced its plans to expedite the completion of digital migration by 31 March 2022 with devastating consequences for millions of South Africans who remain reliant on analogue to access their FTA services.

62 We submit that, on this basis too, the state respondents' approach is unlawful.

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[92] Id, para 67.

REMEDY

63 In terms of section 172, a court deciding a constitutional matter within its power:

63.1 Must declare that conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency;[93] and

63.2 May make any order that is just and equitable.[94]

64 It is established that the state respondents' chosen method of implementation of ASO, and in particular, the selection of the date of the end of March 2022 by which time to implement ASO, is unlawful and unconstitutional. Accordingly, the Court is obliged to declare invalid the state respondents' intended implementation of the date of the end of March 2022 by which time to implement ASO.

65 The Minister attempts to avoid this result by being coy about whether a decision has been taken. She denies that a date has been determined; and says that all that has happened is that: "*Cabinet has expressed a desire that the migration be concluded by March 2022*."[95]

66 We submit that the Minister cannot avoid the constitutional implications of the state's conduct in this way. In substance and effect, the state has determined that ASO must be concluded by March 2022, and is acting in accordance with

[93] Section 172(1)(a)

[94] Section 172(1)(b)

[95] Minister's AA, para 75.2, caselines p009-24.

that determination. The Court should have regard to the substance of the Minister's conduct, rather than its form:

> *"the law regards the substance rather than the form of things – a doctrine common, one would think, to every system of jurisprudence and conveniently expressed in the maxim* plus valet quod agitur quam quod simulate concipitur*."*[96]

67 The critical question then is what constitutes an appropriate just and equitable remedy.

68 The Constitutional Court has established the following principles in respect of relief granted under section 172(1)(b) of the Constitution:

68.1 What is just and equitable depends on the circumstances of each case.[97]

68.2 The default position requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented.[98]

68.3 The court must provide effective relief for infringements of constitutional rights.[99] In *TAC*, the Constitutional Court held that:

> *"Where a breach of any right has taken place, including a socio-economic right, a Court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case. Where necessary*

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[96] *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 547.

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

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

[99] *Allpay II* at para 42.

this may include both the issuing of a mandamus and the exercise of supervisory jurisdiction."[100]

68.4 In the exercise of this wide remedial power, the Constitutional Court has highlighted the need for courts to be pragmatic in crafting a just and equitable remedy.[101]

69 There is no doubt that this Court has an ample and flexible remedial power to design a remedy which appropriately balances the competing issues at stake, and resolves the true issues between the parties. In *Hoerskool Ermelo*[102], the Constitutional Court held:

> *"It is clear that s 172(1)(b) confers wide remedial powers on a competent court adjudicating a constitutional matter. The remedial power envisaged in s 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under s 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements. In several cases this court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties. Sometimes orders of this class have taken the form of structural interdicts or supervisory orders. This approach is valuable and advances constitutional justice, particularly by ensuring that the parties themselves become part of the solution."*[103]

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

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

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

[103] Id, para 97.

(emphasis added)

70 In *Electoral Commission*[104] the Constitutional Court held that:

> *"Section 172(1)(b) clothes our courts with remedial powers so extensive that they ought to be able to craft an appropriate or just remedy even for exceptional, complex or apparently irresoluble situations. And the operative words in this section are "an order that is just and equitable". This means that whatever considerations of justice and equity point to as the appropriate solution for a particular problem, may justifiably be used to remedy that problem. If justice and equity would best be served or advanced by that remedy, then it ought to prevail as a constitutionally sanctioned order contemplated in section 172(1)(b).*[105]

71 The intervenors seek the following just and equitable relief:

71.1 First, before the Minister determines a date for ASO, there must be a process of consultation, including with the intervenors.[106]

71.2 Second, before ASO is completed, the Minister must comply with her constitutional obligations to provide those South Africans presently reliant on analogue broadcasting with alternative means to access terrestrial broadcasting.[107]

71.3 Third, the Minister is directed to file a report with this Court to explain the steps taken to provide those alternative means.[108]

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

[105] Id, para 132.

[106] NOM p 005-3 para 2.1

[107] NOM p 005-3 para 2.2

[108] NOM p 005-4 para 2.4

72 We submit that the relief sought by the intervenors constitutes just and equitable relief aimed to remedy the constitutional deficiencies in the state respondents' approach to ASO.

72.1 It does not seek to prevent ASO for an indeterminate period of time. It merely seeks to ensure that, before ASO is concluded, the Minister has conducted a proper consultation process and made adequate alternative arrangements for those currently reliant on FTA television.

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

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

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

73.1 This is not unduly onerous, or a breach of the separation of powers. As Budlender and Roach emphasise, such reporting duties "*should not be*

seen as a punishment of government for defiance of the Constitution" but are *"simply a means of ensuring effective compliance with the Constitution, which must be the core concern of the courts*."[109]

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

> *"It goes without saying that the refugees and asylum seekers encountered here are amongst those who are most in need of protection. They do not have powerful political constituencies and their problems, more often than not, are ignored by government. Previous orders of our courts appear to have done little to make their problem visible and to cause the relevant authorities to comply with their obligations…. Given the intransigence on the part of the relevant authorities, it thus seems important to provide a remedy to the respondents that is both effective and meaningful."*[110]

73.3 In *Mwelase*,[111] the Constitutional Court echoed these principles, albeit in a different context. The Court affirmed that "*[t]he vulnerability of those who suffer most from these failures underscores how important it is for courts to craft effective, just and equitable remedies, as the Constitution requires them to do.*" It added that in such "*cases of extreme rights infringement, the ultimate boundary lies at court control of the remedial process. If this requires the temporary, supervised oversight of administration where the bureaucracy has been shown to be unable to perform, then there is little choice: it must be done*."[112] In such cases, the "*bogeyman of separation*

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

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

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

[112] Id, para 49.

of powers concerns" should not cause courts to shirk their constitutional responsibility to grant effective remedies to protect constitutional rights.[113]

74 We accordingly submit that a proper case has been made out for the relief sought in the intervenors' notice of motion.

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AMMARA CACHALIA

Chambers, Sandton

16 February 2022

[113] Id, para 51.

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