

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: _____
GPHC CASE NO: 51159/21

In the matter between:

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

NOTICE OF MOTION : URGENT APPLICATION

PLEASE TAKE NOTICE that the applicants hereby apply for an order in the following terms:

- 1 The rules, time limits, forms, and procedures provided for in the Constitutional Court Rules are dispensed with in terms of Rule 12, to the extent necessary, and that this application be heard as a matter of urgency.
- 2 The applicants are granted direct leave to appeal in terms of Rule 19 against paragraphs 2 and 6 of the order of the Gauteng Division of the High Court, Pretoria, delivered on 28 March 2022, as well as the reasons for that order.
- 3 The appeal is upheld and paragraphs 2 and 6 of the High Court order are set aside and replaced with an order as follows:
 - 3.1 The Second Respondent's ("the Minister's") determination and gazetting of the analogue switch-off date for 31 March 2022, made on 28 February 2022, is declared constitutionally invalid and set aside.
 - 3.2 It is declared that, prior to the determination by the Minister of the analogue switch-off date and the date for completion of digital migration, the Minister is required to undertake a process of consultation with affected parties, including, but not limited to e.tv, Media Monitoring Africa,

SOS Support Public Broadcasting, community broadcasters, the SABC and representatives of indigent qualifying households, regarding the date of the analogue switch-off date and the date for the completion of digital migration and whether appropriate measures are in place to ensure that those in South Africa who are reliant on analogue broadcasting are not deprived of their access to free-to-air broadcasting as a consequence of the determination by the Minister.

3.3 It is declared that the digital migration process may not be completed and the analogue switch-off date may not be proclaimed by the Minister, unless and until the Minister has complied with her constitutional obligations and public promises to take reasonable and justifiable steps to provide indigent qualifying South Africans households who are presently reliant on analogue broadcasting with the means to access free-to-air broadcasting via digital broadcasting.

3.4 The Minister is directed to file a Report to this Court within one (1) month of the date of the Order, or such other period as this Court should determine to be appropriate and just and equitable, setting out the steps that have been taken to ensure that:

3.4.1 members of the public who are currently reliant on analogue broadcasting services are provided with access to set-top boxes and/or reception devices to enable them to continue to be in a position to access free-to-air broadcasts without subscription or charge following digital migration;

- 3.4.2 adequately resourced call-centres are operational to process viewer queries sufficiently and effectively;
 - 3.4.3 an effective viewer information campaign has been conducted;
and
 - 3.4.4 sufficient Sentech resources have been allocated to action the switch-off of transmitters.
- 3.5 The Minister, the Third Respondent ("ICASA") and the Seventh Respondent ("Vodacom") are to pay the costs of the intervening parties, jointly and severally including the costs of two counsel.
- 4 The costs of the application for leave to appeal and the appeal are to be paid, jointly and severally, by the respondents.
- 5 Further and/or alternative relief.

TAKE NOTICE FURTHER that the affidavit of **WILLIAM BIRD** will be used in support of this application.

TAKE NOTICE FURTHER that the applicants have appointed **Le Val, 45 Jan Smuts Avenue, Westcliff, Johannesburg** as the address at which they will accept notice and service of all process in these proceedings.

TAKE NOTICE FURTHER that, in terms of Rule 19(4) of the Rules of the Constitutional Court, if you intend opposing this application you are required to notify the Applicants and the Registrar in writing of your intention to oppose within 10 (ten)

days of receiving this Notice, together with the grounds for such opposition.

TAKE NOTICE FURTHER that the Chief Justice is requested, pursuant to Rule 12, to issue directions to the parties regarding:

- a) The filing of affidavits;
- b) The filing of written submissions;
- c) The allocation of a date for the urgent hearing of this matter;
- d) Any further matter(s) which the Court requires the parties to address.

DATED AT JOHANNESBURG THIS 4th DAY OF APRIL 2022.



ROSENGARTEN & FEINBERG
First and Second Applicants' Attorneys
Le Val
45 Jan Smuts Avenue
Westcliff
Johannesburg
Tel: 011 486 0242
Ref: Dan Rosengarten/Daniel Basckin
Email: danr@rf-law.co.za
danielb@rf-law.co.za

TO:

**THE REGISTRAR OF THE ABOVE
HONOURABLE COURT
CONSTITUTIONAL COURT
BRAAMFONTEIN**

AND TO:

**THE REGISTRAR
HIGH COURT
PRETORIA**

AND TO:

NORTONS INC
First Respondent's Attorneys
38 4th Avenue
Parkhurst
Tel: 011 666 7560
Ref: Anthony Norton /
Anton Roets / Nina Greyling
Email: anthony@nortonsinc.com /
anton@nortonsinc.com /
nina@nortonsinc.com

AND TO:

MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES
Second Respondent
iParioli Office Park
1166 Park Street
Hatfield
Pretoria
c/o THE STATE ATTORNEY
SALU Building
316 Thabo Sehume Street
Pretoria
Email: ichowe@justice.gov.za

AND TO:

KUNENE RAMAPALA INC
Third and Fourth Respondents' Attorneys
6th Floor Anchor House
100 Juta Street
Braamfontein
Johannesburg
c/o 1090 Infotech Building
1st Floor, Arcadia Street
Hatfield
Pretoria
Tel: 011 463 3888

Ref: ICASA / Telkom L1/B.Shoba
Email: bshoba@kr-inc.co.za / mnkoane@kr-inc.co.za
BY EMAIL

AND TO:

NATIONAL ASSOCIATION OF BROADCASTERS

Fifth Respondent
410 Jan Smuts Avenue
Burnside Island Office Park
Building number 8
Ground Floor
Craighall
Email: nadia@nabsa.co.za
BY EMAIL

AND TO:

SOUTH AFRICA BROADCASTING CORPORATION

Sixth Respondent
Broadcasting Centre
Henley Road
Auckland Park
Johannesburg
By email: moilwap@sabc.co.za /
VanaraNJ@sabc.co.za
BY EMAIL

AND TO:

CLIFFE DEKKER HOFMEYR

Seventh Respondent's Attorneys
1 Protea Place
Sandown
Sandton
Tel: 011 562 1129
Fax: 011 562 1629
Email: anja.hofmeyr@cdhlegal.com

AND TO:

WEBBER WENTZEL

Eight Respondent's Attorneys
90 Rivonia Road
Sandton
Johannesburg

2196
Tel: 011 530 5419
Fax: 011 530 6419
Email: Nozipho.Mngomezulu@webberwentzel.com /
peter.grealy@webberwentzel.com

AND TO:

CELL C (PTY) LTD
Nineth Respondent
Waterfall Campus
Corner Maxwell Drive and Pretoria Main Road
Buccleuch
Gauteng
Email: Themba.Phiri@cellc.co.za / jmoela@cellc.co.za /
zahir@cellc.co.za

AND TO:

WERKSMANS ATTORNEYS
Tenth Respondent's Attorneys
96 The Central
Rivonia Road
Sandton
Tel: 011 535 8145
Fax: 011 535 8645
Email: cmanaka@werksmans.com / abilaty@werksmans.com
Ref: Mr C Manaka / TELK6044.414
BY EMAIL

AND TO:

BOWMAN GILFILLAN INC.
Eleventh Respondent's Attorneys
11 Alice Lane Sandton
Johannesburg
Tel: 011 669 9334/9489
Fax: 011 669 9001
Email: livia.dyer@bowmanslaw.com tori.herholdt@bowmanslaw.com
Ref: L Dyer/ T Herhold
c/o ANDREA RAE ATTORNEY
69 Douglas Street
Colbyn
Pretoria
Tel: 012 430 7757
Fax: 012 430 4495
Email: Andrearae@telkomsa.net / a.rae@andrearae.co.za

AND TO:

MAKDA CULL KOTZEE INC

Twelfth Respondent's Attorneys
Unit 201 - East Block 67 on Seventh
67 7th Street Linden
Ref: LIQ1/0001
Tel: +2787 807 7970
E-mail: anton@mcklaw.co.za
[SERVICE BY E-MAIL]

AND TO:

SENTECH SOC LIMITED

Thirteenth Respondent
Sender Technology Park
Octave Road
Page 7 of 7
Honeydew
Gauteng
Email: legalregulatory@sentech.co.za
BY EMAIL

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: _____
GPHC CASE NO: 51159/21

In the matter between:

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

JK
MB

SENTECH SOC LIMITED

Thirteenth Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

WILLIAM ROBERT BIRD

do hereby make oath and state that:

- 1 I am the director of **MEDIA MONITORING AFRICA** and a board member of **SOS SUPPORT PUBLIC BROADCASTING** and am duly authorised to depose to this affidavit on behalf of **MEDIA MONITORING AFRICA** and of **SOS SUPPORT PUBLIC BROADCASTING**.
- 2 The facts contained in this affidavit are, except where the context indicates otherwise, within my personal knowledge and belief and are true and correct. Where I make submissions of a legal nature, I do so on the advice of my legal representatives.

PARTIES

- 3 The first applicant is **MEDIA MONITORING AFRICA** ("MMA"), a non-profit organisation with its principal place of business at Suite 2, Art Centre, 22 Fourth Avenue (Corner Fourth Avenue and Sixth Street), Parkhurst, Johannesburg.

TK
WB

- 4 The second applicant is **SOS SUPPORT PUBLIC BROADCASTING** ("SOS"), a non-profit organisation with its principal place of business at Suite 3, Art Centre, 22 Fourth Avenue (Corner Fourth Avenue and Sixth Street), Parkhurst, Johannesburg.

- 5 The first respondent is **e.tv (PTY) LTD** ("e.tv"). e.tv has its principal place of business at 5 Summit Road, Dunkeld West, Johannesburg. e.tv is South Africa's biggest independent and free-to-air television channel and the only meaningful non-state broadcaster of free-to-air television news in South Africa. e.tv operates in terms of an Individual Broadcasting Service Licence issued to it by ICASA, which entitles it to provide a commercial television broadcasting service. In terms of clause 2 of schedule 1 of this licence (a copy of which is annexed marked "PR5" to the application brought by it under case number 51159/21) e.tv is obliged to provide national coverage of its broadcasting services provided that at any given time the minimum population coverage is 77%. Should it not do so, it will be in breach of its licence conditions and would face the regulatory and statutory consequences resulting from such a breach.

- 6 The second respondent is the **MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES** ("Minister"). The Minister is cited in the application as the responsible Minister under the ECA and because she is the custodian of the digital migration process, which forms the subject of this application. It is the Minister who takes the ultimate decision regarding the digital migration process and who is required to gazette the date for analogue switch-off. The Minister's offices are at iParioli Office Park, 1166 Park Street, Hatfield, Pretoria.

TL
MB

- 7 The third respondent is the **INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA** ("ICASA" or the "Authority"). ICASA is a juristic person established in terms of section 3(1) of the Independent Communications Authority of South Africa Act 13 of 2000 (ICASA Act). Its registered offices are at 350 Witch-Hazel Ave, Eco- Park Estate, Centurion. ICASA exercises the powers and performs the duties conferred and imposed on it by the ICASA Act and the underlying statutes, including the Electronic Communications Act 36 of 2005 (EGA).

- 8 The fourth respondent is the **CHAIRPERSON OF ICASA** ("Chairperson"), with his principal place of business at 350 Witch-Hazel Ave, Eco- Park Estate, Centurion. The Chairperson is cited in his official capacity as the person responsible for the leadership of the Authority's Council, the entity through which ICASA acts in terms of section 3(2) of the ICASA Act.

- 9 The fifth respondent is the **NATIONAL ASSOCIATION OF BROADCASTERS** ("NAB"), a voluntary association of more than 80 organisations which exists to represent the interests of South African broadcasters and which has as its vision to maintain an environment in which South African radio and television broadcasters can thrive - serving audiences and contributing to development and diversity. The principal place of business of the NAB is 410 Jan Smuts Avenue, Burnside Island Office Park, Building no 8, Ground Floor, Craighall, Randburg. The NAB is cited on the basis that it, or its members, may have an interest in the outcome of the relief sought in this application.

- 10 The sixth respondent is the **SOUTH AFRICAN BROADCASTING CORPORATION LIMITED** ("SABC"). The SABC is a public company with limited

TK
WB

liability and incorporated in terms of the company laws of South Africa, and the Broadcasting Act 4 of 1999. The SABC's main place of business is at Broadcasting Centre, Henley Road, Auckland Park, Johannesburg. The SABC is the public free-to-air terrestrial television broadcaster.

- 11 The seventh respondent is **VODACOM (PTY) LIMITED** ("Vodacom"). Vodacom is a private company, registered and incorporated in accordance with the company laws of South Africa. Vodacom's registered office and place of business is at Vodacom Corporate Park, 082 Vodacom Boulevard, Voda Valley, Midrand, Gauteng. Vodacom is also a holder of an Individual Electronic Communications Network (I-ECNS) licence and an Individual Electronic Communications Services (I-ECS) licence.
- 12 The eighth respondent is **MTN (PTY) LIMITED** ("MTN"). MTN is a private company, registered and incorporated in accordance with the company laws of South Africa. MTN's registered office and place of business is at 216 14th Avenue, Fairland, Roodepoort, Gauteng. MTN has similar licences to Vodacom. It, too, has an interest in the outcome of this application.
- 13 The ninth respondent is **CELL C (PTY) LIMITED** ("Cell C"). Cell C is a private company, registered and incorporated in accordance with the company laws of South Africa. Cell C's registered office and place of business is at Waterfall Campus, corner Maxwell Drive and Pretoria Main Road, Buccleuch, Gauteng. In 2001, ICASA licensed Cell C as the third mobile cellular provider in South Africa. It holds the same licences as Vodacom and MTN. Cell C competes with Vodacom, MTN and Telkom in the provision of mobile electronic communications services.

TCC
WAB

- 14 The tenth respondent is **TELKOM SA SOC LIMITED** ("Telkom"). Telkom is a company registered in terms of the company laws of South Africa, with its registered address at Highveld Technical Park, 61 Oak Avenue, Centurion, Gauteng. Telkom holds an Individual Electronics Communications Network (I-ECNS) licence and an Individual Electronic Communications Services (I-ECS) licence as well as various radio frequency spectrum licences.
- 15 The eleventh respondent is **WIRELESS BUSINESS SOLUTIONS (PTY) LIMITED TIA RAIN** ("Rain"). Rain is a private company, registered and incorporated in accordance with the company laws of South Africa. Rain's place of business is at The Main Straight 392 Main Road, Block D, Bryanston, Sandton. Although Rain has similar operating licences to Vodacom, MTN and Cell C, its spectrum holdings are different. It was initially licensed to provide mobile data services.
- 16 The twelfth respondent is **LIQUID TELECOMMUNICATIONS SOUTH AFRICA (PTY) LIMITED** ("Liquid"). Liquid is a private company, registered and incorporated in accordance with the company laws of South Africa. Liquid's registered office and place of business is at 401 Old Pretoria Main Road, Midrand, Gauteng. Liquid bought Neotel. Neotel was initially licensed as the second national fixed line operator to compete with Telkom. It was also issued with certain spectrum which is now identified as IMT and of high demand.
- 17 The fourth to twelfth respondents are cited on account of any interest that they may have in this litigation, and because they were cited in the Auction Review litigation, other than Vodacom who opposed MMA, SOS and e.tv's application brought in the High Court under case number 51159/21.

TU
MB

- 18 The thirteenth respondent is **SENTECH SOC LIMITED**, ("Sentech"), a state-owned company offering digital content delivery services to public and commercial entities, with its main place of business situated at Sender Technology Park, Octave Road, Honeydew, Gauteng. Sentech is cited in this application on account of the interest it may have in the relief, given that it is the entity which provides the services used by e.tv, the SABC and all community television licensees, for the purpose of analogue transmission.

OVERVIEW OF THIS APPLICATION

- 19 This is an urgent application for direct leave to appeal to this Court against a decision Full Court of the Gauteng Division of the High Court, Pretoria, handed down by the Honourable Mr Acting Justice Msimang (with Lukhaimane and Le Roux AJJ concurring) on 28 March 2022. I attach a copy of the High Court judgment as "**WB1**".

- 20 The case concerns the expression rights of millions of indigent South Africans.

20.1 Millions of South Africans (36% of the population) are dependent on analogue television broadcasts in order to watch television.

20.2 Once "analogue switch off" occurs, these people will not be able to watch television on their analogue television sets. They will, however, be able to access free-to-air ("FTA") television via digital transmissions, but will require a device capable of decrypting digital transmissions.

JK
LUB

- 20.3 The state promised that it would be provide those who were unable to afford such devices with assistance by procuring set-top boxes ("STBs") that would enable them to continue watching FTA television when the analogue frequencies are switched off. It has bungled its efforts to do so.
- 20.4 As a result, millions of the poorest and most vulnerable South Africans have not yet been able to obtain the necessary devices, and have no realistic prospect of doing so in the immediate future.
- 20.5 Despite this, the Minister of Communications decided to switch off the analogue transmission of television signal from 31 March 2022. The High Court held that this decision was lawful; but nonetheless extended the date of switch off to 30 June 2022, which for reasons I will explain, does not remedy the problem.
- 20.6 If this Court does not intervene, the result will be that millions of the most vulnerable South Africans will be plunged into a television blackout and will not be able to watch FTA television for an indeterminate period of time.
- 21 This constitutes a severe and irreparable breach of the right of freedom of expression. FTA broadcasters play a critical role in our democracy. They are integral to the advancement and realisation of the constitutionally guaranteed right to freedom of expression, which includes the right to receive or impart information or ideas. Due to their free distribution basis, FTA broadcasters are able to provide the poorest and most vulnerable members of our society with

TO
WB

access to televised content such as news, current affairs, public service announcements, informal knowledge building and educational content. Access to such content is, for many millions of South Africans, essential to be able to participate in our democracy. For these millions, FTA television is the only manner in which they are able to receive the aforesaid televised content.

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

23 As I explain below, MMA and SOS contend that the Minister's determination of the date of the ASO was unlawful and invalid, for the following reasons:

23.1 First, the determination of the date of the ASO constitutes an impermissible limitation of the right to freedom of expression (which includes the right to receive information or ideas). The Minister makes no attempt to justify the limitation. Moreover, she contends that the decision was a policy decision. This Court has held that policy decisions cannot lawfully limit fundamental rights, because they do not constitute law of general application.

23.2 Second, turning off analogue broadcasts without taking reasonable and justifiable measures to ensure that the poorest South Africans are capable of migrating to digital television constitutes an impermissible

TLC
MB

retrogressive measure because it removes existing access to the right to freedom of expression.

23.3 Third, the Minister's determination of the date of ASO was irrational.

23.3.1 The Minister has no idea how the ASO switch off will impact expression rights. She candidly admits that when deciding the date of ASO, she never investigated or considered how many South Africans remain dependent on analogue broadcasts; how many South Africans will be plunged into television darkness as a result of the decision; and for how long. It could never be lawful or rational to take a decision without considering or even investigating the extent of the rights violation the decision will entail.

23.3.2 After dithering for decades, government suddenly imposed a three-week deadline for indigent families to register for STBs. Only those who registered by this deadline of 31 October 2021 would have STBs installed by the ASO date of 31 March 2022 as gazetted by the Minister. The deadline was unreasonable and inevitably resulted in hundreds of thousands of households falling outside the registration deadline. Those families will be plunged into television darkness for at best 3 to 6 months after the date of ASO, but more likely for an indeterminate period.

23.3.3 The Minister has offered no reasons at all to justify the selection of 31 March 2022 as the date for ASO. Nor has she

TK
MB

offered any reasons to justify the sudden imposition of a 3-week deadline for registration.

24 MMA and SOS approached the High Court to defend the expression rights of the affected members of the public.

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

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

24.3 Given our focus on media and broadcasting related issues, MMA and SOS have been alert to the issue of digital migration from the start of the process. They have monitored its progress and have involved themselves, where appropriate, including through engagements with government and participating in litigation pertaining to digital migration.

24.4 This Court has recognised that these organisations are '*non-profit organisations that campaign for access to high quality broadcasting that is in the public interest.*'

TK
WB

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

- 25 While the High Court dismissed the substantive relief sought in MMA and SOS's application, it is not possible to discern from its reasons why their grounds of challenge failed. I submit that the High Court erred.

FACTUAL BACKGROUND

- 26 Digital migration is the process of converting the broadcasting of television and radio from analogue to digital technology. It begins with the 'switching on' of digital transmission and ends with the 'switch off' of analogue transmission. In the period between "switching on" and "switching off" there is a period of "dual illumination" during which time analogue and digital terrestrial transmissions sit side by side, to enable broadcasters to move from analogue to digital transmissions to allow ASO to take place.

- 27 When analogue transmission is switched off the following will occur:

27.1 All South Africans who are in possession of functioning new generation television sets and STBs which are capable of decrypting digital signal transmissions, or watch television by means of satellite signals will be able to continue to view free-to-air television services.

27.2 All South Africans who do not have new generation television sets or access to satellite television, will lose their existing access to free-to-air television services and will be unable to view television broadcasts

TK
MB

unless and until STBs are installed on their existing television sets or they obtain a new generation television set which has the ability to decrypt digital transmissions.

28 The state has repeatedly promised to assist the millions of poor television-owning households to obtain free STBs through a government subsidy.

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

29.1 Because of government's shambolic rush to implement ASO by the end of March 2022 and its adoption of an irrational and unreasonable registration process, millions of television-owning indigent households have not managed to register for a STB.

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

30 The digital migration process has been underway for more than 15 years and has suffered lengthy and persistent delays. The government missed its first target date for completion in 2011 and its second target date in June 2015.

31 For the next five years, from 2015, government was completely silent on the completion date for digital migration and no date for analogue switch off (ASO) was ever announced.

TK
MB

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

33 The following is a brief chronological account of the process which led to the determination of ASO for the end of March 2022:

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

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

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

33.4 The BDM Policy was gazetted in September 2008. Under the BDM Policy of 2008, it was intended that South Africa complete its digital

TK
WB

migration process by November 2011. The process was however delayed due to what the Minister has described as '*serious setbacks during the technology negotiation process.*'

33.5 As a result, the BDM Policy was amended in 2012. The 2012 Amended BDM Policy set the following targets:

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

33.5.2 the government would endeavour to switch on DTT signal in the last quarter of 2012.

33.6 The country subsequently failed to meet the targeted date of 17 June 2015.

33.7 In December 2012, the Digital Migration Regulations were promulgated. The Minister gazetted 1 February 2016 as the commencement date for the dual illumination period.

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

33.9 Between 2015 and October 2021, government took some steps to encourage qualifying households to register to obtain a state-provided STB. However, there was no deadline imposed for registration, and no sense of urgency was communicated to the public.

TU MB

33.10 Suddenly, on 5 October 2021, the Minister released a media statement which said that:

33.10.1 Cabinet had approved a last call for registration with a cut-off date of 31 October 2021.

33.10.2 For the first time, there was a deadline to register for assistance: but that deadline was set for a mere 3 weeks in the future, in circumstances where government had been dithering for years and had never before given any indication that a deadline would be imposed.

33.10.3 Qualifying households who registered on or before 31 October 2021 would be connected before the ASO whilst those that registered after 31 October 2021 cut-off would be connected within 3 to 6 months of ASO.

33.10.4 In other words, all qualifying households who did not manage to register within 3 weeks of the statement would be deprived of access to FTA television broadcasts for at least 3 to 6 months.

34 It is clear that the implementation of ASO in circumstances in which government has not taken adequate steps to migrate millions of South Africans to digital transmissions will result in significant breaches of freedom of expression by plunging those millions of South Africans into television blackout for an indeterminate period.

TK
MB

35 MMA and SOS are particularly concerned about the following three categories of South Africans who will be affected:

35.1 First, indigent South Africans who qualify for subsidies but were unable to register by 31 October or who have not yet registered at all. The High Court order does nothing to protect the rights of this category of persons.

35.2 Second, indigent South Africans who managed to register before government's 31 October 2021 deadline but whose STBs have not yet been installed. The High Court attempted to protect this category of person by deferring the date of ASO by 3 months and requiring installations to occur by certain dates.

35.3 Third, all those South Africans who are not indigent and accordingly do not qualify for assistance but who are unable to obtain STBs/new generation television sets because of a global chip shortage and manufacturing delays in their production. The High Court order does nothing to protect the rights of this category of persons.

36 Astonishingly, the Minister has never conducted any form of investigation in order to determine how many people will be plunged into television darkness as a result of her choice of ASO date. She simply has no idea what the impact of ASO will be because she has made no effort to investigate or find out.

36.1 Before the Full Court, MMA and SOS submitted that a decision to set ASO for the end of March could never be rational absent some investigation on the part of the State into the extent of the impact on

TK
WB

the freedom of expression rights of the millions of indigent South Africans affected. None of the respondents took issue with the factual premise of this submission. In other words, it was common cause that there has never been any such investigation and none of the decision-makers involved have ever considered or attempted to determine what the result will be of rushing towards ASO in this way.

36.2 The Minister has subsequently, in public statements, confirmed that this is the position. In an interview with Radio 702 she is quoted as saying that she *"doesn't know how many people are watching TV on analogue and how many will be affected on the switch-off date"* (<https://www.702.co.za/articles/441975/digital-migration-is-e-tv-commercial-interest-more-vested-than-sa-s-minister>).

37 The impact upon each category is as follows.

First category: the missing millions

38 It was undisputed on the papers before the High Court that many millions of South Africans would be plunged into television darkness as a result of the determination of ASO:

38.1 MMA and SOS put up evidence provided by the Broadcast Research Council of South Africa that 36% of the population (or 5,747,823 households) rely entirely on analogue terrestrial television services to access FTA television services. This was not disputed by the Minister.

TU
WB

- 38.2 According to the 2018 Statistics South Africa figures, 3,75 million households in South Africa were indigent.
- 38.3 As a result of the Covid pandemic and the July 2021 riots, there will now be more indigent households in South Africa than there were in 2018.
- 38.4 By the end of October 2021, only some 1,2 million indigent households had registered for STB assistance.
- 38.5 As a result, some 2,5 million indigent households who were entirely reliant on analogue terrestrial television services to access FTA remain unregistered and will lose their access at the date upon which ASO is implemented. This equates to approximately more than 8 million individuals.
- 38.6 While some of these households may have self-migrated, there is simply no evidence that anything approaching 2.5 million households could have done so. It is unlikely that they have due to the global chipset shortage. For the most part, these are indigent households for whom the cost of a STB or new television would be prohibitive, even if they were freely available in the market, which they are not at present.
- 39 It could not be lawful to set ASO for a date when there are literally millions of indigent television households that have not been able to migrate to digital. It could only be lawful to do so if government had given these households a reasonable and meaningful opportunity to migrate, with government assistance. Government has failed to do so.

Tk
WB

Second category: registered for assistance but not yet installed

40 The second category of concern is persons who have managed to register but who have not yet had their STBs installed.

40.1 According to the Minister's answering affidavit there were some 670,000 households who had registered who had not yet been installed by November 2021.

40.2 During the five years leading to the end of November 2021, only 572,255 installations were conducted, according to the Minister.

40.3 Between the end of October and the end of November 2021, Government managed to install some 15,000 STBs a month.

40.4 During argument on the first day of the hearing before the Full Court, the Minister put up a further affidavit in which she admitted that of the 1 167 912 households requiring installations before 31 March 2022, by 10 March 2022, only 660 661 had been installed, leaving 507 251 households who still needed to have STBs installed. In the affidavit, without any substantiating evidence, she made certain projections as to how many installations could be concluded in the weeks remaining before the end of March. The projected rates of increase were utterly fantastical, requiring an increase from some 15,000 installations a month at the time of filing to some 36,000 per day by 25 March 2022, namely a 26-fold or 2,600% increase on the previous rates, absent any explanation as to how this would be achieved.

TIC
LMB

- 40.5 MMA and SOS invites the Minister to state in her answering affidavit the rates of installation that have been achieved since 10 March 2022, when she made these promises to the High Court, together with substantiating evidence. I have no doubt that nothing close to these fantastical rates has been achieved.
- 40.6 Sentech, which the State has relied upon to conduct the relevant installations, has repeatedly failed to reach its performance targets. It has not even managed to reach targets far more modest than those that would be required to install the many hundreds of thousands of STBs required before analogue switch-off occurs.
- 41 The practical reality is that even those who managed to register for assistance in the unreasonable truncated and rushed process conducted by the Minister face the prospect of delays in installation of months or even years.
- 41.1 To date installation of STBs has not been sufficient. MMA and SOS (and even the High Court) are sceptical of the Minister's promised increased installations.
- 41.2 The government has not secured the budget for the installation of STBs for this category of persons.
- 41.3 It is effectively undisputed that there is a global shortage of chipsets (a key component in a STB).
- 41.4 Severe and worsening component shortages have made it impossible to manufacture STBs at the same rate as before the pandemic. The situation is not expected to normalise until 2023.

TCC
WB

- 42 It could never be lawful to switch off analogue transmission where the result will be to impose months or years of television blackout on these indigent South Africans.

Third category: those who do not need assistance but cannot obtain a STB

- 43 There is a further category of persons who will be plunged into television blackout as a result of the state's rush to ASO: those South Africans can afford to procure their own STB, but who are unable to obtain one due to the global chipset shortage (an essential component of an STB) and the fact that STBs are not available in stores at the moment.

- 44 For those South Africans, the reality is:

- 44.1 There is an increased demand for electronics requiring chipsets.
- 44.2 Globally, consumers are experiencing price increases in electronics.
- 44.3 STBs are currently not available in major retail outlets.

Conclusion on the facts

- 45 In summary the factual position is the following:

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

TK
MB

- 45.2 Seven months after the State of the Nation Address, in September 2021, the Minister of Communications suddenly started to accelerate implementation of the programme aiming towards ASO.
- 45.3 This culminated in the Minister's announcement on 5 October 2021 that a last call for registrations was going out imposing for the first time a cut-off date, some three weeks in the future, for the end of October 2021.
- 45.4 That statement made clear that all unregistered indigent South Africans who did not manage to register within the three weeks would inevitably be plunged into a three to six-month television blackout.
- 45.5 The historical rates of installation of STBs gives no comfort that those who managed to register before the 3-week deadline elapsed will have STBs installed before ASO occurs. The state has to date failed to come anywhere close to achieving the installation rates of STBs that would be required to achieve even this three to six-month delay period. It is instead overwhelmingly probable that even for those who registered before 31 October 2021, a long period of television darkness will inevitably result while Government gets through its installation backlog.
- 45.6 While the precise numbers of South Africans who have self-migrated is not known, it was undisputed on the papers before the Full Court that 36% of South Africans are entirely reliant upon analogue television broadcasts in order to access television; and that significant numbers of those are indigent families.

Tk
WB

45.7 There can accordingly be no serious denial that the effect of the Minister's determination of ASO would be to plunge millions of South Africans into a television blackout for an indeterminate period of time.

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

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

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

45.10.1 the date of ASO; or

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

46 As a result, MMA and SOS sought to review the Minister's determination of the ASO date in the High Court, and to obtain declaratory and reporting relief that would effectively protect the expression rights of indigent South Africans.

THE GROUNDS OF CHALLENGE

47 MMA and SOS's case was as follows.

TK

WB

48 First, the Minister's determination of the date of the ASO constituted an impermissible limitation of the right to freedom of expression which includes the right to receive information or ideas.

48.1 The right of freedom of expression of the press is not protected for the sake of the broadcasters (and nor for the sake of telecommunications companies). The right of the public to receive information and be informed lies at the heart of the constitutional protection of expression:

*"The need for public information and awareness flows from the nature of our democracy. Public participation on a continuous basis provides vitality to democracy. This was also recognized by the House of Lords in McCartan Turkington Breen (A Firm) v Times Newspapers Ltd that "[t]he proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring." A vibrant and independent media encourages citizens to be actively involved in public affairs, to identify themselves with public institutions and to derive the benefits that flow from living in a constitutional democracy. Access to information and the facilitation of learning and understanding are essential for meaningful involvement of ordinary citizens in public life."*¹

48.2 The High Court has emphasised the critical function of FTA broadcasters – the SABC in particular - in the context of the constitutional guarantee to freedom of expression in *SOS Support Public Broadcasting Coalition and Others*.² In that case, the Court was required to determine two applications concerning the constitutionality and lawfulness of the powers that the Minister exercises in respect of

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

² *SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others; SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others* [2017] ZAGPJHC 289.

TK
WB

the Directors of the SABC board. In deciding the matter, the Court asserted that *'the freedom to receive or impart information or ideas relates to the right of the SABC to communicate without interference, but also the right of the broader public to have access to the broadcast media.'*³

48.3 The Minister contended before the Full Court that the determination of the ASO date was an executive policy decision, not an administrative decision. But this submission is fatal to her case because this Court has held that it is impermissible for fundamental rights to be limited by policy decisions. A policy decision does not constitute law of general application capable of justification in terms of section 36 of the Constitution (*Dladla and Others v City of Johannesburg and Another* 2018 (2) SA 327 (CC) at paras 52-53).

49 Second, plunging millions of South Africans into television blackout constitutes an impermissible retrogressive measure because it interferes with existing access to the right of freedom of expression. This Court has held this to be impermissible:

49.1 In *Grootboom* 2001 (1) SA 46 (CC) this Court held that any deliberately retrogressive measure requires the most careful consideration and would need to be fully justified with reference to the totality of rights (at para 45).

³ Id, para 31.

TK
WB

- 49.2 A failure to respect existing protections of fundamental rights is unlawful and impermissible (*Governing Body of the Juma Masjid Primary School & Others v Essay N.O and Others* 2011 (8) BCLR (CC) at paras 57-58).
- 49.3 I am advised and submit that the prohibition on retrogressive measures applies *a fortiori* in the context of retrogressive measures in relation to other fundamental rights. This follows from the positive duty in section 7(2) of the Constitution to respect, protect and promote the rights contained in the Bill of Rights.
- 49.4 At the very least, the retrogression entailed by the determination of ASO required justification. The Minister offers none.
- 50 Third, the Minister's determination of ASO was unlawful and irrational:
- 50.1 It could never be rational to set a date for ASO in circumstances in which there had been no investigation whatsoever of the impact of that date upon the expression rights of millions of indigent South Africans. It was common cause that the state made no effort whatsoever to determine how many South Africans required assistance to be migrated and what the consequences of determining ASO for the end of March for those South Africans – and even those South Africans who don't require assistance - would be. In the absence of such an investigation a determination of the date could only be irrational due to a failure to consider a highly relevant consideration.

TK
WB

- 50.2 The sudden imposition of a three-week deadline at the end of October 2021 after decades of dithering on the part of Government rendered the process leading to the determination of ASO irrational because it failed to afford indigent South Africans an adequate opportunity to register timeously. The inevitable result is that hundreds of thousands, if not millions, of television households fell outside of the arbitrarily imposed three-week deadline and will accordingly not be migrated in time for ASO to occur but will only be migrated at some time thereafter.
- 50.3 The Minister offered no reason or justification whatsoever in support of either the date of 31 March 2022 for ASO; or of the imposition of a three-week deadline in October 2021.

THE PROCEEDINGS IN THE HIGH COURT

- 51 MMA and SOS sought the following relief:
- 51.1 The review and setting aside of the Minister's decision to determine the ASO date.
- 51.2 Declaratory relief requiring the Minister to conduct a proper consultation process and to take reasonable measures to provide South Africans presently reliant on analogue broadcasting alternative means to access terrestrial broadcasting services on a free-to-air basis before determining the ASO date.
- 51.3 Directing the Minister to report to the High Court setting out the steps that she had taken in order to ensure continued access to free-to-air

TK
WJB

broadcasts by members of the public currently reliant on analogue broadcasting services.

52 The High Court heard argument on 14 and 15 March 2022. It handed down judgment on 28 March 2022. It made the following order:

52.1 It dismissed the main applications brought by MMA and SOS (para 2 of the High Court order).

52.2 Despite this, it deferred the analogue switch-off date from 31 March 2022 to 30 June 2022 (para 3 of the High Court order).

52.3 It required STBs for qualifying registered households to be installed by no later than 30 June 2022 (for those who had registered by 31 October 2021); and by 30 September 2022 (for those who had registered between 31 October 2021 and 10 March 2022) (paras 4 and 5 of the High Court order).

52.4 It ordered e.tv to pay certain costs but made no costs order in favour of MMA and SOS (para 6 of the High Court order).

53 Before the High Court, there was no substantive response to any one of MMA and SOS's grounds of challenge set out above. Neither the Minister nor ICASA offered any defence to the merits of these grounds of review but contended only that the review was incompetent because it was not ripe for hearing at the time that the review was brought because the Minister had not yet gazetted the date of ASO. This submission was wrong in law.

TK
MB

- 54 As a result, the merits of the grounds of review were effectively unopposed before the Full Court.
- 55 Despite this, MMA and SOS's application for substantive relief was dismissed. With respect, it is difficult to understand from the High Court's reasons why this was so. There are simply no findings in the High Court's reasons on our primary grounds of challenge.
- 56 Despite MMA and SOS seeking review relief and their grounds of review being effectively unopposed, the High Court made none of the findings one would expect in a review application, such as whether the Minister's determination of the ASO date is reviewable; the standard of review to be applied to the Minister's conduct; and whether and to what extent the Minister's conduct fell short of that standard.
- 57 The High Court did make the following findings, which I submit are unsustainable:
- 57.1 It held that only those indigent South Africans who have managed to register have rights that required protection by way of Court Order. As a result, the High Court left out of account entirely the missing millions who, as a result of Government's irrational rush towards the end of March 2022 and in particular the imposition of the three-week deadline in October 2021, have not managed to register timeously but who will still be plunged into television blackout if ASO is proceeded with absent a reasonable opportunity for registration.
- 57.2 The High Court held that there was no study that had been conducted by any of the litigants to indicate how many indigent households receive

TK
WB

television via analogue (para 54 of the High Court judgment). It is correct that the State failed to conduct any such study. However, MMA and SOS put up evidence from the Broadcasting Research Council to the effect that 36% of households in the land are dependent on analogue television broadcasts which was undisputed. Moreover, the High Court appears not to have appreciated that it is that failure by the state to conduct any research or investigation which rendered its determination of the ASO date irrational and unlawful.

57.3 The High Court held that households who did not manage to register have no entitlement to an STB, holding that "*the household that has not raised its hand and applied as required has no standing*" (para 56 of the High Court Order). But this disregards government's failure to afford a reasonable opportunity to qualifying households to register as a result of the precipitative rush towards a March 2022 cut-off. It fails to account for the undisputed evidence that the practical difficulties in registration within a three-week time period would have resulted in hundreds of thousands, if not millions, of qualifying households being unable to do so in the available time. The High Court said nothing about the effect of the three-week deadline on the rationality of the process.

57.4 The High Court held, without substantiation, that the process undertaken by Government to provide STBs to all qualifying registered households means that "*the Government has done enough within its powers to help the qualifying households realise [the right to freedom*

TK

W03

of expression]" (para 60 of the High Court judgment). There was simply no basis for this finding in the facts before it.

57.5 The High Court dismissed an application brought by MMA and SOS in terms of Rule 6(5)(e) to place additional evidence before the Court. The additional evidence was a media statement made by the South African Broadcasting Corporation on 25 March 2022 in which it confirmed the essential factual allegations upon which MMA and SOS had based its case. That statement said, in relevant part, that:

"As we approach the 31 March 2022 ASO deadline, we remain hopeful that our engagement with Shareholder Representative, the Minister of Communication and Digital Technologies, Khumbudzo Ntshavheni, will yield favourable outcomes, including the extension of the ASO timetable. The SABC believes that the extension of the ASO timetable will ensure that no South African is left behind or denied access to Free-To-Air television and public television services.

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. The corporation will do everything possible within the Intergovernmental Relations Framework and the law to safeguard its interests and protect the rights of every citizen to access public television services." (Emphasis added)

Tlc
WB

57.6 The High Court dismissed the applicants' reliance on the doctrine of unconscionable state conduct. In doing so, it applied the minority decision of Froneman J in *KwaZulu-Natal Joint Liaison Committee*⁴, on the ground that it considered the minority judgment to be "*more in line with the position in our law of contract and the law of property*" (para 34 of the High Court judgment). The High Court accordingly failed to recognise that it was bound by the *ratio* of the majority judgment of this Court. It was not at liberty to apply the *ratio* of a minority decision which it preferred.

58 In all of this, I submit the High Court erred.

THE EFFECT OF THE HIGH COURT JUDGMENT

59 The effect of the High Court's judgment is the following:

59.1 The High Court dismissed MMA and SOS's application for substantive relief. It accordingly failed to provide any remedy for the unconstitutional consequences of the Minister's unlawful determination of the ASO date.

59.2 Because it dismissed the main application, the High Court does not require the Minister to take into account the impact of the ASO date on the expression rights of millions of South Africans; and does not require her to ensure a reasonable and rational process leading up to ASO that would afford indigent South Africans a proper and appropriate

⁴ *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal and Others* 2013 (4) SA 263 (CC).

TK
WBS

opportunity to register for and have installed Government subsidised STBs.

59.3 As a result of the dismissal of MMA and SOS's application, the process that was followed by the Minister leading to the determination of the ASO date has been held to be lawful and appropriate.

59.4 Despite having dismissed the main application, the High Court deferred the date of ASO from 31 March 2022 to 30 June 2022. It did so only because it was "sceptical" about Government's ability to conduct installations as swiftly as promised, and only for those who had already registered either before 31 October 2022 or before 10 March 2022.

60 MMA and SOS do not seek to appeal against paragraphs 3, 4 and 5 of the Full Court's orders. While they do not do enough to protect the rights of all those affected by the unconstitutional conduct of the Minister, they provide for a three-month postponement of the date of ASO and put the state on terms to conduct installations for those who managed to register.

61 However, that three-month postponement and the interim provision does not go nearly far enough to vindicate the constitutional rights that are in issue on the facts of the matter. The High Court's failure to uphold the review application and grant the declaratory relief with reasons explaining why means that:

61.1 The unregistered millions of indigent South Africans who qualify for assistance but who were unable to register due to Government's shambolic process, are left out of account entirely and their rights are wholly unprotected.

TK
WB

- 61.2 The Minister has not been told that her determination of ASO constitutes an impermissible retrogressive measure and is irrational for a failure to afford a proper opportunity in this regard.
- 61.3 The Minister has not been told that she had a duty to consult with the public and in particular with interested parties such as MMA and SOS and the public about her intended date of ASO.
- 61.4 Due to the absence of a reporting requirement in the order (notwithstanding the fact that a report was tendered by the Minister's counsel during oral argument) the deadlines for installations contained in paragraphs 4 and 5 of the order are meaningless, because it will be impossible to verify whether the rates of installation are occurring at anything like the necessary speed to achieve those deadlines.
- 62 It is unclear how the High Court could competently defer the date of ASO without upholding the review of the Minister's determination of this date. There could not have been any basis to defer the date of ASO unless the Minister's determination was unlawful and invalid. The Court accordingly erred in not declaring it to be so and reviewing and setting it aside. Moreover, the deferment of the ASO date by the High Court was not based on any evidence before the Court.
- 63 As a result, the effect of the Full Court judgment is that:
- 63.1 The millions of South Africans who have not been able to register before 10 March 2022 will be left entirely in the dark with effect from the end of June 2022 when analogue switch off will now occur. This will be for an indeterminate period of time. Their expression rights will be

TR
WB

impermissibly breached, and they have been afforded no remedy, despite MMA and SOS coming to Court to protect their rights.

- 63.2 Those indigent South Africans who did manage to register between 31 October 2022 and 10 March 2022 (260,868 households) will be plunged into television darkness for at least three months until 30 September 2022. In reality, based upon historical rates of installation, these qualifying households can expect to remain without STBs and without free-to-air television for a significantly longer period than this.
- 63.3 Those South Africans who register after 10 March 2022 will be left without access to FTA television for an indeterminate period given that there are insufficient STBs available to cater for those registering after this date.
- 63.4 All those South Africans who are not registered and do not qualify for Government assistance with subsidised STBs but remain unable to obtain such STBs because they are generally unavailable in the market due to supply chain issues and a global shortage of chips for manufacture will also be plunged into television darkness until such time as they are able to obtain STBs.
- 63.5 Those indigent South Africans who registered by 31 October 2021 to have STBs installed, but whose STBs are not installed by the end of June 2022, when ASO will now occur, will have their expression rights impermissibly breached despite the extension of the ASO date from 31 March 2022.

TCC

WB

64 I accordingly submit that the order of the High Court will inevitably result in the expression rights of millions of South Africans being severely limited for an indeterminate period of time. The High Court accordingly erred and failed to provide a remedy for the State's intended widespread violation of fundamental expression rights.

WHY A DIRECT APPEAL IS NECESSARY

65 I respectfully submit that, in the present matter, direct leave to appeal is warranted. For this reason, although the applicants will for the sake of caution also applied for leave to appeal to the Supreme Court of Appeal ("SCA"), we have made expressly clear in that application that it is conditional on this Court refusing direct leave to appeal.

66 I am aware that, in general, this Court declines to entertain appeals directly from the High Court, because to do so results in the bypassing of the SCA. However, this Court has repeatedly made clear that each case must be considered on its merits in this regard:

"Leave to appeal directly to this Court will be granted if it is in the interests of justice to do so. Each case is considered on its own merits. The factors relevant to a decision whether to grant an application for direct appeal have been listed as including whether there are only constitutional issues involved, the importance of the constitutional issues, the saving in time and costs, the urgency, if any, in having a final determination of the matters in issue and the prospects of success. These must be balanced against the

TK
WB

*disadvantages to the management of the Court's roll and to the ultimate decision of the case if the Supreme Court of Appeal (SCA) is bypassed.*⁵

67 In what follows, I explain why on the facts of this case, direct leave to appeal is indeed warranted.

68 First, this appeal involves only constitutional issues.

68.1 It concerns the question of the impact on the expression rights of millions of South Africans who require the assistance of Government in order to continue to receive their existing access to free-to-air television broadcasts : are they to be plunged into television darkness, or is the Minister required to make adequate measures to ensure that they are able to migrate to digital television before determining the date of analogue switch off? This is a purely constitutional question.

68.2 There are no material disputes of fact in the matter.

68.3 This Court will be asked to determine whether the process conducted by the Minister leading to the determination of the ASO was constitutionally compliant; and whether the substantive impact of that date upon the rights of indigent South Africans accords with section 16 of the Constitution.

69 Second, the application raises critical issues of the utmost public and constitutional significance.

⁵ *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395 (CC) at para 21.

TCC
WB

- 69.1 It concerns the right to freedom of expression (section 16 of the Constitution) as well as the right of all South Africans to have the government follow a lawful and rational process before taking decisions that will have the effect of severely limiting the rights of millions.
- 69.2 As explained above, on the figures before this Court, millions of South Africans face the very real prospect of being plunged into television darkness for an indeterminate period of time as a result of the State's inadequate process after decades of dithering suddenly accelerating towards an ASO date in circumstances where the vast majority of South Africans remain dependent on analogue television broadcasts in order to access FTA television.
- 70 Third, it is urgent that MMA and SOS obtain relief.
- 70.1 The High Court held that the matter was urgent. This finding has not been cross appealed by the respondents.
- 70.2 The High Court deferred the date of ASO until the end of June 2022. As a result, there has been some, though not an adequate, reprieve from the initial determination of the end of March as the date of ASO. If this Court does not hear the appeal and give its judgment before, at the latest, mid-June 2022, then ASO will occur despite the deeply flawed process followed by the State leading up to it and despite the fact that its consequence will be to plunge millions into television darkness for an indeterminate period.

T/C

WB

- 70.3 Our representatives are aware of the considerable pressures of workload facing this Court and the fact that it has stated that it does not easily convene as a matter of urgency.
- 70.4 However, the indigent South Africans on whose behalf MMA and SOS come to court find themselves in a desperate situation. Unless this matter is heard by this Court on an urgent basis, they will be plunged into television darkness for an indeterminate period. This is because, even if special leave to appeal is granted by the SCA and the appeal is heard, it is likely that it will take some months for the matter to be heard and decided. By the time that has occurred, the date of ASO will have come and gone, and ASO will be irreversible.
- 70.5 In addition, even if the SCA upholds the appeal, given the respondents' pugnacious attitude to the litigation so far, it seems inevitable that they would seek leave to appeal to this Court. Such an appeal would not likely be capable of resolution before the ASO has become irreversible.
- 71 Fourth, the application has strong prospects of success. As this affidavit explains, the approach adopted by the High Court is not consistent with the judgments of this Court and the constitutional scheme.
- 72 Finally, although this Court will be deprived of the views of the SCA on this issue, it has the benefit of a full set of reasons from the High Court to consider.
- 73 Therefore, I respectfully submit that the present case constitutes such a palpable denial of expression rights, with such resultant irreparable harm, that this Court

TK
WB

is both entitled to and should deal with the matter as a direct appeal, as urgently as possible.

PROSPECTS OF SUCCESS

74 I respectfully submit that, for the reasons outlined above, the appeal bears reasonable prospects of success. The appellants are requesting conditional leave to appeal directly to the Supreme Court of Appeal, should this Honourable Court not grant direct access. In this regard, I do not set out each of the respects in which the applicants submit the Full Court erred. These are set out in more detail in the application for leave to appeal to the High Court which is attached as annexure "WB2" and which I pray is read as incorporated herein.

CONCLUSION

75 In all the circumstances, I submit that:

75.1 The envisaged appeal concerns significant constitutional issues and falls within the jurisdiction of this Court;

75.2 The envisaged appeal bears excellent prospects of success; and

75.3 In view of the various features of this case, it is in the interests of justice for leave to appeal to be granted directly to this Court.

76 I therefore pray for the relief set out in the Notice of Motion.

TK
WB



WILLIAM ROBERT BIRD

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at WESTCLIFF on this the 4 day of APRIL 2022, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.



COMMISSIONER OF OATHS

Full names:

Address:

Capacity:

TSHEGOFATSO KHUNOU

Practising Attorney
Le Val, North Block
45 Jan Smuts Avenue
Westcliff, Johannesburg
South Africa
Tel: 011 486 0242/3
Commissioner of Oaths

"WBI"

000-1

1

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 51159/2021

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/ YES
28/3/2022	

In the matters between:-

e.tv (PTY) LTD

Applicant

MEDIA MONITORING AFRICA

**First Intervening
Applicant**

SOS SUPPORT PUBLIC BROADCASTING

**Second Intervening
Applicant**

and

**MINISTER OF COMMUNICATION AND DIGITAL
TECHNOLOGIES**

First Respondent

**THE INDEPENDENT COMMUNICATIONS
AUTHORITY OF SOUTH AFRICA**

Second Respondent

**CHAIRPERSON: INDEPENDENT COMMUNICA-
TION AUTHORITY OF SOUTH AFRICA**

Third Respondent

000-1

Tk WB

NATIONAL ASSOCIATION OF BROADCASTERS	Fourth Respondent
SOUTH AFRICAN BROADCASTING CORPORATION SOC LIMITED	Fifth Respondent
VODACOM (PTY) LIMITED	Sixth Respondent
MOBILE TELEPHONE NETWORKS (PTY) LTD	Seventh Respondent
CELL C (PTY) LIMITED	Eighth Respondent
TELEKOM SA SOC LIMITED	Ninth Respondent
WIRELESS BUSINESS SOLUTIONS (PTY) LTD t/a RAIN	Tenth Respondent
LIQUID TELECOMMUNICATIONS SOUTH AFRICA (PTY) LIMITED	Eleventh Respondent
SENTECH SOC LIMITED	Twelfth Respondent

JUDGMENT

MSIMANG, AJ

The Applicants and Intervening Applicants brought an application against the Respondents for the following orders:

- [1] That only to the extent necessary and pursuant to directions issued by the case management judge (the Honourable Mr Justice Fourie), the ordinary provisions regarding service and time periods are dispensed with and this matter is treated as one of urgency in terms of Uniform Rule 6(12),

- [2] It is declared that, prior to the determination by the Minister of the analogue switch-off date and the date for completion of digital migration, the Minister is required to undertake a process of consultation with affected parties, including, but not limited to e.tv and the Intervening Applicants, regarding the date of the analogue switch-off date and the date for the completion of digital migration and whether appropriate measures are in place to ensure that those in South Africa who are reliant on analogue broadcasting are not deprived of their rights of access to information by means of receiving free-to-air broadcasts as a consequence of the determination by the Minister.
- [3] It is declared that the digital migration process may not be completed and/or the analogue switch-off date may not be proclaimed by the Minister unless and until the Minister has complied with her constitutional obligations and public promises to provide those South Africans who are presently reliant on analogue broadcasting with alternative means to access these services on a free-to-air basis.
- [4] To the extent that the Minister has taken a final decision in relation to the determination of the date for digital migration's completion and analogue switch off, or takes such a decision prior to the determination of this application ("*the determination decision*"):

4.1 The determination decision is declared to be unlawful and invalid;

4.2 The determination decision is reviewed and set aside.

[5] The Minister is directed to file a Report to this Court within one (1) month of the date of this Order, or such other period as this Court should determine to be appropriate and just and equitable, setting out the steps that have been taken to ensure that:

5.1 members of the public who are currently reliant on analogue broadcasting services (including but not limited to 54% of e.tv's viewers as measured over the period September 2020 to August 2021) are provided with access to set-top-boxes and/or reception devices to enable them to continue to be a position to access free-to-air broadcasts without subscription or charge following digital migration;

5.2 adequate resourced call-centres are operational to process viewer queries sufficiently and effectively;

5.3 an effective viewer information campaign has been conducted; and

5.4 sufficient Sentech resources have been allocated to action the switch-off of transmitters.

- [6] Such further and/or alternative relief as this Court considers necessary, just and equitable.
- [7] The First and Second Intervenors brought an application to be granted leave to intervene as parties in the main application, which is granted.

THE HISTORY

- [8] This matter raises disputed, complicated, and technical issues of fact and law, including constitutional law, and this judgement was prepared under significant time pressure due to the current deadline of 31st March 2022 for the switch-off analogue broadcasting signal, as explained below. The Court also required additional evidence from the Minister, which was only provided after hours on the first day of oral argument and responded to with further additional evidence from the applicants before the hearing commenced the next day. The Court appreciates the efforts of all parties to provide this relevant additional evidence, which confirms the complexity of the issues raised before the Court and requiring the Court's consideration in the short time available to it. Indeed, on the eve of judgment on Sunday 27th March 2022, the applicants applied to place still further evidence before the Court for its consideration. Those applications are discussed below. The matter is about the fraught process of digital migration - a process which started in 2006. During 2005 the Minister of Communications, Dr Ivy Matsepe-Casaburri (hereinafter referred to as

Minister including all successors in title) established the Digital Migration Working Group (DMWG). The Minister in consultation with the DMWG made far reaching recommendations that paved the way for the migration of the South African Broadcasting systems from analogue to digital. The DMWG group consisted of the government, broadcasting industry, organised labour and civil society.

- [9] South Africa is a member of the International Telecommunications Union (ITU). In 2006 the Regional Radiocommunication Conference (PRC-06) of the ITU resolved that all countries of Europe, Africa, Middle East as well as the Islamic Republic of Iran should migrate from analogue to digital broadcasting services by 2015. Broadcasting Digital Migration is the process of converting the broadcast of television and radio signals from analogue to digital technology. This is set to mark the beginning of the end of analogue broadcasting in these regions.
- [10] The process started in earnest in 2007 through public participation which was held regarding the proposed Digital Migration policy based on the recommendations made by the DMWG and the inputs received from the public.
- [11] The key benefit of digital broadcast technologies is that they use scarce national radio frequency spectrum far more efficiently than analogue technologies. This means that the existing broadcasting services can be

provided by using less of the radio frequency spectrum they currently occupy. The radio frequency spectrum freed up through the digital migration process, often referred to as “digital dividend”, has the potential not only to provide new and improved broadcasting but also to enable additional information and communication technology (ICT) services traditionally not provided in the broadcasting radio frequency band, such as mobile telephony and wireless broadband. The “digital dividend” can only be realised after the migration process is completed.

[12] Digital Migration begins with the “switch-on” of the broadcasting digital transmission signals and ends with the “switch-off” of analogue ones. Until the analogue switch-off occurs there is a period of “double illumination” during which both analogue and digital services are simultaneously broadcasted.

[13] The switch-on date¹ of broadcasting digital terrestrial television (DTT) signal was originally set for the 1st November 2008 and the switch-off date for the analogue terrestrial television (ATT) signals was the 1st November 2011. However, this feat was not accomplished.

¹ 2008 Digital Migration Policy Section 2 and 7(1) Government Notice No. 958 dated 8 September 2008

Tk
MB

- [14] The Broadcasting Digital Migration Policy of 2008 was amended by the Minister on the 17th February 2012.² The 2012 policy provided that the government will endeavour to switch-on the digital terrestrial television signal in the last quarter of 2012. The date for the switch-off of analogue signal will be determined by the Minister after engaging with cabinet and the relevant broadcasting sector stakeholders. Section 3.3.1 of the amendment provided:

“Government is committed to meet the deadline for analogue switch off by 17 June 2015 in line with the relevant ITU resolution. Taking into account the different processes which need to be completed before digital switch-on, Government has decided that digital signal should be switched on by the end of the 2012/2013 financial year. A final date for the commencement of the dual illumination period will be announced by the Minister of Communications after engaging with Cabinet and all relevant stakeholders, including the broadcasting industry. The date for the final switch-off of the analogue signal with Cabinet and other relevant stakeholders and assessing the extent of take up by audiences of the necessary equipment to facilitate universal access to broadcasting services”.

- [15] In December 2012, ICASA promulgated the Digital Migration Regulations³. The purpose of the regulations was to provide for the transition from analogue broadcasting to digital broadcasting of the existing television channels and to prescribe the conditions for assignment of channel capacity for purposes of digital migration⁴.

² Government Notice No. 97 of 7 February 2012. Government Gazette 35014

³ Government Notice No.1070 Government Gazette 36000 of 14 December 2012

⁴ Regulation 2, read with the definition in Regulation 1.

- [16] The Digital Migration Regulations required progressive dual illumination of the SABC channels, e.tv channel and M-Net channels during the dual illumination period to achieve the phased digital migration of those channels in the whole of the Republic⁵.
- [17] The date for the commencement of the dual illumination period as well as the date of the final switch-off of the analogue signal would be published by the Minister in the Gazette⁶.
- [18] On the 18 March 2015 the Minister published amendments to the 2008⁷ and the 2012⁸ policies as follows:

Para 2 Executive Summary

“The switch-on and switch-off date of the digital and analogue broadcasting digital terrestrial television signals will respectively be determined by the Minister of Communications in consultation with Cabinet”

“3.3.1 the government is committed to ensure a successful migration in South Africa. Taking into account the different processes, that need to be completed before the digital switch-on. Government has decided that the signal should be switched-on, on a date to be determined by the Minister in consultation with Cabinet. The date for the final switch-off of the analogue signal will similarly be announced by the Minister in consultation with Cabinet.

⁵ Regulation 3.3

⁶ Regulation 7

⁷ Government Gazette No. 31408 of 8 September 2008 and the 2012

⁸ Government Gazette No. 35014 of 17 February 2012

TK
WB

[19] On the 1st February 2016 the Minister gazetted the commencement of the dual illumination period for the digital broadcasting signal in South Africa:

“Kindly take notice that the commencement of the dual illumination period for the digital broadcasting signal in South Africa starts on 1 February 2016. However, the analogue switch-off date will be announced after consultation with Cabinet”.

[20] On the 5th October 2021 the Minister issued a media statement stipulating that:

20.1. The digital migration commenced in 2006 when South Africa acceded to the ITU Regional Agreement in Geneva.

20.2. During January 2021 President Ramaphosa announced that South Africa must complete digital migration by the 31st March 2022.

20.3. All eligible households earning less than R3500 per month are required to register at the nearest post office in or before the 31st October 2021 to receive government assistance for STB installations.

[21] On the 28th February 2022 the Minister determined the 31st March 2022 as the date for the final switch-off of the analogue signal and the end of dual illumination¹⁰.

FACTS

[22] The dispute in this matter is about the 700MHz/800MHz spectrum. In terms of the ITU Convention it was agreed that the spectrum must be cleared of analogue broadcasting for IMT700/IMT800 Mobile Network Operators (MNO). The migration process would culminate with the switch-on of digital transmission and the switch-off of analogue transmission.

[23] In South Africa the 700MHz/800MHz spectrum was allocated to the SABC, M-Net and e.tv for analogue television broadcasting. In terms of the digital migration process analogue transmission would be switched-off on the 31st March 2022 as announced by the Minister.

[24] The broadcasters would not be able to broadcast on this spectrum. The SABC has already switched off 288 analogue transmitters and has migrated to digital transmission. M-Net (Multi-choice) has switched off 84 transmitters and has migrated to digital transmission. e.tv has switched off 4 of the 95 transmitters and is still broadcasting on analogue. It is common

¹⁰ Government Notice 1804 of 28 February 2022 Government Gazette No. 45984

cause between the parties that the IMT 700/IMT 800 spectrum that has been cleared by the SABC and M-Net will not be capable of use for digital transmission as long as e.tv analogue broadcast continues as there will be interference in the signal.

[25] On the 5th October 2021 the Minister issued a media statement on the Broadcast Digital Migration and Analogue Switch-off Plan and stated the following:

“2.1 The government undertook to assist beneficiary households (households earning total salary of less than R3500 per month) with installation of set-top-boxes to ensure universal migration. The process of registering beneficiary households to be supported commenced in 2015 and to date 1.184 million qualifying households have been registered out of the estimated 3.75 million qualifying households (as per StatsSA 2018 data).

2.2 Since the inception of the BDM programme, 556 954 beneficiary households have been migrated from the current total of 1.184 million. In addition, almost 10.5 million households out of just over 14 million TV households (2018 StatsSA estimates) self-migrated through private satellite boxes, as follows:

- DSTV = 7.8 million households*
- OpenViewHD = 2.3 million households, and*
- StarSat = 450, 000”*

“4.5 Households Qualifying for Support

4.5.1 Given the low numbers of registered beneficiary households, Cabinet approved a last call for registration with a cut-off date of 31 October 2021, this last call is also made fully aware of the impact of the Covid-19 pandemic on household income, In terms of this call:

- *The qualifying households who register on or before 31st October 2021, will be connected before the ASO; and*
- *The households that register after the 31st October 2021 will only be connected within three (3) to six (6) months after the ASO.*

4.5.2 We call upon all eligible households to register at the nearest post office on or before the 31st October 2021 to receive government assistance for your STB installation. We are also finalizing a registration App and the details will be announced in the near future”.

[26] The applicants brought these applications which seek to delay the migration process. The basis for the opposition is that the process has not been fair in that the government has breached the rights enshrined in the Constitution and the Bill of Rights particularly in that it intends to switch off approximately 3.75 million poor South African households including 54 percent of e.tv viewers who are receiving Free-To-Air Broadcasting. The government had promised the estimated 3.75 million qualifying households that they would not be left behind in the migration to digital transmission in that they would be provided with installed STB's prior to ASO if they registered to receive a STB.

[27] The argument of e.tv is that out of the 3.75 million households eligible and reliant on government to migrate them, the Minister could probably install 1 167 912 STB's by March 2022 which means that 2.58 million qualifying

indigent households (over 8 million South Africans) would not have migrated.

[28] Mr Marcus SC, Counsel for e.tv argued that the Minister's conduct threatened the fulfilment of the government's over-arching duty under section 27 of the constitution to ensure social assistance, in the form of financial support, for those who cannot support themselves. Further he argued that in this case the duty is accentuated for government when it comes to the indigent and their access to information, particularly where government has publicly promised to assist the poor with STB's to enable them to receive digital television.

[29] Similarly, Mr Ferreira, Counsel for the intervening applicants, argued that as a result of the sudden rush by the Minister to switch-off analogue broadcasting at least 2.5 million indigent households representing 8.25 million indigent people will be left entirely without Free -To -Air services at the end of March 2022 and in the immediate aftermath of the ASO.

THE KZN PRINCIPLE

[30] Mr Marcus relied on the so-called "KZN"¹¹ principle" that a state organ will be bound by its seriously and lawfully made public promises and that it

¹¹ Kwa Zulu Natal Joint Liaison Committee v MEC for Education, Kwa Zulu Natal and others 2013(4) SA 263 (cc)

would be legally and constitutionally unconscionable for the state to renege on that promise.

[31] In that case, the MEC for Education issued a Notice in September 2008 setting out the subsidy amount which had to be paid to independent schools for the budget year commencing 1st April 2009. The payment of the first term tranche was due on 1st April 2009. The Independent Schools had incorporated the allowance for those subsidies in their budgets for 2009. In May 2009, the department sought to retract and significantly reduce the available subsidy amount. The Constitutional Court through Cameron J¹² stated the following:

“[48] Even though the 2008 Notice may not have given rise to an enforceable agreement between the Applicant and the Respondents, it constituted a publicly promulgated promise to pay. And, once the close date for payment of a portion of the subsidy passed, this created a legal obligation unilaterally enforceable at the instance of those who were intended to benefit from the promise”

[32] The 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

¹² Kwa Zulu Natal Joint Liaison Committee at 48

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.

[33] Froneman J¹³ expressed a different view as against the majority view:

"[106] The lack of an intention to contract was the only real defence that the Department offered to the contractual claim of the applicant. The promise to pay the subsidies to schools is reasonably susceptible to a construction that it was an offer to schools which was accepted by them. Nothing in private contract law or public administrative law excludes that construction as a matter of principle"

[34] The reasoning of Froneman J is more in line with the position in our law of contract and the law of property which recognises various rights and obligations. Rights are reciprocal and for every right there is an obligation. A real right (*ius in re*) is a right to a thing and is enforceable against the world at large. A personal right (*ius in persona*) is a right to performance or a prestation and is enforceable only against the person who is party to the contract.¹⁴ It is important to establish what rights the registered

¹³ KwaZulu Natal Joint Liason Committee of para 106

¹⁴ Silberberg and Schoeman's - The Law of Property 5 ed page 23

"The following patrimonial rights or property rights with corresponding legal objects may be distinguished namely:

- (a) A real right is a right to a thing. As indicated before, a thing is an independent corporeal object (other than human beings) which is susceptible to legal control and which is valuable and useful to a person.
- (b) A personal right is a right to performance. Performance is an act in the form of delivering something, doing or not doing something (*dare, facere or non facere*) which one person can require a particular other person to perform.
- (c) An immaterial property right is a right to immaterial property. Immaterial property is the intangible expression of human skills, or inventions of the human mind, embodied in a tangible agent and which are by law allotted to their author.

TLC
WBS

applicants acquired *vis-à-vis* the unregistered households and the government.

[35] e.tv's arguments are anchored, on the promise that the Minister and government had made in respect of the provision of the STB's. It is imperative to establish the nature and the extent of the promise in order to establish any rights and obligations it created and who should be the beneficiaries of the promise. In order to do so we must interrogate all the policies where the promise was made.

-
- (d) A limited real right to other patrimonial rights (serving as legal objects) such as real rights, personal rights and immaterial property rights.
 - (e) A statutory right granted by the legislature to a party to an agreement to claim performance from the other party to the contract. Performance in this instance is also an act in the form of delivering something, doing or not doing something (*dare, facere or non facere*) which one person can require a particular other person to perform.
 - (f) A statutory right against the state to certain resources or performances. The following rights distinguished:
 - (i) Welfare claim rights against the state and not based on contract (for example pensions, medical benefits and subsidies);
 - (ii) Licences, permits and quotas issued by the state; and
 - (iii) Other rights against the state and based on legislation (especially land and water-use rights, and mineral and petroleum rights in terms of land reform and similar initiatives undertaken in terms of section 25 of the 1996 Constitution)."

Sakereg Vonnlsbundel 2nd edition page 5

- "(a) Volgens die *personaliteitsteorie* is die onderskeid tussen saaklike en persoonlike regte in die werking van die regte geleë. 'n Saaklike reg het hiervolgens absolute werking, d w s dit geld teen die hele wêreld. 'n Persoonlike reg daarenteen het slegs *relatiewe* werking, d w s dit geld slegs teenoor 'n bepaalde individu...
- (b) Volgens die *klassieke* teorie is die onderskeid tussen saaklike en persoonlike regte nie in die werking van die regte geleë nie, maar in die *aard van die betrokke regsbetrekking*. 'n Saaklike reg is volgens dié siening 'n regsbetrekking tussen 'n regsobjek en 'n saak, terwyl 'n persoonlike reg met 'n verhouding tussen 'n regsobjekte onderling te make het."

[36] The 2008 DM Policy¹⁵

The policy estimated that there are 4.5 million households that are poor who would find it very difficult to afford STB's by November 2011 and that government has decided as a matter of policy, to consider finding means of making STB's affordable.

[37] The 2008 policy promised to find a means to make STB's affordable by 1st November 2011. It did not promise to provide STB's and in any event the 1st November 2011 switch-on and switch-off was not met.

[38] 2012 DM Policy¹⁶

The 2012 policy estimated that there are 11.5 million TV households in South Africa and of these 5 million are poor households who would find it very difficult to afford STB's. The government had decided as a matter of policy, to consider finding some means to make STB's 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 Electronic Communication Act (ECA)¹⁷, to subsidise poor households through the Universal Service and Access Fund (USA Fund).

¹⁵ Government Gazette 31408 Government Notice 158 of 2008

¹⁶ Government Gazette 35014 Government Notice 97 of 2012

¹⁷ Electronic Communications Act No. 36 of 2005

[39] It must be noted that the policy estimates that there are 5 million poor households who would find it difficult to afford STB's. The government, in order to assist the poorest households to make the STB's affordable, mandated the use of Funds available in the USA Fund, ensuring that the benefit that they currently enjoy is maintained.

[40] It is important at this stage to consider the provisions of section 88(1)(a) of the ECA which provides:

"88 Application of money in Universal Service and Access Fund:

(1) The money in the Universal Service and Access Fund must be utilised exclusively for payment of subsidies-

(a) For assistance of needy persons towards the cost of the provision to, or the use by, them of broadcasting and electronic communication services"

[41] The mandate of Section 88(1) of the ECA is to assist needy persons towards the costs of broadcasting and electronic services. The 2012 policy enables the government to use the USA Fund to assist in the provision of STB's. The policy, makes provision to assist the poorest of the poor households. The USA Fund mandate is for the usage of the fund for the needy.

TC
MB

[42] 2015 DM Policy¹⁸

The 2015 Broadcasting Digital Migration policy simply provided that the total TV-owning households in South Africa are estimated at 13 million, of which approximately 65 percent rely exclusively on free-to-air broadcasting. No commitment was made with the provision of the STB's.

[43] On 10th March 2015 the Independent Online News reported that 5 million poor television household owners would receive free STB's from government. The Fact Sheet (annexure PR 28) provided by e.tv states that government will provide free STB's to more than 5 million poor households television owners and that the following groups are eligible to receive subsidies:

- Indigent South African with a green Identity Document.
- Households who are in possession of a functioning TV set and are not subscribed to paid television services.
- Households dependent on social grants.
- Households already covered by SABC concessionary TV licence scheme.
- South Africans living around the boarder region areas of the country SKA in the Northern Cape.

¹⁸ Government Gazette 38583 Government Notice 232 of 2015

The people who will not qualify for the government subsidy will have to buy STB's. Prices will be announced once the STB's are available and further states that the South African Post Office (SAPO) is responsible for the distribution of STB's.

[44] On the 13th May 2021 the Post Office provided requirements to qualify for a free TV decoder (STB) and advised people to apply for a subsidised STB.

- Proof of family income. Families with income of R3200 per month or less qualify.
- Recipients of a SASSA social grant qualify.
- Proof of SA identity and SA citizenship.
- Proof of address (for installers).
- A police affidavit to state that you have a working TV.

[45] On the 5th October 2021 the Minister made a media statement that during Sona 2021 the President announced the 31st March 2022 as the switch-off date for analogue. That government undertook to assist beneficiaries earning less than R3500 per month with the installation of STB's to ensure universal migration. That the process of registering the beneficiary households to be supported commenced in 2015 and that to date 1.184 million qualifying households have been registered out of the 3.75 million qualifying households (as per Stats SA 2018 data).

Since the inception of the BDM programme 556 954 beneficiary households have been migrated from the current 1.184 million.

[46] According to Stats SA there are 14 million TV owning households in South Africa 10.5 million self-migrated and 3.5 million are the qualifying households. The 10.5 million is made of: -

DSTV	7.8 million
OpenViewHD	2.3 million
Starsat	450 000.

[47] *"We call upon all eligible households to register at the nearest post office on or before 31st October 2021 to receive government assistance for your STB installation. We are also finalising a registration application and the details will be announced in the near future."*

STATISTICS

[48] The Statistics that are relied on by all parties were obtained from Statistics South Africa. The Statistics during 2008 indicated that the majority of television sets in South Africa were analogue.

[49] Television manufactures started manufacturing digital compliant television sets from 2010. New generation television sets manufactured from 2010 were digital compliant. It appears that by 2021 out of the

14 million television sets in South Africa 10.5 million were compliant and about 3.75 million were analogue.

- [50] The Statistics indicated that there are 3.75 million analogue television sets that receive analogue transmission. There are no statistics that indicate the financial status of the households. The Statistics do not indicate how many households meet the criteria set by government or the USA Fund.

CRITERIA FOR ELIGIBILITY

- [51] In 2015 the registration process started for the poorest households who needed assistance and the Post Office was identified as the Distributor of the decoder (STB's). The criteria was set for registration and to qualify the following requirements had to be met:

- 51.1 Income of R3200 or less;
- 51.2 Sassa Grant recipient;
- 51.3 Proof of South African Identity Document and Citizenship;
- 51.4 Proof of Address;
- 51.5 Police affidavit to state that you have a TV set in working condition.

THE PROMISE AND THE MISSING MILLIONS

- [52] It is clear from the 2018 Stats South Africa statistics that there were 3.75 million television sets in South Africa receiving signal via analogue. The households that have heeded the government's call to register were 1.184 million. These statistics are actual and tangible figures. Similarly, the 260 868 who registered after the cut-off date present real and tangible figures.
- [53] As at 31st October 2021, 1 228 879 households had registered, of which 1 180 666 qualified to receive STB's. 12 754 could not have the STB's installed at the stipulated addresses (no reasons provided), leaving 1 167 912 households requiring installation. Since the installation programme commenced, only 660 661 STB installations have been completed as of the 14th March 2022, leaving 507 251 registered households outstanding. The Minister's department (department) projected that it could install 197 214 STBs by 20th March 2022, 184 196 by 25th March 2022, 93 202 by 28th March 2022 and the balance of 32 639 by 31st March 2022 to achieve installation of all 507 251 outstanding registered and qualifying households. Of these, 34 294 were in the Free State, 39 835 in the North- West, 5 598 in the Northern Cape, 20 122 in

Mpumalanga and 17 918 in Limpopo. These are the provinces in which analogue transmission has already been switched off in terms of an agreement with the SABC and installation completion is most urgent there. The department achieved the installations completed thus far with 285 installers and noted that Sentech has engaged another approximately 8 000 installers to complete the project. No further details or evidence was placed before the Court regarding what remains to be achieved and how it can reliably occur before ASO on the 31st March 2022. Again, the department indicated on 14th March 2022 to the Court its projection that all these outstanding installations will be completed by 31st March 2022, the ASO date. This commitment, whilst seriously made by the department, must be considered by the Court in light of the common cause facts regarding the progress in installations thus far. It would be unconscionable for any of these households to continue to be left behind prior to ASO and there is a significant probability of this happening given the slow installation progress made thus far, especially in the provinces that have already switched-off.

[54] 2.58 million households have not registered. The applicants argue that they constitute about 8 million people that have been forgotten or who are missing from the migration process. The applicants have not provided the Court with any statistics that these are deserving households that require

Tk
WB

STB's. Neither the government nor the applicants have conducted a research or study that indicates how many indigent households receive television via analogue. Households continued registering after the 31st October 2021 and continue to do so; an indication that there are still households deserving of STB's out there although the exact number is unknown. As at the hearing before the Court, a further 260 868 households had registered between 31st October 2021 and 10th March 2022. The department and Minister say no more about this group other than that:

- (i) Their STB installations are currently not budgeted for, necessitating an application to National Treasury to secure additional funds that have not yet been made available, and;
- (ii) Their STB installations are expected to take three to six months.

While this group failed to register by the 31st October 2021 cut-off date announced on the 5th October 2021, the Minister has included them in the numbers of those who are entitled to urgent STB installation.

[55] **RIGHT OF THE REGISTERED HOUSEHOLDS *vis-a-vis***

GOVERNEMENT

It is common cause that government publicly made a call in the Gazette calling on members of the public who meet certain criteria to apply for

TK
MB

STB's. The households that registered and met the requirements set by government qualify for STB's. By registering, the households accepted the invitation for a free STB from government¹⁹. It is analogous to the offer and acceptance as stated by Froneman J in the Kwazulu Natal principle case. The person who registered acquired a prestation which entitled that person to performance that will compel government to provide that person with a STB.

[56] RIGHTS OF UNREGISTERED HOUSEHOLDS *vis-a-vis* THE GOVERNMENT

The households that did not heed government's call and did not register do not qualify for STB's. In order to qualify the household had to comply with the criteria set and fulfil the requirements. The household had to register. The registration is imperative in order for the household to be counted. Without registering, the government will be unable to ascertain the number of deserving households and to make the necessary provisions for the STB's. The household that has not raised its hand and applied as required has no standing.

¹⁹ Christie's Law of Contract in SA

"In the leading English case of *Carlill v Carbolic Smoke Ball Co* [1983] 1 QB 256 (CA) 268, the company had published an advertisement offering to pay £100 to anybody who used its smoke ball as directed but nevertheless, caught influenza. Bowen LJ said:

"It was also said that the contract is made with all the world – that is, with everybody; and that you cannot contract with everybody. It is not a contract made with all the world. There is the fallacy of the argument. It is an offer made to all the world; and why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and perform the condition?"

- [57] The 1.184 million households are entitled to STB's to be installed by government on or before the 31st March 2022 which is the switch-off date announced by the Minister. The 260 868 households who registered after the 31st October 2021 had been promised that their STB's will be installed in three to six months from the 31st March 2022.
- [58] It remains to be seen how many households will be adversely affected by switch-off. However, it would be unreasonable to allow for a situation where this unknown variable is allowed to hold up a process that will eventually be of benefit to all citizens and where the government must meet its international obligations.
- [59] 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.

FREEDOM OF EXPRESSION

- [60] It was argued by the applicants that an estimated 8 million South Africans will be cut-off from analogue broadcasting and thereby would be denied their right to freedom of expression including freedom to receive information. It is correct that in today's world, freedom of expression and freedom to receive information, is best served by being able to receive information from multiple sources (an argument aptly made by Vodacom)

TK
MB

and sources of a person's own choice. It is the court's view, that in light of the process undertaken by government to provide for STB's to all qualifying registered households, the government has done enough within its powers to help the qualifying households realise this right. It is near impossible for the government to establish who else qualifies for a STB without the affected households registering as not all indigent households own an analogue TV and not all households that own an analogue TV are indigent.

[61] **DUTY TO CONSULT**

The duty to consult which is raised by the applicants is primarily that the Minister must consult e.tv, Media Monitoring Africa and SOS Support Public Broadcasting before announcing the switch-off date. The migration process has a long and arduous history starting with the establishment of the Digital Migration Working Group and continuing all the way to the dual illumination period and, finally, the provision of STB's. The various Digital Migration Policies indicated what consultation had taken place. e.tv mostly relies on the six letters written by it in September and October 2021 but cannot dispute its inclusion in several satisfactory consultations over many years regarding the process of digital migration. Its disagreement with the process followed and preference for a process that serves its commercial interests does not require further consultation

opportunities. Similarly, the Intervening Applicants have not shown that further consultations with them are necessary to ensure a rational, reasonable, and lawful digital migration process. The applicants' interests have been heard by government and balanced against the urgent need for digital migration to occur, many years after it ought to have been completed in terms of South Africa's international commitments. 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.

[62] 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.

Nugent J A in Scalabrini concluded:

"[72] that consultation in this case does not have as a consequence that there is a general duty on decision makers to consult organisations or individuals having an interest in their decisions. Such a duty will arise only in circumstances where it would be irrational to take the decision without such consultation, because of the special knowledge of the person or organisation to be consulted, of which the decision-maker is aware. Here the irrationality arises because the Director-General, through his representations, at the meeting of 7 May 2012, acknowledged the necessity for such consultation..."²⁰

²⁰ "Minister of Home Affairs v Scalabrini Centre 201 (5) SA 421 para 72

TK 000-30
MB

[63] The Minister announced the switch-off date as 31st March 2022. There is nothing that prevents her from doing so. It is in the interest of the country the economy and for South Africans in general that the Digital Migration be finalised.

[64] INSTALLATIONS: STATUS QUO

The government's responsibility is to provide STB's to the 1.184 million registered households by the 31st March 2022 in terms of the agreement with the households who applied and registered for the STB's.

[65] In terms of the figures provided 1 167 912 households had registered and were entitled to STB installations. On the 5th October 2021 the Minister indicated that 556 954 of these households had been migrated which means that there were 610 958 outstanding installations. The Minister indicates that as at the 10th March 2022 there were 507 251 households which still required installations. This means that from October 2021 to 10th March 2022 only 103 707 STB's had been installed.

[66] The Minister provided the Court with projections that 507 251 outstanding installations will be conducted and concluded by the switch-off date, 31st March 2022. These projections are ambitious and very tight. The Court is sceptical that the government will be able to install the STB's as per the projections as they are not supported by any statistics or evidence of on-

the-ground arrangements that could suggest that the projections made are capable of being met by 31st March 2022.

[67] Mr Motau SC, Counsel for the Minister, gave the Court the assurance that these projections will be met. He offered to submit a report to the Court on the progress of installations.

[68] The Court is not in the position to project manage the programme of installing STB's. It appears that the government will require more time to be able to install the STB's. The Court finds solace in the fact that some 800 000 STB's are available from the post office warehouse and that it appears that arrangements have been made for the sourcing of many thousands more technicians to undertake the installations.

[69] In order to make sure that the government does not switch-off the 507 251 households who have timeously registered and who are entitled to the installation of STB's by 31st March 2022; and who are likely to be switched-off if the government does not reach its installation target; the Court has decided that the switch-off date should be deferred for a period of three (3) months, to 30th June 2022, to give the government sufficient time to complete the installations of the outstanding STB's. The prompt installation of those qualifying households who registered after 31st October 2021 and by 10th March 2022 also is required to be completed

within the timeframe committed by the Minister to ensure the shortest disruption of their receipt of information on their analogue tv's.

RULE 6(5)(e) APPLICATIONS

[70] On Sunday 27th March 2022, the eve of judgement, e.tv and the Intervening Applicants brought two applications in terms of Rule 6(5)(e) to place further additional evidence before the Court. As with the main applications, these are strikingly similar. In both applications, the additional evidence was a media statement made by the South African Broadcasting Corporation on 25th March 2022 regarding the imminent ASO date of 31st March 2022. The SABC has played no part in these proceedings. The Minister and other respondents have not had the opportunity to deal with these applications or the contents of the SABC's media statement. Given the stage of the litigation and obvious need for all parties to have finality and certainty as to the ASO date and the installation of STB's for qualifying registered households, there is prejudice that will result from affording a party not before the Court in these proceedings the opportunity to be joined, consider its position and respond to the complex issues raised in a manner that also then enables the respondents to address the new evidence. However, in light of the Court's order, this further evidence is not required, and these applications are dismissed.

COSTS

[71] For the reasons set out above, e.tv and the Intervening Applicants were unsuccessful in obtaining the majority of the relief they sought in their main applications aimed at further consultation, interdicting the ASO in effect and requiring the Minister to report to the Court. They also were unsuccessful in their applications in terms of Rule 6(5)(e). The relief granted by the Court in its order is granted because it is just and equitable to do so in terms of section 172 of the Constitution to ensure that the qualifying registered households received their STB's before ASO or, for those who missed the registration cut-off date, within the shortest possible time period projected by the Minister. This means that the applicants ought to bear a portion of the respondents' costs in opposing the applications. However, the *Biowatch* principle applies to the Intervening Applicants which litigated in the public interest. For these reasons, e.tv is ordered to pay 50 % of the first respondents' costs and 100 % of the costs of the second, third and sixth respondents on party and party scale, including the costs of three counsel where employed.

ORDER

I therefore make the following order:

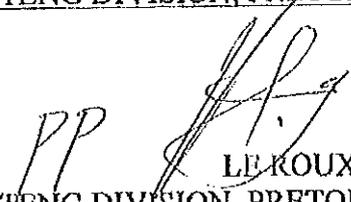
- 1) Media Monitoring Africa and SOS Support Public Broadcasting are granted leave to intervene as co-applicants in the proceedings under case number 51159/21;
- 2) The main applications and the applications in terms of Rule 6(5)(c) are dismissed;
- 3) The analogue switch-off date is deferred from 31st March 2022 to 30th June 2022;
- 4) Set-Top-Boxes for the 507 251 qualifying households registered by 31st October 2021 are to be installed by no later than 30th June 2022, with priority to be given to the installation of Set-Top-Boxes for the qualifying registered households located in the Free State, North-West, Northern Cape, Mpumalanga and Limpopo provinces;
- 5) Set-Top-Boxes for the 260 868 qualifying households registered between 31st October 2021 and 10th March 2022 are to be installed by no later than 30th September 2022; and
- 6) e.tv is ordered to pay 50% of the costs of the first respondent and 100% of the costs of the second, third and sixth respondents on party and party scale including the costs of three counsel where employed.


MSIMANG AJ
ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

I agree


LUKHAIMANE AJ
ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

I agree


LE ROUX AJ
ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

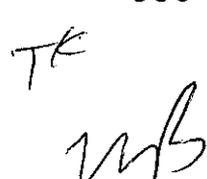
Heard on: 14 -15 March 2022
For the Applicant (e.tv): Gilbert Marcus SC
Max du Plessis SC
Andreas Coutsooudis
Sarah Pudifin-Jones
Celeste Moodley

Instructed by: Nortons Inc

For MMA and SOS: Nick Ferreira
(the Intervening Applicant) Amanda Cachalia
Instructed by: Rosengarten & Feinberg

For the First Respondent: Terry Motau SC
Minister of Communication & Benny Makola SC
Digital Technologies Buhle Lekokotla
Peter Smith
Busani Dhladhla
Instructed by: State Attorney - Pretoria

For the Second & Third William Mokhare SC
Respondents: Mpho Makgato



(ICASA)
Instructed by:

Constance Lithole
Kunene Ramapala Inc

For the Sixth Respondent:
(Vodacom)

Frank Snyckers SC
Duncan Turner
Ayanda Msimang
Cliffe, Dekker Hofmeyer Inc

Instructed by:

Date of Judgment:

28 March 2022

TK
WB

"WBZ"

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 51159/21

In the matter between:

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

and

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

JCC
WB

CONDITIONAL APPLICATION FOR LEAVE TO APPEAL

PLEASE TAKE NOTICE THAT on an urgent date to be arranged with the registrar of this Court, the First and Second Intervening applicants intend to apply for leave to appeal to the Supreme Court of Appeal against the whole of the judgment and order of the Full Court (delivered on 28 March 2022 under case number 5159/2021), per the Honourable Msimang AJ with Lukhaimane AJ and Le Roux AJ concurring (hereafter 'the Court'), except for paragraphs 1, 3, 4 and 5 of the order.

TAKE NOTICE FURTHER THAT:

- (a) The First and Second Intervening Applicants are applying to the Constitutional Court for direct leave to appeal; and
- (b) This application for leave to appeal is conditional upon, and will only be proceeded with, if that application to the Constitutional Court for direct leave to appeal is dismissed.

TAKE NOTICE FURTHER THAT the First and Second Intervening Applicants contend that:

- (a) This application has reasonable prospects of success on the grounds set out in Annexure A attached hereto; and

- (b) In any event, the importance and impact of this matter for the public and the duties of the Minister of Communications amount to compelling reasons for leave to appeal to be granted.

DATED AT **JOHANNESBURG** THIS 4TH DAY OF APRIL 2022.


ROSENGARTEN & FEINBERG
First and Second Intervening
Applicants' Attorneys
Le Val
45 Jan Smuts Avenue
Westcliff
Johannesburg
Tel: 011 486 0242
Ref: Dan Rosengarten/Daniel Basckin
Email: danr@rf-law.co.za;
danielb@rf-law.co.za
c/o **BRAZINGTON SHEPPERSON &
McCONNELL**
424 Hilda Street
2ND Floor Hatfield Plaza North Tower
Hatfield
Pretoria
Ref: Andrew McConnell
Tel : 012 430 4303
Fax : 012 430 7829
Direct Fax : 0866343576

TO:

**THE REGISTRAR
CONSTITUTIONAL COURT
BRAAMFONTEIN**

AND TO:

TIC
WB

**THE REGISTRAR OF THE ABOVE
HONOURABLE COURT
PRETORIA**

AND TO:

NORTONS INC
Applicant's Attorneys
38 4th Avenue
Parkhurst
Tel: 011 666 7560
Ref: Anthony Norton /
Anton Roets / Nina Greyling
Email: anthony@nortonsinc.com /
anton@nortonsinc.com /
nina@nortonsinc.com

AND TO:

MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES
First Respondent
iParioli Office Park
1166 Park Street
Hatfield
Pretoria
c/o THE STATE ATTORNEY
SALU Building
316 Thabo Sehume Street
Pretoria
Email: ichowe@justice.gov.za

AND TO:

KUNENE RAMAPALA INC
Second and Third Respondents' Attorneys
6th Floor Anchor House
100 Juta Street
Braamfontein
Johannesburg
c/o 1090 Infotech Building
1st Floor, Arcadia Street
Hatfield

TKC
WB

Pretoria
Tel: 011 463 3888
Ref: ICASA / Telkom L1/B.Shoba
Email: bshoba@kr-inc.co.za / mnkoane@kr-inc.co.za
BY EMAIL

AND TO:

NATIONAL ASSOCIATION OF BROADCASTERS

Fourth Respondent
410 Jan Smuts Avenue
Burnside Island Office Park
Building number 8
Ground Floor
Craighall
Email: nadia@nabsa.co.za
BY EMAIL

AND TO:

SOUTH AFRICA BROADCASTING CORPORATION

Fifth Respondent
Broadcasting Centre
Henley Road
Auckland Park
Johannesburg
By email: moilwap@sabc.co.za /
VanaraNJ@sabc.co.za
BY EMAIL

AND TO:

CLIFFE DEKKER HOFMEYR

Sixth Respondent's Attorneys
1 Protea Place
Sandown
Sandton
Tel: 011 562 1129
Fax: 011 562 1629
Email: anja.hofmeyr@cdhlegal.com

AND TO:

WEBBER WENTZEL

Seventh Respondent's Attorneys

TK
WB

90 Rivonia Road
Sandton
Johannesburg
2196
Tel: 011 530 5419
Fax: 011 530 6419
Email: Nozipho.Mngomezulu@webberwentzel.com /
peter.grealy@webberwentzel.com

AND TO:

CELL C (PTY) LTD
Eight Respondent
Waterfall Campus
Corner Maxwell Drive and Pretoria Main Road
Buccleuch
Gauteng
Email: Themba.Phiri@cellc.co.za / jmoela@cellc.co.za /
zahir@cellc.co.za

AND TO:

WERKSMANS ATTORNEYS
Ninth Respondent's Attorneys
96 The Central
Rivonia Road
Sandton
Tel: 011 535 8145
Fax: 011 535 8645
Email: cmanaka@werksmans.com / abilatyi@werksmans.com
Ref: Mr C Manaka / TELK6044.414
BY EMAIL

AND TO:

BOWMAN GILFILLAN INC.
Tenth Respondent's Attorneys
11 Alice Lane Sandton
Johannesburg
Tel: 011 669 9334/9489
Fax: 011 669 9001
Email: livia.dyer@bowmanslaw.com / tori.herholdt@bowmanslaw.com
Ref: L Dyer/ T Herholdt
c/o ANDREA RAE ATTORNEY
69 Douglas Street
Colbyn

TA
WB

Pretoria
Tel: 012 430 7757
Fax: 012 430 4495
Email: Andrearae@telkomsa.net / a.rae@andrearae.co.za

AND TO:

MAKDA CULL KOTZEE INC
Eleventh Respondent's Attorneys
Unit 201 - East Block 67 on Seventh
67 7th Street Linden
Ref: LIQ1/0001
Tel: +2787 807 7970
E-mail: anton@mcklaw.co.za
[SERVICE BY E-MAIL]

AND TO:

SENTECH SOC LIMITED
Twelfth Respondent
Sender Technology Park
Octave Road
Page 7 of 7
Honeydew
Gauteng
Email: legalregulatory@sentech.co.za
BY EMAIL

WB
TC

ANNEXURE A: GROUNDS OF APPEAL

- 1 The Court erred in dismissing, in paragraph 2 of the Court's order, the First and Second Intervening Applicants' ("**MMA and SOS's**") main application in circumstances where:
 - 1.1 There was no substantive response to any of MMA and SOS's grounds of review of the First Respondent's ("**the Minister's**") decision to determine the Analogue Switch Off ("**ASO**") date. Neither the Minister nor the Second Respondent ("**ICASA**") offered any defence to the merits of MMA and SOS's grounds of review but contended only that the review was incompetent because it was not ripe for hearing at the time that the review was brought because the Minister had not yet gazetted the date of ASO. The submission was wrong in law.
 - 1.2 The judgment does not contain any findings in respect of MMA and SOS's grounds of review, but nevertheless dismissed the review.
 - 1.3 Despite dismissing the review, the High Court nevertheless granted just and equitable relief, in paragraphs 3 to 5 of the its order, varying the Minister's decision and/or correcting a defect in the Minister's decision by deferring the ASO date and imposing dates by which STBs must be installed on the basis that it was just and equitable to do so.

WAB TK

- 2 The High Court erred in finding, at paragraph 60 of the judgment, without any substantiation, that "*the Government has done enough within its powers to help the qualifying households realise [the right to freedom of expression]*".
 - 2.1 The finding is, with respect, unsustainable in law. The test to be applied when assessing the lawfulness of the exercise of public power is not whether the state has "done enough within its powers" to help people realise their rights.
 - 2.2 The Court ought to have found that any exercise of public power must, at a minimum, be rational and that the lawfulness of the Minister's decision must be assessed against that standard.
 - 2.3 The Court ought to have found that the Minister's decision was unlawful and irrational on the basis of MMA and SOS's grounds of review.

- 3 The Court erred in failing to give due consideration to or make any findings in respect of MMA and SOS's grounds of review. It ought to have found that the Minister's decision was unlawful and irrational (and thus ought to be reviewed and set aside) on at least the following grounds:
 - 3.1 The Minister's determination of the date of the ASO constituted an impermissible limitation of the right to freedom of expression which includes the right to receive information or ideas.
 - 3.2 Plunging millions of South Africans into television blackout constitutes an impermissible retrogressive measure because it interferes with existing access to the right of freedom of expression.

TC
MB

- 3.3 It could never be rational to set a date for ASO in circumstances in which there had been no investigation whatsoever of the impact of that date upon the expression rights of millions of indigent South Africans.
- 3.4 The sudden imposition of a three-week deadline at the end of October 2021 after decades of dithering on the part of Government rendered the process leading to the determination of ASO irrational because it failed to afford indigent South Africans an adequate opportunity to register timeously.
- 3.5 The Minister offered no reason or justification whatsoever in support of either the date of 31 March 2022 for ASO; or of the imposition of a three-week deadline in October 2021.
- 4 The High Court erred in dismissing, at paragraphs 33 and 34 of the judgment, the applicants' reliance on the doctrine of unconscionable state conduct on the basis of the minority decision of Froneman J in *KwaZulu-Natal Joint Liaison Committee*¹ which it found to be "more in line with the position in our law of contract and law of property". The Court ought to have found that it is bound by the doctrine of precedent to accept and apply the *ratio* of the majority of the Constitutional Court. It is not at liberty to apply the *ratio* of a minority decision which it preferred.

¹ *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal and Others* 2013 (4) SA 263 (CC).

TK
WB

- 5 The High Court erred in failing to make any order in terms of paragraph 2.4 of MMA and SOS's notice of motion directing the Minister to file a Report setting out steps taken to ensure that the rights of affected persons are not violated:
- 5.1 The High Court did not make any findings in respect of or (ostensibly) give any consideration to the reporting relief sought by MMA and SOS in paragraph 2.4 of their notice of motion.
- 5.2 It is, with respect, not possible to discern from the judgment why such relief was not granted.
- 5.3 The High Court ought to have granted such reporting relief, particularly in circumstances where the Court made an order deferring the ASO date and was "sceptical" that the government would be able to install STBs as per its projections.
- 6 The High Court erred in finding, at paragraph 56 of the judgment, that that only those indigent South Africans who have managed to register for Set Top Boxes ("STBs") have rights that required protection by way of Court Order. It ought to have found that:
- 6.1 The right to freedom of expression, which includes the right to receive information, does not accrue only to those qualifying indigent South Africans who managed to register before the registration deadline.
- 6.2 Government's irrational rush to close registration for STB assistance, and in particular the sudden imposition of the three-week deadline in October 2021, also affects those who did not manage to register timeously because

TKC
WBS

they will still be plunged into television blackout if ASO is proceeded with absent a reasonable opportunity for registration.

7 The High Court erred in finding, at paragraph 54 of the judgment, that there was no study that had been conducted by any of the litigants to indicate how many indigent households receive television via analogue. It ought to have found that:

7.1 36% of households in South Africa are dependent on analogue television broadcasts, according to the undisputed evidence provided by MMA and SOS.

7.2 The State failed to conduct any investigation or study or evaluation of how many indigent households receive analogue television broadcasts.

7.3 The failure by the State to conduct any such investigation, study or evaluation before determining the ASO date renders the Minister's decision unlawful and irrational.

8 The High Court erred in finding, at paragraphs 56 and 57 of the judgment, that households who did not manage to register for STB assistance have no entitlement to STB assistance. It ought to have found that:

8.1 Government failed to afford a reasonable opportunity to qualifying households to register as a result of the sudden rush towards a March 2022 cut-off and three-week notice of the deadline.

TTC
MB

- 8.2 The practical difficulties in registration within a three-week time period would have resulted in hundreds of thousands, if not millions, of qualifying households being unable to do so in the available time.
- 8.3 The sudden imposition of a three-week deadline for registration for STB assistance, after decades-long delays in the migration process by government, renders the Minister's decision unlawful and irrational.
- 9 The High Court erred in dismissing, in paragraph 70 of the judgment, the application by MMA and SOS in terms of Rule 6(5)(e) to place additional evidence before the Court.
- 9.1 The Court dismissed the application on the basis that "*prejudice will arise from affording a party not before the Court in these proceedings the opportunity to be joined, consider its position and respond to the complex issues raised in a manner that also then enables the respondents to address the new evidence*" (paragraph 70 of the judgment).
- 9.2 The Court ought to have found that:
- 9.2.1 The SABC was before the Court. SABC is cited as the Sixth Respondent in MMA and SOS's application. The SABC chose not to participate in the proceedings. It did not need to be given "*an opportunity to be joined*".
- 9.2.2 The additional evidence sought to be placed before the Court by MMA and SOS (a public media statement by the SABC)

WB^{TR}

amounted to one page and was directly relevant to the relief sought by MMA and SOS and the factual issues in dispute.

9.2.3 The statement did not raise "*complex issues*" which would prejudice the SABC if not responded to in the proceedings.

9.2.4 It was in the interests of justice to permit the statement to be placed before the Court.

9.2.5 The statement confirmed the correctness of the facts upon which MMA and SOS based their case.

10 MMA and SOS accordingly seek leave to appeal to the Supreme Court of Appeal against the whole of the judgment and order of the Full Court (delivered on 28 March 2022 under case number 5159/2021), except for paragraphs 1, 3, 4 and 5 of the order on the grounds above only if the application by MMA and SOS to the Constitutional Court for direct leave to appeal is dismissed.

TK
MB