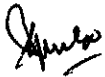


IN THE HIGH COURT OF SOUTH AFRICA /ES  
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: <del>YES</del> / NO	
(2) OF INTEREST TO OTHER JUDGES: <del>YES</del> / NO	
(3) REVISED	
DATE 24/6/15	SIGNATURE 

CASE NO: 26166/2015

DATE:

IN THE MATTER BETWEEN

e.tv (PTY) LTD

AND

MINISTER OF COMMUNICATIONS

MINISTER OF TELECOMMUNICATIONS  
AND POSTAL SERVICES

INDEPENDENT COMMUNICATIONS AUTHORITY  
OF SOUTH AFRICA

UNIVERSAL SERVICE AND ACCESS AGENCY  
OF SOUTH AFRICA

SOUTH AFRICAN BROADCASTING  
CORPORATION SOC LTD

ELECTRONIC MEDIA NETWORK LTD

ASSOCIATION OF COMMUNITY TELEVISION – SA

NATIONAL ASSOCIATION OF MANUFACTURERS  
OF ELECTRONIC COMPONENTS (1<sup>st</sup> Grouping)

APPLICANT

1<sup>ST</sup> RESPONDENT

2<sup>ND</sup> RESPONDENT

3<sup>RD</sup> RESPONDENT

4<sup>TH</sup> RESPONDENT

5<sup>TH</sup> RESPONDENT

6<sup>TH</sup> RESPONDENT

7<sup>TH</sup> RESPONDENT

8<sup>TH</sup> RESPONDENT

SOUTH AFRICAN COMMUNICATIONS FORUM	9 <sup>TH</sup> RESPONDENT
SENTECH SOC LTD	10 <sup>TH</sup> RESPONDENT
CELL C (PTY) LTD	11 <sup>TH</sup> RESPONDENT
TELKOM SOC LTD	12 <sup>TH</sup> RESPONDENT
TELLUMAT (PTY) LTD	13 <sup>TH</sup> RESPONDENT
S.O.S. SUPPORT PUBLIC BROADCASTING COALITION	14 <sup>TH</sup> RESPONDENT
MEDIA MONITORING SOUTH AFRICA	15 <sup>TH</sup> RESPONDENT
NATIONAL ASSOCIATION OF MANUFACTURERS OF ELECTRONIC COMPONENTS (PTY) LTD (2 <sup>nd</sup> Grouping)	16 <sup>TH</sup> RESPONDENT

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### JUDGMENT

#### PRINSLOO, J

- [1] This application came before me as one of urgency. The record runs into some 1 440 pages. There were six legal teams representing the applicant and the first, fifth, sixth, eighth, fourteenth, fifteenth and sixteenth respondents respectively. The eighth, fourteenth and fifteenth respondents made common cause and were represented by the same team. There were fifteen counsel in all. The hearing lasted two days.
- [2] A day or two before the hearing, the sixteenth respondent launched an application to intervene and be joined as the sixteenth respondent. The sixteenth respondent, bearing the same name as the eighth respondent, is represented by another grouping from the ranks of the eighth respondent. Without being disrespectful, it is fair to say that the eighth respondent has two opposing factions in its ranks. The first grouping, under the banner of the eighth respondent, made common cause with the fourteenth and fifteenth respondents and supported the application. The sixteenth respondent is represented by

the second grouping, which is at arm's length with the first grouping, and opposes the application.

At the commencement of the proceedings, I granted the joinder on an unopposed basis. Counsel for the eighth and the sixteenth respondents agreed that they would simply make their presentations (conflicting as they are) and the right or standing of either faction to represent this particular organisation, as well as any costs flowing from the intervention or joinder application, would stand over for later adjudication, if necessary, in a different court. An appropriate order was made.

- [3] As to urgency, the first respondent ("the Minister") was the only respondent contending in her opposing affidavit that the application was not urgent. At the commencement of the proceedings, I offered counsel for the Minister the opportunity to address me on urgency *in limine* but he informed me that the Minister was no longer pressing the issue of urgency. Consequently, the application was heard as one of urgency. In the circumstances, it is incumbent upon me to attempt to deliver the judgment (which will not be as detailed as it may have been under "non-urgent" circumstances) as a matter of urgency.

#### **Brief synopsis of the case**

- [4] This is a review application arising from a decision taken by the Minister on or about 18 March 2015 to enact certain amendments to the Broadcasting Digital Migration Policy for South Africa ("the BDM policy").

For the sake of detail, I add that, following the 2014 national elections, the Communications portfolio was split into two: a new Department of Communications under the present Minister of Communications (the first respondent or "the Minister") and the Department of Telecommunications and Postal Services ("the DTPS") under the Telecommunications Minister.

In terms of a proclamation published in the *Government Gazette* of 15 July 2014, the administration of and the powers and functions entrusted by the Electronic Communications Act, no 36 of 2005 ("the ECA") were transferred to the Telecommunications Minister.

However, subsequently, in terms of a proclamation appearing in the *Government Gazette* of 2 December 2014, the power to make broadcasting policy in terms of section 3 of the ECA was transferred from the Telecommunications Minister to the Communications Minister ("the Minister"). "Minister" is defined in the ECA as meaning the Minister responsible for Communications.

- [5] The BDM policy deals with a matter of considerable significance for all South Africans – the digital migration process. Simply put, this process involves a technological shift from the present analogue television broadcasting system to a digital television broadcasting system.
- [6] I briefly turn to some particulars on this subject, as they emerged from detailed and well crafted papers presented by the parties.

(i) **Terrestrial versus Satellite**

[7] At present in South Africa there are two ways in which television may be broadcast:

(1) First, television is broadcast on the terrestrial spectrum. This involves viewers receiving the television signal via their aerials. Terrestrial television is directly relevant to the present application.

(2) Second, television is broadcast via satellite. This involves viewers receiving the television signal via a satellite dish, as is the case with MultiChoice's DStv. Satellite television is not directly relevant to this application, although it is referred to, mainly for comparative purposes, from time to time in the papers.

[8] This case concerns terrestrial television. This is how the vast majority of people in South Africa receive television broadcasts at present and how they are likely to receive television broadcasts for the foreseeable future. (The emphasis added through underlining, is that of the drafter of the papers, in this case the founding affidavit. These technical details are, by and large, common cause between the parties.)

[9] At present there are a limited number of terrestrial channels being broadcast in South Africa:

1. There are four primary free terrestrial television channels – SABC1, SABC2, SABC3 and e.tv. (e.tv is, obviously, the applicant and will be referred to as "e.tv" or "the applicant" at times.)

Accordingly, SABC and e.tv are, together with certain community broadcasters, referred to collectively as the free-to-air or FTA broadcasters.

2. The other channel that is currently broadcast via terrestrial television is M-Net. However, it is not free. Rather, it is a subscription-based service. It is also the sixth respondent which opposes this application.

[10] For the sake of detail, I add that all five of these channels – the SABC channels, e.tv and M-Net – can also be received via satellite, for example via DStv, for those who can afford access to satellite broadcasts.

(ii) **Analogue v digital**

[11] At present, terrestrial television broadcasting uses analogue technology. This entails the transmission of the television picture and sound information to the viewer in its entirety – there is no conversion of the picture and sound, and none of the picture and sound information is removed.

[12] This is now set to change. Terrestrial television broadcasts will shortly be broadcast using digital technology instead.

1. Digital technology entails the conversion of the television picture and sound into discrete digital information which is then compressed by removing unnecessary information and it is then transmitted to the end-user as a digital signal.
2. Because of the nature of the process, each television set will require a set-top box ("STB") in order to properly receive and display the broadcast. At the receiving end, the digital signal from the aerial is first passed into the STB which converts the digital information back into the TV picture and sound

(obviously, for those millions of TV viewers still using "old" television sets equipped with "analogue" technology).

(iii) **The digital migration process**

- [13] The process in terms of which this shift from analogue to digital is taking place is often referred to as the "*digital migration process*", because it means that all terrestrial television viewers in South Africa will have to "*migrate*" from receiving such broadcasts in analogue form to receiving them in digital form.
- [14] In short, the main purpose of the global migration from analogue to digital is to release limited radio frequency spectrum, which is used for the purposes of both broadcasting and telecommunications. Digital broadcasts only require a fraction of the spectrum required by analogue broadcasts. Therefore a shift from analogue to digital means a more efficient use of available spectrum (in the ECA, "radio frequency spectrum" is defined as meaning the portion of the electromagnetic spectrum used as a transmission medium for electronic communications and broadcasting).
- [15] South Africa co-ordinates its use of spectrum with other countries to ensure that there is no interference between their broadcasting signals.

Analogue broadcasting is currently protected from interference. In light of certain decisions of the International Telecommunications Union ("the ITU"), South Africa is required to migrate from analogue to digital terrestrial television.

South Africa was expected to have completed the digital migration process by 17 June 2015. After this date, it is not able to continue relying on the ITU to protect its broadcasts from interference by other countries' broadcasting signals. South Africa has not yet started with the digital migration process, but may do so shortly, and it is alleged, on behalf of the applicant, that no "calamitous" effects will result from South Africa missing this deadline. Indeed, there are many countries who will not meet the deadline. Moreover, because of South Africa's geography and the limited interference likely to come from its neighbours, the impact on members of the public of missing the deadline of 17 June 2015 is not severe. Sentech SOC Ltd (the tenth respondent), which is responsible for the transmission of e.tv's broadcasts, estimates that only 3 600 people receiving e.tv on terrestrial television will be likely to suffer some form of interference.

- [16] Because the conversion from analogue to digital terrestrial television cannot occur overnight, otherwise millions of viewers would be left without any ability to watch television, it is envisaged that there will be the migration process, referred to, whereby digital terrestrial television will begin in conjunction with analogue terrestrial television, with the latter being "turned off" on a specified date.

I add that in theory, it is possible to avoid the use of an STB by purchasing an "integrated digital television" or "iDTV" – this is a television set with a built-in receiver which carries out the functions of an STB. However, iDTVs are not a practical option for the vast majority of ordinary South Africans given that they are not freely on sale in South Africa and are very expensive.



- [17] The process of digital migration has been a complicated and lengthy one. The BDM policy was first published in 2008.
- [18] The Independent Communications Authority Of South Africa ("ICASA", which is also the third respondent), acting in terms of its regulation-making powers under section 4 of the ECA, enacted various sets of draft and final regulations to regulate the digital migration process. That process was completed on 14 December 2012 with the publication of the Digital Migration Regulations, 2012.
- [19] The government has made available substantial funds for the digital migration process. It is estimated that over the period 2012 to 2018, these expenses or funds will come to some R4 billion.
- (iv) **The need for Set-Top Boxes ("STB's") and the government subsidy**
- [20] On the current (analogue) system, terrestrial television viewers do not need an STB to receive the four FTA channels. They simply connect their television set to the aerial and can then receive and watch the three SABC channels and e.tv for free.
- [21] This will change with the migration from analogue to digital. Because of the nature of digital technology, viewers will require STB's to watch television. Every television will have to be connected to both the aerial and the STB. Without this, the viewer will be unable to watch terrestrial TV. Each terrestrial television-viewing household or workplace will therefore have to possess an STB.

- [22] More than 8 million South African households rely solely on aerials, and therefore terrestrial television to receive the four FTA channels. It is therefore envisaged that approximately 8 million STB's will have to be manufactured in total in order to allow for an effective digital migration.
- [23] The average price of an STB is likely to be in the region of R600,00. This is recognised to be out of reach of many ordinary South Africans who receive their television broadcasts via terrestrial means. The government, quite appropriately, decided early on that it would commit to at least a partial subsidy to provide 5 million STB's to the poorest TV-owning households. This was recognised in the BDM policy from the outset. Ultimately, it was decided that these 5 million STB's would be fully subsidised and therefore provided for free to the poorest TV-owning households. These STB's will be referred to as the "subsidised STB's" or the "free STB's".
- [24] A tender to provide these 5 million STB's was issued in November 2014.
- [25] The government will be investing billions of rand in supplying the subsidised STB's. To ensure that this investment is protected they must be fitted with a control system ("the STB control system"). A lack of control could result in the subsidised STB's being stolen and sold to South African households which do not qualify for the subsidy or sold to people living in neighbouring countries. This theft could occur in high volumes during the distribution process or on an individual basis.

(v) **STB control**

[26] The BDM policy has, from its enactment in 2008 to the present, always recognised the need for an STB control mechanism.

[27] For example, in the first version of the policy it was stipulated that STB's would "have a control system to prevent STB's from being used outside the borders of South Africa and to disable the usage of stolen STB's". Later it was stipulated that STB's would have "capabilities to unscramble the encrypted broadcast signal so that only fully compliant STB's made or authorised for use in South Africa can work on a network". There was a 2012 stipulation that STB's will "have a robust STB control system that will also benefit the consumers by ensuring that they do not have to own multiple boxes for both current and future free-to-air broadcasting services". Later reference was made to a "national standard" which would "include a robust free-to-air STB control system to ensure that only conformant STB's can work in the electronic communications network in South Africa".

[28] The national standard was later issued by the SABS as SANS 862:2012. It prescribes that the "main functional elements specified for security" are:

- (1) "a secure over-the-air software and bootstrap loader;
- (2) a mechanism to prevent STB decoders from functioning in non-RSA DTT networks; and
- (3) STB control system that will enable mass messaging."

(Note: DTT stands for Digital Terrestrial Television.)

The standard specifies that FTA broadcasters are responsible for determining security requirements and manufacturers of STB's can obtain these security requirements from the FTA individual broadcasting service licensees.

(vi) **Encryption**

[29] **This subject embodies the crux of the case: e.tv wants the subsidised STB's to be fitted with a so-called "encryption facility" because e.tv wants to broadcast so-called "encrypted" signals as an FTA broadcaster to the terrestrial TV users.**

**The Minister, on the other hand, in her March 2015 policy amendment, stipulated that subsidised STB's will not have "capabilities to encrypt broadcast signals". The decision of the Minister to prescribe, when making her policy, subsidised STB's without the encryption capability, is what is attacked on review in this application. Relying, essentially, on the principle of legality, e.tv contends that the Minister's decision was unlawful (she exceeded her powers), irrational and that the procedure adopted to enact the amended policy was also unfair.**

**The application is strenuously opposed by the Minister (the first respondent or "no 1"), no 5 (the SABC), no 6 (M-Net) and the newly joined no 16. No 8, and with it, no 14 and no 15, support the application. None of the other respondents have entered the fray, although no 7 filed an affidavit supporting the opposition to the application.**

[30] So much for a brief synopsis of the case.

**The Minister's amendments to the BDM policy which are under attack in this review application ("the impugned amendments")**

[31] The amendments were published in terms of the Electronic Communications Act, Act 36 of 2005 ("the ECA") in *Government Gazette* no 38583 of 18 March 2015.

[32] In an introductory paragraph to the amendments, Minister Muthambi states that she amends the BDM policy issued initially by *Government Gazette* on 8 September 2008 and as amended by amendments published in a later *Government Gazette* of 17 February 2012, "to the extent indicated below taking into consideration submissions made by stakeholders on the amendments proposed by the Department of Communications on 6 December 2013".

[33] There are ten paragraphs containing amendments, but e.tv is only challenging those contained in paragraph 8. These are new paragraphs inserted into the (already amended) policy. It is convenient to quote paragraph 8:

"8. Paragraphs 5.1.2(A), (B) and (C) are inserted in the Policy:

5.1.2(A) In keeping with the objectives of ensuring universal access to broadcasting services in South Africa and protecting government investment in subsidised STB market, STB control system in the free-to-air DTT will be non-mandatory.

5.1.2(B) The STB control system for the free-to-air DTT STB's shall -

(a) not have capabilities to encrypt broadcast signals for the subsidised STB's; and

(b) be used to protect government investment in subsidised STB market thus supporting the local electronic manufacturing sector.

5.1.2(C) Depending on the kind of broadcasting services broadcasters may want to provide to their customers, individual broadcasters may at their own cost make decisions regarding encryption of content."

[34] 5.1.2(C) is not attacked on review.

[35] Apart from the "urgency clause", and the clause praying for costs against those respondents opposing the relief sought, the relevant paragraphs in the notice of motion provide:

- "2. The decision of the First Respondent on 18 March 2015 to enact clauses 5.1.2(A) and 5.1.2(B)(a) of the Broadcasting Digital Migration Policy ('BDM policy') is reviewed and set aside.
3. It is declared that clause 5.1.2(A) of the BDM policy is unlawful and invalid and, to remedy the defect, clause 5.1.2(A) is deemed to read as though it provides as follows:  
  
'In keeping with the objectives of ensuring universal access to broadcasting services in South Africa and protecting government investment in subsidised STB market, the use of the STB control system in the free-to-air DTT will be non-mandatory.'
4. It is declared that clause 5.1.2(B)(a) of the BDM policy is unlawful and invalid."

[36] As far as the attack on 5.1.2(A) is concerned, e.tv initially argued, in the founding papers, that it was the result of a "drafting error" and that the phrase "the use of" should have been inserted.

I debated this issue with Mr Budlender, for e.tv, and he conceded, quite properly, that e.tv's attack on 5.1.2(A) is misplaced. He accepted that the proper meaning of 5.1.2(A), is that advanced on behalf of the Minister and some of the other respondents. It is this: the amendment enacted by the Minister, also described by e.tv as "the non-mandatory control amendment" relates to the manner in which control over STB's may be exercised. As far as the provision of subsidised STB's is concerned (for purposes of digital migration), all STB's are going to be provided by the government. 5.1.2(A) provides that "STB control system in the free-to-air DTT will be non-mandatory", which, in simple terms, means that the "STB control system" will not be mandatory. On the other hand, in terms of 5.1.2(B)(b) the STB control system shall "be used to protect government investment in subsidised STB market" and not any other STB's, ie non-government STB's. The provision does not apply to STB's provided by broadcasters themselves or which are not subsidised by the government. It applies to subsidised STB's because those which may be provided by broadcasters, such as e.tv, to their customers (which they are free to do) do not need the government's protection through the Policy. The policy is not the appropriate instrument to provide whatever protection broadcasters may need for their own issued STB's. The policy only prescribes an STB control system for the government subsidised STB's. This is necessary to protect the government's investment, as

indicated. I add that the inclusion of an encryption facility or capability in the STB control system is not prescribed by the SABS national standard, *supra*.

[37] As a result of Mr Budlender's concession, the attack on 5.1.2(A) has, therefore, been abandoned for all practical purposes. In fairness, I add that Mr Budlender did mention that, as far as the attack on 5.1.2(A) was concerned, he was still "left with the procedural challenge". This is a reference to the so-called "third leg" of a review in terms of the principle of legality. The others involve lawfulness and rationality. It is difficult to understand why it would be necessary, or appropriate, to launch a "procedural challenge", against an enactment which, on the challenger's own concession, is in order.

#### **More about encryption: the pros and cons**

[38] A slightly more detailed discussion on this subject appears to be appropriate because the only amendment to the policy still under attack, in this review application, is the so-called "encryption amendment" which is to be found in 5.1.2(B)(a). It deals with the policy stipulation that subsidised STB's shall not have capabilities to encrypt broadcast signals.

[39] "Encryption" refers to the process in terms of which a tv-signal is deliberately encrypted at the source before being broadcast. In the *Shorter Oxford English Dictionary*, volume 1 on p822, "encrypt" is described as follows: "convert into code, especially to prevent unauthorised access; conceal in something by this means".



- [40] The encrypted television signal is then transmitted to television households where it can only be decrypted by an STB that has been loaded with the right software, hardware and decryption keys. The STB therefore "unlocks" the encrypted signal for viewing.
- [41] It is common cause between the parties that encryption technology is used by all pay-TV operators – for example, DStv, M-Net and Top TV. In the context of pay-TV, it ensures that only subscribers who have paid their fees are ordinarily able to watch the encrypted broadcast. This seems to fit into the dictionary definition.
- [42] Encryption technology is not used by the FTA broadcasters, including e.tv. e.tv is the only FTA broadcaster contending for encryption capability to be included in the control system for subsidised STB's.
- [43] In the founding affidavit, e.tv, quite properly, concedes that it was initially of the view that STB control was not necessary for DTT. In fact, it made lengthy submissions to the Minister, during the earlier policy making process, to the effect that encryption is undesirable for purposes of FTA broadcasting. When I confronted Mr Budlender with this, he reminded me, quite correctly, that everyone is entitled to change his or her or its mind.
- [44] In the founding affidavit, it is contended on behalf of e.tv that the latter considers it essential that it be able to encrypt its broadcast signal. It considers this to be "critical to its business" and the interest of the public for at least two reasons. Before I turn to these reasons, I point out that e.tv, repeatedly, and properly, alleges that it would be in

the interests of its own business plan if subsidised STB's were to be provided with encryption capability. Indeed, the main thrust of e.tv's case is that it laments the fact that, if there were to be no encryption facility for subsidised STB's, and if it were to insist on broadcasting encrypted signals, e.tv would have to supply its own commercial STB's to the 5 million odd subsidised terrestrial viewers referred to. This will be an expensive exercise. What e.tv fails to explain, or adequately explain, is why it needs to encrypt its signals for FTA DTT purposes. It is the only FTA broadcaster that supports the idea and it has not been doing so up to now. Encryption is not necessary for FTA broadcasting purposes (DTT) and, as I will illustrate, it appears to have more negative features than positive ones. Some of these negative features directly impact on the interests of the impoverished 5 million soon to be subsidised FTA viewers. This issue does not appear to be high on the priority list of e.tv.

[45] In its founding affidavit, e.tv makes the following introductory statement:

"In particular, e.tv considers it essential that it be able to encrypt its broadcast signal. It considers this to be critical to its business and the interest of the public for at least two reasons." (Emphasis added.)

[46] For the sake of brevity, I quote only portions of the submissions made by e.tv with regard to these two reasons:

"1. It would ensure compliance with a minimum set of specifications for STB's within the country, preventing non-compliant STB's from receiving digital broadcast signals. Such STB's would allow for FTA

broadcasts to be received in the correct format and with the correct features, ensuring a uniform and reliable viewer experience.

A failure to comply with the minimum set of specifications would likely result in a weak experience for the viewer ... This would reflect negatively on FTA broadcasters, as viewers would assume that the poor quality of the user experience was the broadcasters' fault ... This weak FTA offering would be particularly damaging in a context where FTA broadcasters must compete with a strong incumbent pay-TV brand such as DStv.

2. Broadcasters such as e.tv would in the future likely be unable to provide broadcasts in high definition ('HD') without a fully conformant platform enabled through STB control with encryption. ... Preventing free-to-air broadcasters from broadcasting in the latest forms of technology will seriously and irreparably damage their business as viewers will be forced to switch to pay-TV in increasing numbers to achieve the desired viewing experience." (Emphasis added.)

[47] e.tv acknowledges that its views on this score are strenuously contested by "certain interested parties".

[48] Remarkably, e.tv then contends that its case does not rest on the court making a determination as to which of the contested positions is correct. It states that its case does not rest on the court determining whether encryption of FTA broadcasts is good or bad for broadcasters or the country as a whole. This statement is perhaps not

surprising given the vigorous opposition to the submissions made by e.tv when singing the praises of encryption. I also do not agree that information about the advantages and disadvantages of encryption is to be disregarded: in my view, this is a factor which could be taken into account when deciding whether or not the Minister's decision was rational.

[49] An example of the strong opposition to e.tv's assertions about the benefits of encryption for FTA broadcasting is to be found in the opposing affidavit of M-Net, the sixth respondent:

"17. e.tv wishes to encrypt its free-to-air television broadcast signals in the DTT environment. It is the only free-to-air television broadcaster in South Africa which wishes to do so, and its intention is at odds with the global trend. The overwhelming majority of free-to-air terrestrial television broadcasters world-wide do not encrypt their broadcast signals.

18. The reasons which e.tv puts forward for wishing to encrypt its free-to-air broadcast signals are based on flawed and incorrect assumptions which are contradicted by e.tv's own previous statements.

19. Contrary to the misconceptions promulgated by e.tv in its founding affidavit, and by recent commentators in the media, encryption of free-to-air broadcasting signals –

19.1 is not required to prevent piracy of television broadcasting content. As I explain below, this objective is met by the incorporation in the STB of High-bandwidth Digital Content Protection (HDCP), a form of digital copy protection which

prevents unauthorised copying of content. The standard developed by the South African Bureau of Standards (SABS) for STB's, SANS 862:2013 Edition 2.1 (the National Standard) explicitly requires the inclusion of HDCP in STB's;

- 19.2 it is not required to enable free-to-air broadcasters to obtain high definition content. As I explain below, the majority of free-to-air terrestrial broadcasters world-wide broadcast their signals unencrypted and obtain and broadcast high definition content. These broadcasters include, in the United Kingdom, the public broadcaster, the BBC, the public commercial broadcasters ITV and Channel 5; in the United States, the public broadcaster PBS, and commercial broadcasters ABC, NBC and CBS; and in Australia, the public broadcaster ABC and commercial broadcasters Seven Network, Nine Network, Network Ten and SBS. Leading international program suppliers do not require encryption of their programs on free-to-air terrestrial networks; and
- 19.3 is not required to prevent the importation and sale of cheap, poor quality STB's to the public. As I explain below, this objective will be addressed by a range of conformance measures to protect consumers against poor quality products, including the adoption of the National Standard, the certification of compliant products, and consumer education on the risks of purchasing STB's which are not certified.

20. At the heart of e.tv's challenge is the claim that the encryption amendment will directly preclude free-to-air terrestrial broadcasters from encrypting their broadcast signals in respect of the 5 million households which will have government-subsidised STB's, and indirectly preclude them from deciding to encrypt their signals at all. Both parts of this claim are unfounded and untrue.
21. What e.tv does not acknowledge or even disclose is that it can itself fund the manufacture and provision of its own customised STB's with encryption capability for the households which it wishes to reach. As a commercial broadcaster which, we are told, has identified the encryption of its signals as '*critical to its business*', e.tv does not explain why it expects the cost of this decision to be borne by government.
22. Also absent from e.tv's account is a recognition of the transitory role which the STB is expected to play in the terrestrial television broadcasting landscape. It has always been accepted that the STB will be a temporary feature of television broadcasting. It is attractive in the early stages of digital migration as a low cost means of enabling an existing analogue television set to receive digital transmissions. Viewers already using iDTVs when digital migration is concluded will not need to use STB's at all. When, as happened globally, iDTVs become more widely available and affordable, the STB will become redundant.
23. If the government subsidised STB's were to incorporate encryption capability to meet e.tv's needs, viewers would be reliant in perpetuity

on STB's and STB's would have to be manufactured, purchased and maintained indefinitely for e.tv's commercial benefit. Since digital tuners can and will be built into a wide range of consumer products, including portable tv's, viewers using all these products would require STB's as well.

24. e.tv also does not deal with the other significant implications of including encryption capability in STB's, which include not only the cost but also the technical complexity which it will add to each STB, thus increasing the risk of STB malfunction and giving rise to higher maintenance and repair costs for the consumer, and a higher risk of replacement. As explained below, the inclusion of encryption capability also has important implications for emerging manufacturers of STB's in South Africa.
25. Evidently e.tv does not wish to make the investment necessitated by its decision to encrypt its free-to-air broadcast signals. Instead, it wants encryption capability to be incorporated in the control system in all the government-subsidised STB's. Having failed to persuade government of the merits of its views for purposes of the formulation of government policy, it now seeks to achieve this objective by way of judicial review. It seeks, in essence, to usurp government policy for its own commercial advantage.
26. e.tv acknowledges that its views on the merits of encrypting free-to-air broadcast signals are '*strenuously contested*' by '*certain interested parties*', but asserts that its case does not depend on the court

determining whether encryption of free-to-air broadcast signals is good or bad for broadcasters or the country as a whole.

27. In fact, e.tv's views on encryption are unsupported by the facts, have no support among South African free-to-air television broadcasters, and are aberrant globally. In these circumstances, e.tv's contention that it brings this application in the public interest is unsustainable. The application has self-evidently been brought only in e.tv's commercial interest. Since the reasons afforded by e.tv for wishing to encrypt its free-to-air broadcast signals are groundless, it can only be assumed that e.tv has a different, undisclosed objective."

[50] So much for M-Net's views on encryption in respect of FTA television broadcasting.

[51] M-Net is in good company. The SABC (fifth respondent) is equally scathing in its condemnation of encryption in the free-to-air space. The SABC highlights certain aspects of research and analysis it has conducted over the past two to three years as part of preparing the various submissions that it has made during the DTT migration process. For the sake of brevity, I will attempt a brief summary of the aspects listed by the SABC:

1. One of the critical success factors identified by the European Union in its migration process was "low cost and widely available set-top boxes". It is important, as already mentioned, to distinguish between the role played by set-top boxes in the pay-Television environment and in the free-to-air environment. In the former, encryption is essential because it is the only way for a broadcaster to ensure that only people who subscribe to, and pay for, its



service will gain access to it. In this environment, the additional costs of facilitating encryption are built into the broadcasters' costing, and are justified because they are an essential component of the business model.

2. On the other hand, in the free-to-air environment, consumers are used to receiving their signal for free. They do not want to pay extra to receive a channel that they have historically received for free. The European experience therefore shows that the cheaper the free-to-air STB, the greater numbers of consumers are likely to migrate to DTT. In the FTA environment, the STB's must therefore be as affordable as possible.
3. The SABC points out that e.tv, in its founding affidavit, did not address the cost of enabling encryption in set-top boxes. There would be a significant cost implication of a decision by government to procure STB's with encryption capabilities:
  - (i) There would be an immediate once off cost of \$2 per STB to equip each with encryption capability. This would increase the cost of subsidising 5 million STB's by about \$10 million. SABC submits, correctly in my view, that where the use of encryption in the FTA environment is questionable, to put it mildly, it is difficult to see why government should be expected to pay well over R100 million for such a capability.
  - (ii) SABC estimates that the implementation of encryption of the free STB's would involve annual costs of approximately R561,9 million to be borne by the broadcasters. These costs would involve the annual royalties for the encryption software, the additional business systems needed to manage and control STB's and consumer databases, the cost

of operating call centres and the regular maintenance costs of the complicated software.

- (iii) Because the necessary software in STB's that facilitate encryption is more complicated, it is inevitable that there are accessibility difficulties from time to time, when encryption is used. This means, as is already the case in the pay-TV environment, call centres will be needed to assist consumers with accessibility problems. A number of call centres will be required to service the needs of approximately 12 million FTA consumers (this is the SABC estimate). Consumers will have to pay to communicate with these call centres. All this means that consumers, who previously could simply switch on and access FTA channels, will face the extra step of having to navigate, at their cost, accessibility difficulties. This is the opposite of what is required in the digital migration process, which, to work properly, needs to introduce as few barriers to access as possible.
  - (iv) STB's with encryption capabilities will require the use of software that increases the cost of STB's because of royalties that must be paid.
4. The SABC emphasises the fact that, throughout the world, the norm for FTA broadcasts is not to be encrypted. For the government to decide to pay extra to enable STB's to encrypt signals in the FTA environment, would constitute a highly unusual step.
5. If STB's are to be supplied with encryption facilities, software available only overseas will have to be used. There are various situations which could cause an overseas contractor to terminate access to the software. The SABC, in

discharging its public mandate, uses its signal to convey a variety of important information to the public. A simple example is information about electricity supply and the implication of its use for possible load-shedding. If public access to the SABC was shut down, even on a temporary basis, this could have disastrous consequences for the country.

[52] Later, I will briefly revert to the question as to whether or not the Minister's decision (which is under attack) to enact the "encryption amendment" (5.1.2(B)(a)), was rational, but the SABC, correctly in my view, submits that in the light of the aforesaid discussion about the use of encryption in the FTA environment, a choice by government not to subsidise an encryption capability in STB's is entirely rational and reasonable. Equally, so the SABC submits, a policy that allows individual broadcasters to make their own decisions about encryption, but requiring those broadcasters to carry the costs of encryption themselves if they opt for encryption (amendment 5.1.2(C)) is entirely rational and reasonable.

In these circumstances, as already pointed out earlier, I disagree with e.tv's submission that its case does not rest on this court determining whether encryption of FTA broadcasts is "good or bad for broadcasters or the country as a whole". As I mentioned, this issue is, in my view, an important one that should go into the scale when judging the decision of the Minister objectively.

[53] Towards the end of its discussion on the use of encryption in the FTA environment, the SABC also makes the following submission, which I find convenient to emphasise

at this point, lest it escapes me, as I consider it to be of particular relevance in the present case:

"It is well-established that the deference that is required in the context of all reviews of executive conduct is particularly important when the allocation of state resources is involved."

The Minister, in her heads of argument, deals with the same subject by referring to *National Treasury v Opposition to Urban Tolling Alliance* 2012 6 SA 223 (CC). It is useful to quote what was said in that judgment at 241E-H:

"[67] The harm and inconvenience to motorists, which the High Court relies on, result from a national executive decision about the ordering of public resources, over which the executive government disposes and for which it, and it alone, has the public responsibility. Thus, the duty of determining how public resources are to be drawn upon and recorded lies in the heartland of executive-government function and domain. What is more, absent any proof of unlawfulness or fraud or corruption, the power and the prerogative to formulate and implement policy on how to finance public projects reside in the exclusive domain of the national executive subject to budgetary appropriations by parliament.

[68] Another consideration is that the collection and ordering of public resources inevitably call for policy-laden and polycentric decision-making. Courts are not always well suited to make decisions of that order. It bears repetition that a court considering the grant of an interim interdict against the exercise of power within the camp of

government must have the separation-of-powers consideration at the very forefront."

[54] Still on the subject of opposition to introducing an encryption facility for subsidised STB's, it is fair to refer briefly to the submissions made on behalf of the sixteenth respondent in opposing the application.

[55] The deponent of the opposing affidavit, speaking for emerging black manufacturers of electronic components (in this case, no doubt, STB's, bearing in mind that there are indications on the papers that all twenty tenderers, responding to the government tender to manufacture STB's, received a share of the tender) advances some arguments militating against the notion of allowing encryption facilities. I will attempt a brief summary, for the sake of brevity:

1. Black manufacturers will need to be accredited by the foreign Conditional Access vendor companies ("CA vendor"), who hold the software licences necessary to produce encrypted STB's. This accreditation would come at an unnecessary significant cost to the manufacturer.
2. The manufacturing process will then be subject to a decision by a CA foreign vendor which will serve as a gate-keeper to manufacturers as this software is only available overseas.
3. A CA vendor will essentially have the unilateral powers to decide who eventually manufactures STB's in South Africa.
4. The manufacturers will be hampered in their development costs because any applications that need to be incorporated will be subjected to integration costs that the CA vendor charges.

5. The incumbent manufacturers would be the beneficiaries because they have already been accredited by CA vendors.
6. The costs that this system introduces will have to be borne by the taxpayer.
7. It is an undesirable system "that has never been implemented as a government policy anywhere in the world".

[56] The deponent on behalf of the sixteenth respondent then records that a multi-stakeholder workshop was held on 16 April 2013 to discuss whether or not encrypted STB's were the best option for South Africa. At the workshop, a resolution was passed to the effect that the requirement for STB control/encryption should be scrapped from government policy in its entirety.

The resolution was jointly signed by the sixteenth respondent, the MK Military Veterans' Association, the Progressive Woman's Movement of South Africa, the Congress of Traditional Leaders, the SA National Civic Organisation, the Black Business Council and many other organisations.

[57] I turn, briefly, to the contribution of the seventh respondent, the Association of Community Television – SA (also referring to itself as "ACT – SA").

[58] This association filed an "explanatory affidavit" indicating that it would abide the decision of the court, but clearly recording in this affidavit that it opposes the application.

- [59] ACT – SA is a voluntary association representing the interests of community television in South Africa. It was established in 2013 when all of the existing community television licensees in South Africa at the time, namely Soweto TV, Cape Town TV (CTV), Bay TV, One KZN (1 KZN), Tshwane TV, North West TV and Bara TV, signed a joint memorandum of understanding creating ACT – SA and confirming their membership of ACT – SA.
- [60] Community television broadcasters provide free-to-air broadcasting services to their viewers. Their programming has a particular focus on local community content.
- [61] The deponent on behalf of ACT – SA states that for some time, community broadcasters have been anxious about indications that STB's would be required to have a "control system" with encryption technology. The concern is that encryption technology will unnecessarily and unduly increase the cost of STB's, thus adversely impacting on the accessibility of STB's for the people who need these devices the most, namely lower income South African households which rely exclusively on free-to-air broadcasting services and only have analogue television sets.
- [62] The deponent states that a requirement that all broadcasters, including free-to-air broadcasters, would be expected to encrypt their services, would be inimical to the very concept of free-to-air broadcasting. "Free-to-air broadcasting is underpinned by the spirit of enhancing accessibility. Encryption is, by its very nature, aimed at restricting accessibility."