IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No: 89/2022
GP Case No: 51159/2021

In the matter between:

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

And in the matter between:

CCT Case No: 92/2022
GP Case No: 51159/2021

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

E.TV'S[1] HEADS OF ARGUMENT

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[1] e.tv is the Applicant in case number 89/2022 and the First Respondent in case number 92/2022 before this Court.

Glossary of 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, 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

Judgment – the judgment and order of the Full Court of the High Court in the matter under GP Case No. 51159/2021 delivered by Msimang AJ with Lukhaimane AJ and Le Roux AJ concurring on 28 March 2022

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

INTRODUCTION

1. This case concerns the constitutional rights of millions of poor and vulnerable South Africans who are reliant on analogue television broadcasting to access news, public service announcements, information and educational content. They are imminently to be deprived of access to television broadcasts through a precipitous and unlawful analogue switch-off ("**ASO**") by the Minister of Communications and Digital Technologies ("**Minister**"). Pursuant to the judgment of the Full Court against which this application for leave to appeal is lodged, implementation of the ASO date has been delayed until 30 June 2022.[2] But by 30 June 2022, millions of South Africans will still be deprived of their existing access to television broadcasts. Hence the need for a final determination of their rights by this Court before that occurs.

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

3. The effect of the Full Court's Order – even assuming in her favour that the Minister can and will comply with it – is that **8 million people** who are currently reliant on analogue television broadcasting will face a blackout as at the date of ASO.[3] As set out below, this cut-off is unjustifiable, irrational and retrogressive. Importantly, it is also

[2] Para 3 of the Order, CCT Page No. 2384.

[3] Even if the Government is able to install set-top boxes for all 1.229 million households that registered by 31 October 2021 by the ASO date (of which the Government has indicated only 1.18 million qualify), this would still leave approximately 2.5 million households, or 8 million South Africans without access to analogue television come 30 June 2022. The Minister went on at the hearing to undertake to at least install a further 610 000 boxes before ASO (which at that stage was just two weeks away); however, the High Court did not consider the Minister's promises feasible. Accordingly, the Court ordered her to do so by the extended ASO date of 30 June 2022. Even assuming that the Minister's undertaking will be effected (which e.tv disputes on the Minister's own evidence of the rate of rollout), **8 million** people are left behind.

unnecessary.[4] And the High Court was seemingly oblivious to the imminent violation of rights and the need for such conduct to be justified.

4. This application for leave to appeal is brought by e.tv (Pty) Ltd. ("**e.tv**"), South Africa's biggest independent and free-to-air television channel and the only non-state broadcaster of free-to-air television news in South Africa.[5] A separate application for leave to appeal the Full Court Order has been lodged by Media Monitoring Africa ("**MMA**") and SOS Support Public Broadcasting ("**SOS**") – two public interest NGOs, who intervened in the High Court application in the public interest and placed evidence before the High Court regarding the unconscionable impact that an unreasonably imposed switch-off would have on the rights of the affected South Africans.[6] Pursuant to the Chief Justice's direction of 29 April 2022, the e.tv and MMA and SOS applications for leave to appeal have been consolidated and set down for hearing on 20 May 2022.[7]

5. The heart of e.tv's case is that the Minister bears an obligation under section 7(2) of the Constitution not to retrogressively deprive South Africans of rights that they have previously enjoyed, including the right to receive information, a component of the right to freedom of expression (guaranteed and protected in terms of section 16 of the Constitution).

6. The Minister's obligations are heightened in the circumstances of this case where the Government has, for nearly a decade, made repeated, serious promises that those

[4] e.tv RA, para 22.2,2; CCT Page No. 2082.
[5] Founding Affidavit, para 52; CCT Page No. 32. Importantly, the auction covers *all* analogue spectrum, including that spectrum *under* the 694 MHz frequency band, and which accordingly does not form part of the ITA auction.
[6] The Intervention Affidavit appears at CCT Page No. 373 and following.
[7] Chief Justice's Directions of 29 April 2022; CCT Page No. 2583.

who are reliant on analogue broadcasting and who do not have the means to self-migrate to a digital television or decoder will be provided with a government-sponsored set-top box ("**STB**"), to ensure that they are not left in the dark come ASO.[8]

7. But regrettably, the Minister's conduct has fallen woefully short of her constitutional obligations. She has imposed an ASO date without taking any reasonable steps to ensure that the affected communities have the promised STB to continue receiving television broadcasting. This retrogressive step will deprive millions of South Africans of their rights, and breaches Government's own public promises to assist indigent South Africans.

8. Notwithstanding this, the High Court dismissed e.tv's application (order 2) and ordered e.tv to pay costs (order 6).[9]

9. In dismissing the application, the High Court found that millions of South Africans who will lose access to television broadcasting entirely have "*no standing*" to challenge the decision.[10] But the Court then went on to accept that there was a potential risk to rights posed by the Minister's insistence on 31 March 2022 as the hard switch off date. The Court thus felt moved to grant a three-month extension of the ASO date (till **30 June 2022**) because it was clear that the Government had not adequately catered for even those indigent households who had managed to register for set-top boxes before the artificial cut-off imposed by the Minister on almost no notice.[11]

[8] The principle arises from this Court's decision in KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal 2013 (4) SA 262 (CC); see too Pretorius and another v Transport Pension Fund and others 2018 ZACC 10; 2019 (2) SA 37 (CC) at para 30. As set out below, the High Court elected not to follow the majority decision of this Court.
[9] A copy of the Judgment appears at CCT Page No. 2350. It is only these two orders against which this application for leave to appeal lies.
[10] Judgment, para 56; CCT Page No. 2376.
[11] Judgment, para 69; CCT Page No. 2381.

10. But the High Court's concern was limited to those that had managed to register on time. The rest of its judgment reflects a refusal to deal at all with the main thrust of the argument of e.tv, MMA and SOS that the Minister's decision and promulgation of the ASO date (31 March 2022) constituted a breach of section 7(2) of the Constitution and an impermissible and unjustifiable retrogressive deprivation of rights. Not a word is said about this central feature of e.tv's case, and which was firmly supported by MMA and SOS. All other indigent South Africans who rely on analogue television, in the millions, and who did not manage to register by the precipitously-imposed deadline of 31 October 2021 will be cut off and lose access come 30 June 2022. This includes over 260 000 households (representing over 800 000 South Africans) that managed to register between 31 October and 10 March 2022,[12] since the judgment only requires them to be provided with STBs three months *after* the extended ASO date of 30 June 2022, by the end of September. As set out below, there is no assurance that even this can or will be achieved.

11. In reaching this decision, the High Court ignored, or refused to apply, the binding and applicable authority of this Court in relation to the state's constitutional duties, including the duty to respect, protect, promote and fulfil constitutional rights, to justify any limitation of those rights, and to fulfil promises lawfully and seriously made.

12. The important issues at stake in these proceedings justify this Court's urgent attention and correction of the High Court Order, by granting the appropriate relief sought by e.tv and MMA and SOS – the setting aside of the unconstitutionally determined ASO date, declaring the constitutional obligations that the Minister bears prior to declaration

[12] Minister's Supplementary Affidavit, para 17; CCT Page No, 2242.

of the ASO date (which the Minister refuses to acknowledge), and requiring the Minister to report on the steps taken to protect the rights of millions of South Africans.

13. These heads of argument are structured as follows:

13.1. First, we provide a brief background to the stalled digital migration process, the precipitous rush to completion, and the undisputed facts in relation to the millions of South Africans that will be left behind.

13.2. Second, we set out the five constitutional duties which the Minister bears as an organ of state, with which she failed to comply.

13.3. Third, we deal with the Minister's failure to comply with Government's seriously and lawfully made promises to poor South Africa's to provide them with set-top boxes.

13.4. Fourth, we explain how the Minister's setting of the ASO date breaches the freedom of expression and related rights of affected communities, and breaches her constitutional duties.

13.5. Fifth, we deal with the Minister's breach of the duty to consult, when setting the ASO date, and the related set-top box registration cut-off date.

13.6. Sixth, we consider the appropriate remedy.

13.7. Finally, we explain why it is in the interests of justice for this Court urgently to grant direct leave to appeal.

BACKGROUND

The Digital Migration Process – more than a decade of dithering

14. Digital migration is a process of moving (migrating) from the use of analogue forms of broadcasting to digital ones.[13] At the end of the digital migration process, which terminates on the analogue switch off date, all analogue television broadcasting will cease. There will be no more analogue broadcasts of e.tv's channel, SABC, local community television, or any other channels.[14]

15. The process of digital migration in South Africa commenced approximately 16 years ago, in 2006.[15] The original aim was for the process to be completed in 2011, but the programme suffered what the Minister decried as "*serious setbacks*".[16]

16. In December 2012, ICASA promulgated the Digital Migration Regulations.[17] The purpose of the regulations is to regulate the digital migration of the existing television channels and to prescribe the conditions for the assignment of channel capacity for the purposes of digital migration.[18]

17. In 2016, the "*dual illumination period*" commenced,[19] which entails the simultaneous analogue and digital broadcasting of existing television channels on a simulcast basis; however, thereafter the process of digital migration once again ground to a halt until early 2021.[20]

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[13] Digital Migration Regulations, GN 1070 in *GG* 36000 of 14 December 2012; Regulation 2 read with Regulation 1.
[14] Digital Migration Regulations, GN 1070 in *GG* 36000 of 14 December 2012, Regulation 3(6).
[15] FA, para 67; CCT Page No, 36.
[16] FA, para 68; CCT Page No, 36.
[17] GN 1070 in *GG* 36000 of 14 December 2012.
[18] Regulation 2, read with definitions in Regulation 1.
[19] As gazetted by the then Minister of Communication in Gazette No. 39642 of 01 February 2016.
[20] FA, para 70; CCT Page No, 37.

The Government's public promises of set top boxes throughout the digital migration process

18. Currently 36% of the television audience in South Africa (over 5 million households), who are mostly indigent and reliant on Government to provide them with set-top boxes, still access television solely through analogue broadcasting.[21] These viewers cannot "self-migrate" because of their socio-economic status. It is because of that reality, that Government has accepted an obligation, as it was constitutionally required to do, to assist them.

19. Throughout the 16-year process of digital migration, the Government and the various incumbent Ministers have 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, and to do so *before* the analogue switch off takes place.

20. These promises are contained in the official policy documents around the digital migration process, including:

    20.1. The 2008 Broadcasting Digital Migration Policy (**the Digital Migration Policy**);[22]

    20.2. The 2012 amendment to the Digital Migration Policy,[23] which introduced the "*Universal Service and Access Fund*", and the Government's commitment was recorded as follows:

[21] FA, para 152; CCT Page No, 61.
[22] Paragraph 2.3.4 of the 2008 Broadcasting Digital Migration Policy; CCT Page No. 267 records: "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". The Policy further recorded at para 2.1.4 that the process of digital migration is "*essential to meet our poverty reduction goals"* and to *"bridge the digital divide in South Africa*"; CCT Page No. 266
[23] Government Notice No. 97 relating to the Amendment of the Broadcasting Digital Migration Policy published in Government Gazette No. 35014 and signed by the Minister of Communications (Ms D Pule) on 7 February 2012; CCT Page No. 278.

"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)…"

20.3. The 2015 amendment to the Digital Migration Policy, in which the Minister described the hallmark of a successful digital migration as: "*Universal access, the availability and accessibility of broadcasting services to all citizens are a key component of successful digital migration.*"[24]

21. Consistent with these Policy documents, the Minister has made various public announcements, in which it has been confirmed that the Government will provide set top boxes to those households that are dependent on social grants or earning R3500 per month or less (which Government's own publicly announced estimates put at 3.75 million households).[25]

22. In the Minister's Media Statement of 6 October 2021, the Minister re-affirmed her commitment to universal access to digital services prior to analogue switch off, and

[24] Broadcasting Digital Migration Policy Published under GN 958 in GG 31408 of 8 September 2008, as amended by GN 97 in GG 35014 of 7 February 2012, as amended by GN 232 in GG 38583 of 18 March 2015 Annexure PR27 to the FA; CCT Page No. 305. Notably, the High Court erred in holding that in the Digital Migration Policy, as amended in 2015, "*no commitment was made with (sic) the provision of STBs*".[24] The Court is clearly wrong: the Digital Migration Policy, as amended in 2015, contains the express promise at para 2.1.4 that was contained in the 2008 policy, namely that:

"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)."

[25] See Government's announcements released by the South African Post Office on 21 October 2021, Annexure PRA1 to Replying Affidavit, CCT Page No. 2134; May 2021 Press releases, Annexure PR29; CCT Page No. 311; June 2021 news article, PR29 CCT Page No. 314 (initially the threshold was set in some documents as R3200, now it has been confirmed as R3500). See too Annexure PR28 to the FA; CCT Page No. 307. See "Broadcasting Digital Migration Factsheet" available https://www.gov.za/sites/default/files/bdm-fact-sheet.pdf, accessed on 3 May 2022.

she acknowledged that without STBs people would not be able to watch their TVs. 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 analogue TVs with dates, please ensure that you migrate before the set dates to continue receiving Television services."[26]

23. The Minister repeated these promises on oath in the High Court. The answering affidavit contains the following undertakings:

23.1. "*Government's undertakings to make devices/STBs available to qualifying households is (sic) well documented*".[27]

23.2. "*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*".[28]

23.3. "*Government has not and will not be leaving any South Africans behind*".[29]

The 6 October 2021 scramble – The Minister's imposition of a cut-off date for registration and announcement of the ASO date

24. On 6 October 2021, the Minister made two announcements out of the blue:[30]

24.1. First, that a cut-off date for the registration for STBs would now be imposed, and that this cut-off date was set for three weeks later, as 31 October 2021 (***the STB***

[26] Media Statement by the Minister of Communications and Digital Technologies (Ms K P S Ntshavheni) in respect of the Broadcast Digital Migration and Analogue Switch-Off Plan, dated 5 October 2021 and shared via e-mail on 6 October 2021 10:25; CCT Page No. 213.
[27] Minister's AA para 666; CCT Page No. 1122.
[28] Minister's AA para 199, CCT Page No. 1022.
[29] Minister's AA para 375, CCT Page No. 1069.
[30] Media Statement by the Minister of Communications and Digital Technologies (Ms K P S Ntshavheni) in respect of the Broadcast Digital Migration and Analogue Switch-Off Plan, dated 5 October 2021 and shared via e-mail on 6 October 2021 10:25; CCT Page No. 213.

registration cut-off date). This meant that any person who failed to register by 31 October 2021, would not receive an STB, the essential means to access digital television prior to the switch-off date;

24.2. Second, that the analogue switch-off date was planned for 31 March 2022 (***the switch-off date)***. This was followed by a proclamation in the Government Gazette of the 31 March 2022 ASO date.[31]

25. After *16 years* of failed promises and inaction around the digital migration process, the Minister's announcement of 6 October 2021 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:

25.1. First, the Minister did not consult the public in relation to either of these dates. In particular, there was no attempt to consult with members of the public reliant on Government providing them with STBs, as to the fact that the STBs provision, which had been stalled for years, now would effectively be reinvigorated overnight and would, for the first time, have a registration cut-off date imposed that would result in them losing access to television broadcasts. Moreover, the consultation with e.tv was a sham: while e.tv was invited to meetings (on short notice, and without agendas being set), the Minister simply ignored e.tv's repeated requests for information to enable meaningful consultation regarding the process;[32] and suggested she was open to considering e.tv's plan when in fact she had closed her mind thereto by already obtaining cabinet's approval for

[31] Government Notice No. 1804: Announcement of Date for Final Switch-Off of the Analogue Signal and the End of Dual Illumination published in Government Gazette No. 45984 and signed by the Minister of Communications and Digital Technologies (Ms K Ntshaveni, MP) on 28 February 2022; CCT Page No. 2234.
[32] E.tv's six letters to the Minister appear as PR6 CCT Page No. 143; PR8 CCT Page No.160; PR9 CCT Page No.166; PR11 CCT Page No.181; PR13 CCT Page No. 191; and PR16 CCT Page No. 210.

her own plan to set a 31 March 2022 ASO date – a fact that was only apparent once she had filed her answering affidavit in the High Court. This "charade", in the words of the SCA in *Scalabrini*, was **"inconsistent with the responsiveness, participation and transparency that must govern public administration"**.[33]

25.2. Second, the announcements were made in the knowledge that there would be a large number of indigent South African households that would not, by the cut off date of 31 March 2022, have received an STB from government to enable them to receive their free-to-air broadcasts after analogue switch-off. The Minister states that as of 31 October 2021, the belatedly set STB cut-off date, only 1.229 million households out of approximately 3.75 million households who qualify, had registered[34] (less than a third: meaning that almost **2.5 million households or 8 million people will be left behind**).

25.3. Third, the Minister's sudden imposition of a cut-off date for registration for government STBs (when previously there had been none, and in circumstances, when no ASO date had yet been determined), with almost no notice, meant millions were unable to register by 31 October 2021 (<u>indeed, although notionally the Minister first announced this sudden imposition on 6 October 2021 - mere weeks before the cut off - many of even the initial announcements in the relevant media were made as late as 29 October 2021, just two days before the cut off</u>).[35]

[33] See Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others 2013 (6) SA 421 (SCA) at para 70.
[34] Minister's AA para 211; CCT Page No. 1025.
[35] AA31, Presentation prepared by the Department of Communications and Digital Technologies in respect of Phase 1 of the Awareness Programme: National Generic Radio Script for the period 11 to 31 October 2021; CCT Page No. 1602.

25.4. Fourth, at no point in the papers was any reasonable explanation provided for why this registration cut-off date was selected months before the ASO date was determined. That explanation was called for in order to show reasonableness – i.e. why impose a registration cut-off date, in order to get an STB by the ASO date, if the Minister had not yet even determined when the ASO date will occur?; and why not give more than weeks or days of notice, when no cut off previously existed?

The undisputed facts as to the millions of households who will be left behind

26. In assessing the constitutionality of the Minister's conduct and the appropriate remedy, it is imperative to appreciate the relevant numbers of indigent households requiring the installation of STBs. These are the following:

26.1. The Broadcasting Research Council has confirmed that there are currently 15.8 million television households in South Africa (which is over 90% of the population);[36]

26.2. Of those 15.8 million households it is undisputed that 36% of the TV households, that is 5.7 million households, still receive free-to-air televisions via analogue transmission.[37]

26.3. Regarding eligible indigent television households that are entitled to receive Government installed STBs:

[36] e.tv Further Affidavit para 41 and 41.2; CCT Page No. 2261 - 2262. The Broadcast Research Council data is dealt with in the MMA and SOS Founding Affidavit, para 62; CCT Page No. 406 and confirmed by the Confirmatory Affidavit of the CEO of the Broadcasting Research Council; CCT Page No. 830. It is not disputed by the Minister, see Minister's AA to MMA affidavit, paras 18 – 24, CCT Page No. 1740-1741.
[37] Ibid.

26.3.1. The Minister's Department's own estimate on the latest numbers from Stats SA from 2018, is that there are currently at least 3.75 million households who are eligible for and have been promised government STBs (given that they earn a particular amount or less: R3500 per month).[38]

26.3.2. This represents over 12 million South Africans (there being 3.3 people per household).[39]

27. Of those who are eligible and reliant on Government to migrate them, only 1 228 879 households had registered by the suddenly-imposed cut off of 31 October 2021.[40]

28. By 10 March 2022 (after 7 years of the STB programme) the Government had installed only 660 661 STBs, leaving more than half a million households who had managed to register before the 31 October 2021 cut-off without an STB, just 3 weeks before ASO was to occur. [41]

29. This was only revealed after the first day of the hearing before the High Court, when the Minister – in the midst of e.tv's argument – belatedly sought leave to file a further affidavit.[42] The Minister's affidavit revealed that even for those households that had registered (by the Minister's own cut-off of 31 October 2021), the Minister had only made 103 707 installations from 31 October 2021 to 14 March 2022. In other words, it took the Government some 4.5 months to install 103 707 STBs. That worked out to

[38] e.tv's Further Affidavit, para 42.1; CCT Page No. 2263; Minister's Answering Affidavit, para 254; CCT Page No. 1039; Minister's Press Statement of 5 October 2021 para 2.1, CCT Page No. 214.
[39] e.tv's Further Affidavit, para 42.2; CCT Page No. 2263; MMA RA para 9, CCT Page No. 1796.
[40] Minister's Answering Affidavit, para 178, CCT Page No. 1016.
[41] e.tv's Further Affidavit para 25, CCT Page No. 2257; Minister's Further Affidavit para 8, CCT Page No. 2240.
[42] Supplementary Affidavit of the Minister of Communications and Digital Technologies in the Intervention Application deposed to by Nonkqubela Thathakahle Jordan-Dyani, dated 14 March 2022; CCT Page No. 2237.

approximately 23 000 per month, at the date of the Minister's further affidavit. **That was not an historic rate; that was the current rate – just two weeks before ASO.**

30. Moreover, the Minister's belated affidavit also revealed that there had been an additional 260 868 registrations as of 10 March 2022 (representing some 850 000 South Africans), and the Court accepted that the Government would not provide STBs to any of these households (even by the extended ASO date). At that rate, the Government would come nowhere close to installing 507 251 STBs in three months. On the evidence as confirmed by the Minister, it would take the Government almost two years (22 months), at a rate of 23 000 per month, to install 507 251 STBs. That was (and remains) true even if there were to be a substantial increase in the installation rate. On the High Court's own finding, as much as there was no clear evidence to demonstrate that the Minister could install 507 251 STBs within two weeks of the hearing (the gazetted ASO date), there was similarly no evidence that the Minister could install 507 251 STBs in three months.

31. Notably, the concern around the roll-out rate was not only demonstrated by e.tv and MMA and SOS; it also was publicly shared by the SABC in a press release by the SABC board, [43] which we deal with further below.

THE MINISTER'S FIVE CONSTITUTIONAL DUTIES

32. The Constitution places **five constitutional duties**, on the Minister as an organ of state, and which had to be taken into account by the Minister when determining the ASO date.

[43] Media Statement issued by The SABC Board in respect of the Analogue Switch-Off, dated 25 March 2022; CCT Page No. 2322.

33. **The first duty** is the duty in section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights.[44]

33.1. 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.[45]

33.2. Moreover, section 7(2) also places a positive obligation on government, for section 7(2)'s "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."[46]

34. The Minister's **second duty** is to observe the basic values and principles governing public administration.[47] This includes a duty of reasonable, rational, and procedurally fair decision-making.

35. The **third duty** resting on the Minister is to lead by example.[48]

36. The **fourth duty** is the requirement to be candid in litigation.[49] This duty is interlinked with the duty on government to be open and accountable which form the bedrock of

[44] Section 7(2) of the Constitution.
[45] Mlungwana v S 2019 (1) BCLR 88 (CC); 2019 (1) SACR 429 (CC) para 42.
[46] Glenister v The President of the Republic of South Africa and Others 2011 (3) SA 347 (CC) 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.
[47] Section 195 of the Constitution; Van der Merwe and Another v Taylor 2008 (1) SA 1 (CC) at paras 71-72.
[48] Van der Merwe (supra) at para 71; Mohamed and Another v President of the Republic of South Africa and others 2001 (3) SA 893 (CC) at para 68.
[49] Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC) at para 156; MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute 2014 (3) SA 481 (CC) at para 82.

our constitutional democracy.[50] Justice Sachs articulated this explicitly in his concurring judgment in ***Matatiele***.[51] 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."*[52]

37. The **fifth duty** is the duty on the Minister to honour undertakings, lawfully and seriously made (as established by this Court in ***KZN Joint Liaison***).[53]

38. As we will demonstrate below, the Minister failed to comply with these duties, thus rendering the ASO determination unconstitutional.

39. Yet, strikingly, the High Court failed to deal with any of these obligations which were fatal to the constitutionality of the Minister's conduct, save for the fifth. Despite the application having been argued over two days, and all parties having filed extensive

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[50] 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.

[51] 2006 (5) SA 47 (CC).

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

[53] KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal 2013 (4) SA 262 (CC) (including para 37)

heads of argument on the issues, the High Court did not in its judgment refer to any of the authorities that the applicants (e.tv and MMA and SOS) had relied upon.[54] The only exceptions were the High Court's incorrect and inappropriate reference to the ***KZN*** case (where, as set out in the next section, the High Court stridently held that the majority of this Court had got it wrong and impermissibly elected to rely on the separate minority view of Froneman J) and a passing reference to ***Scalabrini***,[55](without appreciating its real import and why it was authority counting against the Minister).

THE PROMISES MADE AND UNFULFILLED

40. In this case, as set out above, the Government has for a decade promised that analogue switch-off will not occur unless and until those who cannot otherwise afford access to digital broadcasting have been provided with STBs. 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 require social assistance receive it.[56]

41. As indicated earlier, 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

[54] See this Court's recent criticism of this type of conduct in Barnard Labuschagne Incorporated v South African Revenue Service and Another [2022] ZACC 8 at para 29
[55] Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others 2013 (6) SA 421 (SCA) (***Scalabrini***) para 72
[56] See section 27(1), read with section 27(2), of the Constitution. See too the finding of this Court in Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others [2017] ZACC 17; 2017 (9) BCLR 1108 (CC) para 9 that: "*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*." (Emphasis added).

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.

42. A High Court is plainly bound by the decisions of this Court. Remarkably, the High Court chose to expressly disagree with this Court's rulings on the KZN principle, in preference for its own view.

43. The High Court dealt with the KZN Principle from para 30. After setting out the facts of ***KZN Joint Liaison***, the High Court recorded that this Court "*accepted that the promise may not give rise to an enforceable agreement between the parties but because it constituted a publicly promulgated promise to pay once the due date of payment of a portion thereof had passed it created a duty to pay, albeit unilaterally. This means that once a promise is made for payment on a particular date and the promise is not retracted before that date then there is a legal obligation unilaterally enforceable at the instance of those who were intended to benefit from the promise.*"[57]

44. The High Court, however, impermissibly rejected this Court's reasoning. It records, at para 33 and 34 that Froneman J expressed "*a different view as against the majority view*" and that (in the High Court's view) "*the reasoning of Froneman J is more in line with the position in our law of contract and the law of property*". The High Court accordingly rejected ***this Court's*** finding in ***KZN Joint Liaison*** that a public promise could result in "*unilaterally enforceable*" obligations, and held that the promise had to amount to a two-way contract, of offer and acceptance.

[57] High Court judgment, para 32, CCT Page No 2364.

45. This Court has affirmed that compliance with binding decisions of this Court by lower courts is not optional, it is obligatory, and failure to do so is a violation of the rule of law, a foundational value of the Constitution.[58] Therefore, it was not open to the High Court to reject the binding legal determinations of this Court in ***KZN Joint Liaison***. Had the ***KZN Principle*** been properly applied, as enunciated by the majority of this Court, the High Court could not have reached the conclusion that it did.

46. The ***KZN principle*** obliges the Minister to honour her promises, like the promise to provide STBs to all those who need them and particularly all qualifying indigent households. These promises were made as recently as the press release of 6 October 2021[59] and in her affidavits before the High Court. These each "*clearly constituted an undertaking*" that was "*seriously given, in the expectation that it would be relied upon*". In the circumstances, it would be "*unconscionable*" for the Minister to go back on the express promise when measured against the constitutional standard of reliance, accountability and rationality, more particularly where the result would be to deprive literally millions of South Africans of their constitutional rights including the right to information.

47. Notably, the promises in question were made to the poorest and most vulnerable in South Africa – those who are reliant on analogue broadcasting and who do not have the means to self-migrate. In the premises, the Minister's conduct in making and breaking promises of providing STBs to everyone who needs them is a self-standing violation of the Constitution. But it goes further and is a breach of the proper fulfilment

[58] See Ruta v Minister of Home Affairs 2019 (3) BCLR 383 (CC) para 21; Barnard Labuschagne Incorporated v South African Revenue Service and Another [2022] ZACC 8 para 6; Turnbull-Jackson v Hibiscus Court Municipality [2014] ZACC 24; 2014 (6) SA 592 (CC) at para 54.
[59] Media Statement by the Minister of Communications and Digital Technologies (Ms K P S Ntshavheni) in respect of the Broadcast Digital Migration and Analogue Switch-Off Plan, dated 5 October 2021 and shared via e-mail on 6 October 2021 10:25; CCT Page No. 213.

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 support themselves.

48. The section 27 right is intrinsically linked to the achievement of other rights in the Constitution. As this Court has recognised 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, equality and freedom*."[60]

49. The State also has a duty not to take steps that are retrogressive.[61] This 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. [62]

50. On this ground alone, both the Minister's decision and the High Court judgment are unsustainable.

FREEDOM OF EXPRESSION, RELATED RIGHTS, CONSTITUTIONAL OBLIGATIONS AND THEIR BREACH

51. It is clear that:

[60] 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**).
[61] Jaftha para 34.
[62] 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.

51.1. for at least **2.5 million indigent South African households** (representing some **8 million South Africans**), the analogue switch off is a retrogressive step: they will lose their current access to information via these free-to-air broadcasts.

51.2. the households that are predominately affected are the poor, for they are reliant on Government to provide and install free set top boxes in order to receive digital television, once analogue broadcasting is switched off. This Court has emphasised that the poor are particularly vulnerable and their needs require special attention.[63] This 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.[64]

52. Therefore, the Minister's actions threaten a cluster of rights of affected communities dependent on analogue broadcasting.

53. The central right affected by the Minister's ASO determination is the right to freedom of expression, enshrined in section 16 of the Constitution. Freedom of expression – including the right to receive information or ideas – is central to any democratic order and South Africa's constitutional project, as this Court has emphasised on many occasions.[65]

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[63] Government of the Republic of South Africa and Others v Grootboom and Others [2000] ZACC 19; 2001 (1) SA 46 (CC) para 36.
[64] 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) para 74.
[65] 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

54. In ***Islamic Unity***,[66] citing ***Mamabolo***,[67] this 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."*

55. This 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*."[68]

56. Freedom of expression is part of a web of mutually supporting rights,[69] all vital for the proper functioning of our constitutional democracy (in particular, related rights to dignity and political rights). Thus, in ***Khumalo v Holomisa***,[70] this 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. 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*

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

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

[68] Islamic Unity, fn 11 para 32. See too 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) at para 49 and South African National Defence Union v Minister of Defence and Another 1999 (4) SA 469 (CC) ("***SANDU***") at para 7; South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others 2007 (1) SA 523 (CC) (***SABC v NDPP***) paras 23- 28.

[69] Qwelane v South African Human Rights Commission and Another 2021 (6) SA 579 (CC) at para 54; South African National Defence Union v Minister of Defence and Another 1999 (4) SA 469 (CC) at para 8

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

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."

57. In ***SABC v NDPP*****,** this Court in emphasising "*the right of the public to be informed and educated*", noted that this was "*acknowledged in the Preamble to the Broadcasting Act which reads – 'Noting that the South African broadcasting system comprises public, commercial and community elements, and the system makes use of radio frequencies that are public property and provides, through its programming, a public service necessary for the maintenance of a South African identity, universal access, equality, unity and diversity*"'.[71]

58. The implementation of the ASO will lead to the infringement of the section 16 rights and related dignity and political rights of millions of South African. This casts a heavy onus on the Minister to justify the limitation in terms of section 36. And unless the Minister can point to a law of general application, no question of justification arises at all.[72]

59. Moreover, flowing from section 7(2), the Minister bears a constitutional duty to protect, promote and fulfil the right in the Bill of Rights. Yet the facts demonstrate the Minister's ASO proclamation and process, did the opposite and were retrogressive: divesting millions of South Africans of the access they currently enjoy to free-to-air broadcasting, and hence the Minister violated, demoted, and retrograded their right of freedom of expression, inclusive of the right to receive information, and related rights.

[71] *SABC v NDPP* para 27.
[72] Hoffmann v South African Airways 2001 (1) SA 1 (CC) at para 41 August and Another v Electoral Commission and others 1999 (3) SA 1 (CC) at para 23.

60. The High Court judgment does not mention section 7(2) of the Constitution – either in relation to the positive obligations on the Minister or the negative obligations not to take steps that infringe rights which are currently enjoyed. Nor does the judgment deal at all with the limitations clause. Section 36 is not mentioned. Nor does the judgment acknowledge the fact that retrogressively depriving the public of the past enjoyment of a right[73] will be unconstitutional, unless it can be justified by the Minister under section 36 of the Constitution.

61. In the present case, the Minister's justification is stillborn: she claims to rely on a policy as the source of the power to set the ASO, but that means she cannot justify the limitation of the right.[74]

62. Even if the Minister's power is sourced in a law of general application, the Minister has not offered any justification at all. The number of South Africans who will be denied access to current analogue broadcasts extend to millions. Any uncertainty as to the exact numbers of indigent South Africans lies squarely at the Minister's door – because the Minister, impermissibly failed, prior to declaring the ASO date, to conduct any proper survey or analysis to determine how many indigent South Africans would be affected. She still has not done so during the course of this litigation.

63. Thus, the High Court failed to assess any of the Minister's conduct through the proper lenses of section 7(2) and section 36. It did not apply the test in ***Metrorail***[75] concerning

[73] Jaftha v Schoeman, Van Rooyen v Stoltz 2005 (2) SA 140 (CC) (***Jaftha***) para 34, emphasis added.
[74] Hoffmann v South African Airways 2001 (1) SA 1 (CC) at para 41; August and Another v Electoral Commission and others 1999 (3) SA 1 (CC) at para 23; Dladla and Others v City of Johannesburg and Another 2018 (2) SA 327 (CC) at para 52.
[75] Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC) (**Metrorail**) paras 66 to 72.

the "reasonableness" of the Minister's steps, even in circumstances where the Minister had admitted that she was bound by the requirements of section 7(2).[76]

64. Had the Court done so, and had it had regard to the interlocking constitutional duties placed on the Minister, or considered the undisputed facts before it, it would have been evident that the Minister's conduct in determining the ASO date was unreasonable, and could not be justified. In summary:

64.1. The Government's promises to provide STBs to all indigent South Africa households that required them (which it itself estimates to be 3.75 million households), was no mere discretionary gift of government largess. It was constitutionally necessary, because pursuant to section 7(2) of the Constitution, the Government rightly accepted that it could not remove the access of millions of indigent South Africans to analogue broadcasting unless it provided them with the means to migrate to digital broadcasting.

64.2. The facts make it clear that the Minister regarded the 31 March 2022 date, not as one that she had to reasonably set to ensure that indigent South Africans had enough opportunity to be migrated with the provision of STBs, but as a "deadline" that she was required to meet in fealty to the President's announcement in the State of Nation Address in January 2021. The High Court seems to accept that this is precisely what happened[77] – without regard to whether in fact the government had done enough to ensure that no indigent South Africans would be left behind.

[76] Minister's Answering Affidavit, para 662; CCT Page No. 1122.
[77] Judgment para 61 (read with para 45): "On the 5 th October 2021 the Minister made a media statement that during [State of the Nation Address] 2021 the President announced the 31 st March 2022 as the switch-off date for analogue." Para 45.
"The target ASO date was announced by President Ramaphosa during the State of Nation Addresses in 2021 and 2022. The Minister determined and announced the date as required by the policy." Para 61.

64.3. The Minister's entire case is hinged on the contention, which the High Court appears to have accepted, that the sudden imposition (without adequate notice) of the cut-off date was reasonable (even absent consultation), since registration had been open to indigent households since 2015. But this suggestion is contrived. At no point, prior to the sudden announcement of a registration cut-off date (with at most three weeks' notice, but in practice probably only a few days at best) had the Government ever suggested a cut-off date would be imposed,[78] or that it would again proceed with installing STBs, which had stalled in January 2019.[79] It was not in dispute that the digital migration process had ground to a halt at that point until it was reinvigorated in late 2021.[80]

64.4. In taking the decisions to impose the set-top box registration date and the ASO date, the Minister conducted no research or survey to identify why so many indigent households had not registered by 31 October 2021 – other than for the obvious reasons, they had no notice of the cut-off date, or did not properly understand what was required of them (or appreciate that the registration and installation process had begun again after almost three years of stalling and inaction). The High Court accepted the Minister had failed to undertake any such survey, yet appeared to accept that it was constitutionally permissible for the Minister simply to set the analogue switch off date, without knowing how many millions of indigent South Africans would be left behind and cut-off from their previous access to broadcasting.

[78] E.tv RA para 72, CCT Page No 2109.
[79] Minister's AA paras 265 -267; CCT Page No 1040 - 1041; E.tv RA para 44, CCT Page No 2093 – 2094.
[80] E.tv FA para 70, CCT Page No 37.

65. This Court has recently affirmed in Chairperson of ***UNISA v AfriForum***,[81] the duty on an organ of state to put up evidence to show reasonableness when a decision is taken to remove a benefit by changing a policy, in that case the ability to learn in Afrikaans.

66. In the current matter, this Court is dealing most directly with the right of freedom of expression, which includes the right to receive information. That right is clearly violated if and when the Minister imposes an ASO date without ensuring that indigent South Africans will continue to have the means to access television broadcasting. Therefore, it was incumbent on the Minister to justify the limitation of the rights of millions of South Africans that rely on analogue televisions to watch free-to-air television, all the more so given the Government's continual promises in this regard. She failed to do so.

67. Moreover, part of that justification must consider a proportionality analysis to determine if there are less restrictive means that could have been employed, that do not disproportionately harm indigent South Africans.[82] None was done – by the Minister, or the High Court.

68. In ***Bato Star*** this Court emphasised that one of the factors relevant to whether a decision is reasonable was "the impact of the decision on the lives and well-being of those affected."[83]

69. The same is true here: the determination of the ASO date, the determination of the STB registration cut-off date, and the Minister's concomitant failure to ensure the

[81] Chairperson of the Council of UNISA v AfriForum NPC 2022 (2) SA 1 (CC).
[82] See section 36(1) (see in particular (e)) of the Constitution; see also Makwanyane 1995 (3) SA 391(CC) para 104; Medirite (Pty) Ltd v South African Pharmacy Council and Another [2015] ZASCA 27 at paras 20 – 22
[83] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004) at para 45. See too Medirite (Pty) Limited v South African Pharmacy Council and Another (197/2014) [2015] ZASCA 27 para 20.

promised provision of STBs to millions of South Africans, is oppressive and has a disproportionate impact on the poor and vulnerable – it is they, who are reliant on analogue broadcasting, and on the Government to provide STBs, because they cannot afford to self-migrate. And the determination is not *necessary* – there are other less restrictive means to achieve the Minister's aims.

70. This shows, we submit, that the Minister failed to comply with her obligations under section 7(2) to take reasonable steps to respect, protect and fulfil the rights of millions of indigent South Africans, and the Minister has failed to justify the limitation of section 16 rights for millions of South Africans. All of this demonstrates the need for this Court urgently to come to their assistance, by setting aside the ASO determination, declaring the Minister's obligations, and requiring the Minister to report.

71. In response to the pulpable unconstitutional violation of millions of South Africa's rights, the thrust of Vodacom's and ICASA's case (and to some extent that of the Minister) before the High Court was 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. But this is wrong for at least three reasons.

71.1. First, the ITA auction only covers spectrum in the 700-800MHz band, whereas analogue switch-off entails the switching-off of *all* analogue transmitters, even those *under* 694 MHz. There is no need to switch off transmitter *under* 694 MHz (which are currently used and can continue to be used by e.tv and other analogue broadcasters) for the auction to proceed. In this way, the migration process and the auction can take place at the same time. 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.[84] 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;[85]

71.2. Second, the mobile network operators have already been allocated (in November 2021) significant additional spectrum, which alleviates Vodacom's alleged "*pinch*".[86] 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;[87]

71.3. 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.[88] 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 door to reach the spectrum their shareholders and users desire, our Constitution does not permit them or anyone else to do so by trampling over the indigent and vulnerable who rely on that spectrum to access

[84] e.tv RA, para 22.2,2; CCT Page No. 2081.
[85] e.tv RA, para 60; CCT Page No. 2105.
[86] e.tv RA, para 130; CCT Page No. 2128.
[87] e.tv RA, para 130; CCT Page No. 2128.
[88] See for example Vodacom's Answering Affidavit, para 11; CCT Page No. 836.

analogue TV for their news, sport, weather, and entertainment.[89]

72. 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 Government giving them STBs to access digital television, rather than leaving them behind. In our constitutional and developmental state, nothing less is acceptable – and that is what Government repeatedly over years promised to do.

THE MINISTER'S BREACH OF THE DUTY TO CONSULT

73. e.tv and the public as well as MMA and SOS had a right to be consulted (including by fair notice) prior to the Minister's decision in relation to ***the STB registration cut-off date***, and proclamation of ***the switch-off date***. [90]

74. Indeed, the High Court in two previous judgments, held that the Minister's determination of the ASO date "shall be made after a process of engagement with the affected parties has been concluded".[91]

75. Moreover, the right to be heard in the face of a potentially prejudicial decision is of ancient origin and formed part of the common law,[92] and the *audi alteram partem*

[89] e.tv RA, para 22.2.4; CCT Page No. 2082.
[90] Media Statement by the Minister of Communications and Digital Technologies (Ms K P S Ntshavheni) in respect of the Broadcast Digital Migration and Analogue Switch-Off Plan, dated 5 October 2021 and shared via e-mail on 6 October 2021 10:25; CCT Page No. 213.
[91] 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)* (Sutherland J) para 58, Telkom v ICASA [2021] ZAGPPHC 120 (8 March 2021) para 68.
[92] Administrator, Transvaal and others v Traub and others 1989 (4) SA 731 (A) at 748; R v Chancellor, Masters and Scholars of the University of Cambridge; (1723) 1 Strange's Reports 557 at 587; 93 ER 698

principle has been described as the procedural aspect of the rule of law.[93] Given the far-reaching consequences of the Minister's decisions on the rights of individuals, the failure to consult vitiates the two decisions, violates the dignity of those persons who were affected by them, and denied the Minister the chance to improve her decision-making by knowing exactly what the impact thereof might be on an unsuspecting public.

76. The High Court judgment deals with consultation only tersely.[94] The High Court found that the digital migration process had gone on for a long time, and that the "*formulation of policy is an executive competency and the duty to consult will only arise in circumstances where it would be irrational to take the decision without further input from industry experts".*[95] The High Court found further that "*there is nothing that prevents [the Minister] from [determining the switch off date]*".[96]

77. The High Court judgment does not deal *at all* with the first of the two decisions in respect of which it was asserted that consultation was required – namely STB registration cut-off. And the reasoning in relation to the second decision – that there is nothing that prevents the Minister from determining the ASO date – is superficial at best.

78. Nor is there any discussion in the judgment of the particularly acute obligation on 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 expression,

(KB) at 704; Mpande Foodliner CC v Commissioner for the South African Revenue Service and others 2000 (4) SA 1048 (T) at 1065 – 1066, para 39.
[93] Walele v City of Cape Town 2008 (6) SA 129 (CC) at para 27.
[94] Judgment, paras 61 to 63; CCT Page No. 2378.
[95] Judgment, para 62; CCT Page No. 2379.
[96] Judgment para 63; CCT Page No. 2380.

inclusive of the right to receive information,[97] given effect to in the provision of access to free-to-air television.[98]

79. Because both the STB registration cut-off date and the switch-off date had the potential to affect the rights of millions in South Africa, the Minister was duty bound to give the public proper notice of decisions that were about to impact severely on their lives and rights, seek their views on those decisions, and show them proper respect and improve her own decision-making in the process. The Minister failed to do so.

80. Instead, the Minister argued, and the High Court appears to have accepted, that there was no duty to consult, because the Minister's ASO decision was merely a policy determination which the Minister alleged she was empowered to make in terms of the Digital Migration Policy. This was wrong for several reasons:

80.1. First, the Policy was not the source of the Minister's power to make the ASO determination, the Digital Migration Regulations were.[99] The Regulations expressly provided that the ASO must be "determined and published"[100] and that the ASO date must be "published by the Minister in the Gazette."[101] Policy cannot be a source of power. And, the Digital Migration Policy, in question, had been held by this Court to be merely a guide and non-binding.[102]

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[97] Section 16.
[98] 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.
[99] They expressly provide that:
"the "dual illumination period" is "the period commencing on the date of Digital Terrestrial Television switch-on, as 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***". **Section 1**
"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." Section 3(1)
[100] Section 1 of the Digital Migration Regulations.
[101] Section 3(1).
[102] *Electronic Media Network Limited v e.tv* 2017 (9) BCLR 1108 (CC) paras 35 and para 178

80.2. Second, as indicated above, the same Court (the Gauteng High Court, Pretoria), had in two separate judgments, held that the Minister's determination of the ASO date "shall be made after a process of engagement with the affected parties has been concluded".[103]

80.3. Third, the High Court failed to have regard to this Court's decision in ***Ed-u-College***,[104] (despite it being pertinently drawn to the Court's attention) where this Court made clear that it was necessary to distinguish between different ways in which policy can be formulated. In particular, this Court held that where policy was formulated in "a narrower sense" – i.e. "where a member of the executive is implementing legislation" – this will often constitute administrative action.[105] It is clear that the Minister's setting of the ASO date (and the prior determination of the registration cut-off date) is clearly an administrative decision made to implement the Digital Migration Regulations. All administrative action must be procedurally fair.[106]

80.4. Fourth, even if the Minister's determination of the ASO date were held not to be administrative action, it is nevertheless the exercise of public power which must not only be substantively rational, but also procedurally rational.[107] Our courts have recognised that there are circumstances in which rational decision-making

[103] 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)* (Sutherland J) para 58, Telkom v ICASA [2021] ZAGPPHC 120 (8 March 2021) para 68.
[104] Permanent Secretary of the Department of Education of the Government of the Eastern Cape Province and Another v Ed-U-College (PE)(Section21) 2001 (2) SA (1) (CC).
[105] Ed-U-College at para 18.
[106] Promotion of Administrative Justice Act section 6, and section 33 of the Constitution.
[107] 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; and Albutt v Centre for the Study of Violence and Reconciliation 2013 (1) SA 248 (CC) ("Albutt") paras 50-1. See also Earthlife Africa Johannesburg and Another v Minister of Energy and Others [2017] ZAWCHC 50; 2017 (5) SA 227 (WCC) para 50.

calls for interested persons to be heard in a wide range of contexts.[108] Given the facts set out above – which demonstrate that the ASO date directly and drastically infringes the rights of millions of South Africa, and removes their current access to public broadcasting – this is precisely the type of case where procedural rationality required the Minister to consult with interested and affected parties.

80.5. 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 Government to provide set top boxes. Yet 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.

80.6. Finally, 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.[109]

[108] Ibid.

[109] See 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 4; 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) para 92.

81. 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 apprised of the Minister's plans no fewer than six times through letters sent before these proceedings were launched,[110] 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 purpose of those letters was to seek an undertaking that the Minister would undertake a public consultation process with affected parties, including in relation to the date of migration and the need for appropriate measures to ensure that those reliant on analogue broadcasting would not be left behind. The Minister effectively indicated that she would not consult with e.tv and would see e.tv in court.[111] Indeed, this was clear evidence that the Minister was unwilling to engage in any meaningful consultation with an open mind and receptive attitude.

82. This conduct falls far short of what our Constitution requires and vitiates the Minister's decisions.

THE APPROPRIATE REMEDY

83. For the reasons set out above, the Minister's conduct and gazetting of the ASO date, was unconstitutional, limited the constitutional rights of significant numbers of indigent South Africans, and could not be and had not been justified. In the circumstances, e.tv (alongside MMA and SOS) has made out a case for substantive constitutional relief in terms of section 38 and 172, declaring invalid and setting aside the ASO date, declaring as to the constitutional obligations the Minister bore, and reporting to the High Court.

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[110] etv's six letters to the Minister appear as PR6 CCT Page No. 143; PR8 CCT Page No.160; PR9 CCT Page No.165; PR11 CCT Page No.180; PR13 CCT Page No. 190; and PR16 CCT Page No. 209.
[111] Minister's letter of 10 October; PR18; CCT Page No. 219.

84. This relief is clearly appropriate, just and equitable. The High Court erred in not granting it, since it is the necessary and effective relief required to protect the rights of significant numbers of South Africans.

85. Given the unconstitutionally, it is obligatory under section 172(1)(a) of the Constitution to declare the Minister's gazetting of the ASO date to be constitutionally invalid and set aside. This is necessary even on the High Court's own findings, given that it decided it had to extend the ASO date even in respect of those who had managed to register on time by 31 October.[112]

86. It is then necessary to grant just and equitable relief, pursuant to section 172(1)(b), to correct the consequences of this unconstitutionality,[113] and protect and safeguard the rights millions of South Africans.[114]

87. Given the Minister's steadfast refusal to accept or recognise the consequence of the constitutional obligations she bore, it is appropriate and just and equitable for this Court to make declarations[115] as to the obligations the Minister bears to consult, to honour her public promises, and to take reasonable steps to ensure that indigent South Africans do not have their currently enjoyed access to public and free-to-air televisions removed.

[112] E.tv does not challenge those suspension orders. They provide some relief, for a limited interim period, at least ensuring that the gazetted and extant ASO date determination will not be given effect to until 30 June 2022, and compelling the Minister to ensure STBs are installed for certain individuals.
[113] 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
[114] Black Sash para 43. See also generally Electoral Commission v Mhlope & Others 2016 (5) SA 1 (CC) para 132.
[115] See Metrorail paras 107 and 108.

88. The High Court at various places in its judgment bemoaned the lack of certainty in relation to precisely how many millions of South Africans would be left behind by the Minister's precipitous ASO announcement. It decried the failure by the Minister to have conducted research or any study.[116] It doubted the Minister's own predictions as to the Government's ability to provide STBs timeously to the indigent.[117] It highlighted that the Government had failed to get Treasury approval to make provision for even sufficient STBs to be provided and installed for those indigent households that had registered.[118]

89. These facts were for the Minister to provide, clearly and candidly – and she should have had them at her fingertips as a responsible Minister who was about to embark on switching off the ability of millions of South Africans to continue watching their TVs. These facts were foundational to the legality of the process. The uncertainty directly a result of the Minister's failure to undertake the reasonable and necessary steps prior to the announcing of the ASO date and to comply with her constitutional duties of openness and transparency and to assist the Court by providing necessary and up-to-date information to allow it to meaningfully determine the case before it.

90. The facts that *were* before the High Court pointed to the justice and equity of the relief sought being granted.

    90.1. Given the current installation rate on the record before the High Court (only 23 000 per month), and absent any factual foundation to support the Minister's bald allegations that the Government would be able to install half a million STBs across the country by the ASO date, just 15 days away, even the High Court

[116] Judgment, Para 54; CCT Page No. 2374.
[117] Paras 66, 68, and 69; CCT Page No. 2380-2381.
[118] Judgment, Para 54; CCT Page No. 2374.

found that the Minister's predictions and vague assurances could not be accepted. The High Court, therefore, suspended the ASO date for three months and ordered the Minister to install all 507 251 STBs by 30 June 2022.

90.2. Yet, the High Court dismissed e.tv's application, thus refusing to set aside the ASO date, to allow the Minister to comply with her constitutional obligations, and report to the Court to confirm that constitutionally compliant steps had been taken to ensure that indigent South Africans had received STBs prior to the ASO date.

90.3. But on the current installation rate before the Court (the only specific and unquestionable evidence available), the Government had only been able to achieve 23 000 installations per month. At that rate, the Government would come nowhere close to installing 507 251 STBs in three months. That was (and remains) true even if there were to be a substantial increase in the installation rate.

90.4. It therefore was therefore constitutionally inappropriate for the Court to have refused to set aside the gazetted ASO, and to decline to require reporting by the Minister. As we pointed out earlier, on the High Court's own finding, as much as there was no clear evidence to demonstrate that the Minister could install 507 251 STBs within two weeks of the hearing (the gazetted ASO date),[119] there was similarly no evidence that the Minister could install 507 251 STBs in three months.

90.5. Moreover, even if the Government were able to install STBs for all 1.229 million households that registered by 31 October 2021 by the extended ASO date (of which the Government disclosed only 1.18 million were held to qualify), this would still leave approximately **2.5 million households (8 million South Africans)**, of

[119] **On the current rate, as confirmed by the Minister's own affidavit, it would take the Government almost two years (22 months!), at a rate of 23 000 per month, to install 507 251 STBs**.

the 3.75 million that are eligible for STBs by reason of their indigence (some two-thirds of all eligible households), that still require STBs from Government, and will lose access come ASO.

91. As indicated above, those were the undisputed facts before the High Court, but the High Court respectfully got the matter back to front. At para 59, the High Court recorded that: "*The applicant and the intervening parties have accordingly not proved that there are 2.58 million households representing 8 million indigent people that will be switched off on the 31st March 2022*."

92. This finding, and the conclusions drawn from it – that the 2.58 million households had **no entitlement** to an STB and **no standing** before the High Court[120] – is unsustainable and misconceives basic constitutional analysis. It was the Minister who bore the relevant duties and obligations and was required to quantify and justify the limitation of the rights of millions of indigent South Africans.[121]

93. The cold facts are that the Minister's conduct of setting an expedited ASO date and unreasonable registration cut-off deadline had the disproportionate and unreasonable impact of ensuring that millions of viewers who qualified for STBs were not able to register on time. And, absent the clearest evidence to the contrary (which the Minister has failed to adduce), the Minister's approach whether by design or effect will leave some 8 million South Africans without access to public broadcasting. As we discuss below, this cannot be reasonable or constitutionally compliant.

[120] High Court judgment, para 56.
[121] Kalil NO v Mangaung Metropolitan Municipality 2014 (5) SA 123 (SCA) at para 30[121]; Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC) at paras 663 and para 664; Moise v Greater Germiston Transitional Local Council 2001 (4) SA 491 (CC) at para 19; Minister of Justice and Constitutional Development, National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others 2004 (5) BCLR 445 (CC) at para 65.

94. All of this further confirms the constitutional appropriateness and necessity of the relief sought by e.tv: setting aside of the ASO date coupled with declaratory and reporting relief in order to protect the rights of three categories of the population: (i) those half a million households who managed to register before the imposed 31 October deadline; (ii) the quarter of a million households that registered between then and 10 March (and who the High Court was happy to allow being left without access to broadcasting), and; (iii) the many millions more indigent households who had been promised that government would ensure they would not be left behind (which, the Court inexplicably found had no rights or standing), but now would be cut off come the ASO date.

95. Given the very significant impact on constitutional rights of millions of South Africans, this case justifies reporting obligations to be placed on the Minister. Reporting relief is competent and ordered by this Court where the State has failed to appreciate its constitutional duties and there is the need for oversight. It is also particularly important and constitutionally necessary where the constitutional rights of millions of South Africans are threatened.[122] The present is precisely such a case.

96. In the premises, the High Court's suspension order is a poor band-aid, for a far greater constitutional malady. It will only ensure a brief delay of the implementation of the ASO date. It will not ensure the proper constitutional steps are taken to ensure that millions of South Africans are not left behind, and it will not give the constitutionally required answers to the questions about the Minister's obligations in respect of the ASO and consultation. That is because between now and June, there remains ongoing risk to millions of South Africans, precisely because there remains a lack of clarity about whether those who did register on time by 31 October, will in fact receive their STBs

[122] Allpay II at para 75; Treatment Action Campaign (supra) at para 106; Black Sash Trust v Minister of Social Development and Others 2017 (3) SA 335 (CC) at paras 43 and 62.

timeously to avoid losing access to TV; and because on the High Court's own judgment those who did not register on time (who failed to "raise their hand", as the Court put it[123]), are cast out and left behind, despite them never being consulted about or given any proper notice of the imperiously imposed deadline for registration, and despite them never being consulted about the ASO date.

97. e.tv accepts that the High Court's just and equitable extension of the ASO date while insufficient, at least provides protection for those who did register until 30 June 2022, which will allow sufficient time for this Court urgently to consider and determine e.tv's appeal and ensure that the rights of the millions who did not register (or registered late), will be respected, protected, promoted and fulfilled.

98. Thus, e.tv's challenge is limited to the High Court's dismissal of its application, and refusal to set aside the ASO date gazetting, coupled with declaratory and reporting relief.[124] For all the reasons set out above, it is constitutionally necessary and appropriate for this Court urgently to grant that relief.

Admission of the SABC's press release

99. E.tv has sought an order setting aside the High Court's dismissal of its application to adduce very limited further evidence, and replacing it with an order allowing that evidence to be adduced.

100. In summary, the relevant circumstances are as follows:

[123] Judgment, para 56; CCT Page No. 2376.
[124] Application for leave to appeal directly to the Constitutional Court; para 2 of the Notice of Motion; CCT Page No. 2388.

100.1. After the urgent hearing of the matter before the High Court, but prior to judgment, the SABC, the public broadcaster, an organ of state, and respondent in the matter (albeit that it elected to file no papers), issued a highly relevant and concerning press release.[125]

100.2. When the Minister refused, notwithstanding her duty of openness and accountability to assist the Court, to draw this evidence which was clearly in her knowledge, to the Court's attention, e.tv and MMA and SOS separately urgently applied to have it admitted.[126]

101. The Court refused to admit the evidence for two reasons (a) SABC was "a not a party before the Court"[127] and (b) "in light of the Court's order, this further evidence is not required".[128] The Court evidently erred in refusing the application, and in the reasons given for that refusal.

101.1. First, SABC was indeed before the Court. It was cited as a party (the fifth respondent), and continues to be so. As an organ of state, it had a duty to assist the Court under section 165(4) of the Constitution in a matter where it had publicly made statements through its press release which clearly were of relevance to the very issues that were being determined in the litigation in which it was cited as a named respondent.

101.2. Second, it was precisely because the SABC was a party, but had nevertheless harboured very grave concerns about the plight of millions of South Africans

[125] Media Statement issued by The SABC Board in respect of the Analogue Switch-Off, dated 25 March 2022; CCT Page No. 2322.
[126] E.tv's application to admit further evidence, CCT Page No. 2332. MMA and SOS's application appears at CCT Page No. 2312.
[127] Judgment, Para 70; CCT Page No. 2382.
[128] Judgment, Para 70; CCT Page No. 2382.

households who would be left behind, yet had failed, as an organ of state to place those views before the Court, that the public media statement by it is highly relevant. So too was the fact made clear by the media statement that it had shared these concerns with the Minister, but the Minister too had failed to inform the Court of her engagements with SABC and their concerns.

101.3. Third, a consideration of the press release by SABC issued on the afternoon on Friday 25 March 2022, immediately confirms its relevance to the proceedings, and the need for the High Court to have had regard thereto, and, if necessary, urgently require the Minister to explain her failure to advise the court of the SABC's concerns and respond thereto. The press release recorded in relevant part that:

> *"The plan to switch off all ATV transmitters by 31 March 2022,* ***despite the slow progress of STB registrations and installations, presents an unsustainable risk to the rights of millions of indigent households, as well as the Corporation's Turnaround Plan. A premature switch-off will deprive millions of people from important public television services****.*
>
> *The four provinces designated for switch off on 31 March 2022 comprise 68% of South Africa's population. As at February 2022 only 165,000 STBS out of the 2.9m indigent households (5.7%) had been installed in the four outstanding provinces.* ***This number is simply too low for the SABC's ATV services to be switched off in the four largest provinces, at this stage. The SABC engages with the Digital Migration Project mindful of its inescapable constitutional and legal obligations to the people of South Africa****…" (our emphasis).*

102. The press release is clearly highly relevant and material to matter. It reveals the following two important features:

102.1. First, the SABC (the State Broadcaster), an organ of state, and a respondent, shares precisely the same concerns about the premature ASO switch off as e.tv and MMA and SOS. SABC's particular concerns are for the "millions of indigent households" to whom the ASO date of 31 March 2022 represents an

"unsustainable risk" on account of the "slow progress of STB registrations and installations".

102.2. Secondly, the SABC furthermore recognises the "constitutional and legal obligations" to "protect the rights of every citizen to access public television services".

103. These are undoubtedly facts which were relevant to the High Court's judgment. Moreover, that these are SABC's view are incontrovertible – they set out the SABC's position as regards digital migration in a publicly released media statement. And the information could not have been put before the Court earlier, as it only came to light that Friday. e.tv immediately sought to put it before the Court with a full explanation for why the admission met the test of rule 6(e) of the Uniform Rules, read with section 172 of the Constitution.

104. In the circumstances, it is submitted that it was clearly incorrect for the High Court to hold that its orders (including dismissing e.tv's application for declaratory, review, and reporting relief) meant that the further evidence "was not required".

105. For completeness, we note that, subsequent to the press release (on 5 April 2022), the SABC issued a further press release indicating that "*its media statement was not intended for the purposes of the ongoing court case*".[129] However, importantly, SABC does not deny the facts and concerns expressed in its initial press release. It is the fact of those concerns, which are relevant for this hearing.

[129] This statement appears at CCT Page No. 2573.

106. This further demonstrates the need for this Court to order reporting relief, so the true facts can be fully known, the real impact portended by the public broadcaster on the rights of millions of South African TV viewers can be properly assessed, and meaningful supervision can be provided to ensure that those rights are respected, promoted, protected and fulfilled.

Costs

107. e.tv is evidently entitled to its costs if successful. But even if it were not to be successful, it is protected by the ***Biowatch*** principle from any cost order against it. It was similarly protected from a cost order in the High Court. Therefore, the High Court clearly ignored or misapplied this Court's jurisprudence when it ordered e.tv to pay costs.[130]

107.1. In assessing whether the Biowatch principle applies what matters is the nature of the litigation not the character of the individual litigants. As this Court has recently held:

> *"This Court has reiterated on numerous occasions that the crucial consideration in determining whether the principle set out in Biowatch should apply is not the character of the parties, but the nature of the litigation at issue. This Court in Biowatch succinctly stated the principle as follows:*
>
> *'It bears repeating that what matters is not the nature of the parties or the causes they advance but the character of the litigation and their conduct in pursuit of it. This means paying due regard to whether it has been undertaken to assert constitutional rights and whether there has been impropriety in the manner in which the litigation has been undertaken.'"*[131]

107.2. There is no dispute that this is a constitutional matter. Therefore, the ***Biowatch*** principle applied to e.tv and there was no constitutionally permissible basis for the High Court to distinguish in applying the principle to MMA and SOS, but not

[130] Judgment para 71.
[131] Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others [2020] ZACC 10; 2020 (6) SA 325 (CC).

e.tv, even if the Court dismissed the application. Moreover, e.tv's application has always been pursued not only in its own interest but in the interests of millions of South Africans who are reliant on its free-to-air broadcasting for their news, information and entertainment.

INTERESTS OF JUSTICE TO GRANT URGENT DIRECT LEAVE TO APPEAL

108. For the reasons set out above, it is submitted that there are good prospects that this Court will come to a different conclusion than the High Court, and will uphold e.tv's appeal. It is also submitted that the nature of the issues in this application are of significant public importance, implicating the rights of millions of South Africans, and warrant the attention of this Court in the interests of justice.

109. e.tv respectfully submits that it is imperative that this matter be heard and judgment given before 30 June 2022. The Minister agrees.

110. The effect of the Minister's setting of the ASO date, even with the extension ordered by the High Court, is that ASO is now to take place on 30 June 2022. From then on millions of South Africans reliant on government to provide them with STBs will be left without access to public and free-to-air broadcasting.

111. e.tv submits that it is in the interests of justice that this an appropriate case for a direct appeal to be granted, on account of the following factors:

    111.1. The issues are the kind of issues that justify the urgent attention of this Court – as did the issues (also involving the threat to rights of millions of indigent South Africans) in ***Black Sash***;

111.2. It would benefit all parties (e.tv, MMA, SOS, the Minister, the SABC and the public) for this matter urgently and finally to be determined such that there is clarity and certainty regarding the constitutionality of the ASO determination, and the requirements for constitutional ASO determination – the Minister agrees;

111.3. The matter is one of great public importance and the public have a right to know whether the ASO date that is now set for 30 June 2022 is lawful;

111.4. The matter is clearly urgent.

111.5. This Court is not called upon to determine the matter for the first time, it is an appeal from a full court of the High Court, and the consultation associated with the process has already been pronounced on by two High Courts;

111.6. The case does not involve the development of the common law. It requires first and foremost an interpretation of the Constitution, a consideration of whether the Minister's exercise of public power complies with constitutional requirements, and a determination of what appropriate, just and equitable relief is urgently required to protect the rights of significant numbers of poor South Africans. These are matters that this Court has regularly and finally determined, as the ultimate guardian of the Constitution. As a result, the resolution of these issues does not require the specific common law expertise of the Supreme Court of Appeal;

111.7. There is only limited time before the extended ASO date arrives on 30 June 2022. It is essential that the matter be urgently and finally determined. The matter has already been urgently heard by a full court of the High Court (constituted at the request of the Minister given the constitutional and public importance of the matters). There is only sufficient time for one appeal. It must be to this Court, the

ultimate guardian of the Constitution, and the final arbiter of constitutional matters.

112. For all of these reasons, it is submitted that it is in the interests of justice that a direct appeal be granted to this Court, so that the High Court's dismissal of e.tv's application and its refusal to grant the appropriate and necessary constitutional relief can be swiftly and finally remedied.

CONCLUSION

113. In all the circumstances, e.tv seeks orders granting leave to appeal and upholding its appeal, coupled with orders setting aside the ASO date, declaring the constitutional obligations on the Minister, and ordering appropriate reporting relief, together with costs, as more fully set out in its notice of motion.

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Chambers Sandton and Durban,
6 May 2022