[63] ACT – SA was therefore relieved that, as presently formulated, the BDM policy does not require STB's to have encryption capability, and specifically provides that government subsidised STB's shall not have encryption capability. "We notice specifically that the BDM policy does not prohibit broadcasters from encrypting content at their own cost."

[64] I has consistently been ACT – SA's position that an encryption capability requirement for government subsidised STB's would be adverse to the public interest and would serve to marginalise access to information for the poorest members of society.

[65] Government should not have to bear the cost of facilitating the private, commercially-motivated objectives of individual broadcasters, particularly where those objectives run counter to the public interest.

[66] Encryption technology is a costly extra for STB's. It is noteworthy that the deponent then adds that "indeed, e.tv had itself effectively high lighted this concern in previous representations to the Department of Communications". I have referred to this before, indicating that e.tv, for a reason which I still do not quite understand, then changed its mind. The deponent submits that the inclusion of this technology (encryption) will significantly increase the cost of STB's through software and subscriber management costs. In addition, the technical complexity added by the inclusion of encryption technology in STB's will result in higher maintenance and repair costs and a higher risk of needing to replace STB's.

[67] It is clear that ACT – SA opposes the application. I consider it unnecessary to dwell any further on the contents of the "explanatory affidavit".

[68] It is proper to record that the application is supported by the eighth respondent, in turn supported by the fourteenth and fifteenth respondents. These three respondents also filed a joint answering affidavit.

[69] I mentioned at the outset, that the eighth respondent, the National Association of Manufacturers of Electronic Components or "NAMEC", is the same organisation as the sixteenth respondent, which opposes the application and with whose submissions I have dealt. I mentioned at the outset that the eighth and the sixteenth respondents are respectively represented by what can be described as opposing factions or groupings of NAMEC. The eighth respondent grouping supports the application, and the sixteenth respondent grouping opposes the application. The one grouping maintains that the other grouping does not have the necessary standing or authority to represent NAMEC. This leads to the somewhat unusual result that it can be said that NAMEC both supports and opposes the application.

[70] The fourteenth respondent, SOS Support Public Broadcasting Coalition ("SOS") is a civil society coalition that comprises a broad range of non-governmental organisations and individuals, including the fifteenth respondent, Media Monitoring Africa ("MMA"). SOS and MMA campaign for open, competitive and high quality public broadcasting that is in the public interest. They are clearly not broadcasters themselves. It is useful to note that all three these organisations have previously

expressed their views regarding the various iterations of the BDM policy and have previously made submissions to the Minister's predecessors in this regard.

[71] The main thrust of the argument of these organisations, represented by Mr Chaskalson SC and Mr Kelly, if I understand it correctly, was that the Minister's enactment of the BDM policy was unlawful by virtue of her failure to comply with the provisions of section 3(5) of the ECA that obliged her to publish the BDM policy in a draft form for comment by the Independent Communications Authority of South Africa ("ICASA"), the third respondent and Universal Service and Access Agency of South Africa ("USAASA"), the fourth respondent, and interested parties such as these three organisations. Counsel argued that the Minister's suggestion that the prior notice and comment procedure of one of her predecessors, Minister Carrim, discharged this obligation, is incorrect.

[72] As I have mentioned, a version of the BDM policy was first enacted in 2008 by the then Minister. The last amendments to it were enacted by Minister Pule in 2012. On 6 December 2013, Minister Carrim published proposed amendments to the BDM policy for public comment. One of these was that subsidised and non-subsidised STB's would have to include an "STB control system" that would have the capability to "decrypt" encrypted broadcast signals. See my later remarks on this point. It was also proposed that broadcasters could elect whether or not to utilise the STB control system, as its use would be non-mandatory. The costs associated with STB control technology would be covered by government, and would be recovered from broadcasters that elected to utilise the STB control system.

SOS made submissions in support of the amendments proposed by Minister Carrim. It also issued a press statement after the proposed amendments were published, noting, *inter alia*, that "STB's would have the capacity to have a control mechanism through encrypted television signals, but this potential would only be implemented if broadcasters wish to do so". Of course, we know that the only broadcaster interested in broadcasting encrypted signals in the FTA DTT environment, is e.tv, which approach is at odds with the attitude of the remaining broadcasters and, for that matter, the world-wide trend in this regard.

[73] It is also useful to note that Minister Carrim did not enact any of the proposed amendments. He was replaced by the current Minister Muthambi after the 2014 general elections.

[74] Counsel for these three respondents indicated that their heads of argument were confined "to the lawfulness of the process followed by the Minister in enacting the BDM policy, and the significant public interest issues that arise from the clauses that are the focus of e.tv's challenge". I have pointed out that the one leg of the e.tv challenge has all but fallen away, namely the challenge aimed at 5.1.2(A). The reasons I have dealt with.

[75] As to the first leg of the argument of counsel, it involves the subject of procedural fairness. Indeed, it is argued that the process followed by the Minister in enacting this amended BDM policy was procedurally unauthorised and procedurally unfair.

[76] The argument that it was "procedurally unauthorised" is based on submissions that the Minister, in enacting these provisions, failed to comply with the requirements of section 3 of the ECA. It was argued that, in terms of this section, the Minister was obliged, not only to consult with ICASA and USAASA, but also to obtain the views of "interested persons" through the publication of the BDM policy in the *Government Gazette*. It was argued that the Minister did not publish the BDM policy for public comment with the result that parties such as e.tv and these three respondents did not have the opportunity to comment on the BDM policy. It was also pointed out that there is no evidence before the court that the Minister consulted with ICASA and USAASA.

[77] It was also argued that there is no evidence as to the identity of the stakeholders the Minister claims to have consulted regarding the BDM policy.

[78] At this point in the judgment, it seems to me to be appropriate and convenient to turn to the subject of procedural fairness, which is one of the central issues when it comes to a review attack of this nature. I will do so under a few subheadings.

(i) **Are the impugned amendments (or the remaining one) reviewable under PAJA, or the principle of legality or not at all?**

[79] Mr Budlender, who appeared for the applicant with Mr Berger and Mr Tshetlo, argued that the amendments are reviewable both under PAJA and in terms of the principle of legality. These counsel, however, did not focus their submissions on a "PAJA review" but only on a "legality review".

Mr Maenetje SC who, with Mr Tsatsawane, appeared for the Minister, conceded that the amendments were reviewable under the principle of legality. The same goes for Mr Unterhalter SC, who, with Ms Norton, appeared for M-Net, Mr Chaskalson SC, who, as I have said, appeared with Mr Marriott and Mr Kelly for the eighth, fourteenth and fifteenth respondents and Mr Solomon SC, who appeared, with Mr Gumbi, for the sixteenth respondent.

Mr Bhana SC who, with Mr Ramaepadi and Mr Friedman, appeared for the SABC, argued that the amendments are not reviewable at all at this time.

[80] As far as a PAJA review is concerned, I find myself in respectful agreement with Mr Unterhalter's submission that the Minister has decided that, as a matter of national policy, the government-subsidised STB's will have a control system which does not include encryption capability. This decision falls within the Minister's powers under section 3(1) of the ECA and section 85(2)(b) of the Constitution. So much for the submission.

The relevant portion of section 85 of the Constitution reads as follows:

> "85. **Executive authority of the Republic. –**
>
> (1) The executive authority of the Republic is vested in the President.
>
> (2) The President exercises the executive authority, together with the other members of the Cabinet, by –
>
> (a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;

(b) developing and implementing national policy;

(c) ...

(d) preparing and initiating legislation;

(e) performing any other executive function provided for in the Constitution or in National legislation." (Emphasis added.)

The relevant portions of section 3(1) of the ECA read as follows:

"3. **Ministerial policies and policy directions.**

(1) The Minister may make policies on matters of national policy applicable to the ICT sector, consistent with the objects of this Act and of the related legislation in relation to –

(a) the radio frequency spectrum;

(b) universal service and access policy;

(c) the Republic's obligations and undertakings under bilateral, multilateral or international treatise and conventions, including technical standards and frequency matters;

(d) the application of new technologies pertaining to electronic communications services, broadcasting services and electronic communications network services;

(e) ...

(f) the promotion of universal service and electronic communications services in under-serviced areas;

(g) ...

(h) ...

(i) any other policy which may be necessary for the application of this Act or the related legislation." (Emphasis added.)

The relevant portion of the definition of "administrative action" in terms of section 1 of PAJA, reads as follows:

"'**Administrative action**' means any decision taken, or any failure to take a decision, by –

(a) an organ of state, when –

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person ...

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include –

(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e), ... of the Constitution." (Emphasis added.)

From the aforementioned, it is clear that the Minister was exercising her powers in her official capacity as a member of the executive authority of the Republic when making

policy within the ambit of the provisions of section 3(1) of the ECA and, as such, her actions fall outside the ambit of "administrative action" as defined in PAJA.

For these reasons, I have come to the conclusion that this is not a PAJA review, neither was it argued that it was, except that Mr Budlender submitted that the review could resort under PAJA, but he did not press the point before me. For present purposes, and given the urgency of the matter, I accept that the review does not resort under PAJA.

[81] Mr Bhana and his team, in their argument that the amendments are not reviewable at all, recognised the constitutional exclusion, in section 85(2)(b), of executive powers or functions of the National Executive from "administrative action" as defined in PAJA. Nevertheless, they argue that "for present purposes, the relevant aspect of the definition is 'which adversely affects the rights of any person and which has a direct, external legal effect'".

Counsel then proceed to deal, by referring to case-law, with the proper meaning of the term "direct, external, legal effect".

For example, counsel referred to *Grey's Marine Hout Bay (Pty) Ltd and others v Minister of Public Works and others* 2005 6 SA 313 (SCA). This, as I understand it, was a PAJA review. It involved a decision by the Minister to lease a portion of a property to the third respondent. It was held that the Minister's decision was made in the exercise of a public power confirmed by legislation in the ordinary course of administering the property of the state with immediate and direct legal consequences

(at least for the third respondent), and that it constituted administrative action – at 325C-E. This does not appear to be the type of executive function foreshadowed in section 85 of the Constitution, such as "developing and implementing national policy" which, as I have pointed out, is excluded from the definition of administrative action.

This conclusion, it appears to me, is fortified by what the learned Judge of Appeal said in *Grey's Marine* at 323F-324B:

> "[24] Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so. Features of administrative action (conduct of 'an administrative nature') that have emerged from the construction that has been placed on section 33 of the Constitution are that it does not extend to the exercise of legislative powers by deliberative elected legislative bodies, nor to the ordinary exercise of judicial powers, nor to the formulation of policy or the initiation of legislation by the executive, nor to the exercise of original powers conferred upon the President as head of State. Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals."
>
> (Emphasis added.)

[82] Counsel for the SABC nevertheless persist, for purposes of their argument, to enquire into whether the Minister's conduct in enacting the amendments has a direct, external, legal effect, an approach which, in my view, is more appropriate in the case of a PAJA review, where one has to determine whether or not certain conduct amounts to administrative action as intended by the PAJA section 1 definition.

In the course of their enquiry as to whether or not the BDM policy has a direct, external legal effect, counsel submitted that it was necessary "to consider what the courts have said about the making of policy". They referred me to *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 4 SA 501 (SCA). This case involves an application to review the decision by the Western Cape Gambling and Racing Board to refuse an application for a gambling licence. There is no reference to PAJA which only came into effect a few months before this case was decided. There is also no reference to a so-called legality review. The case involves the constitutional imperative of the separation of powers between the Executive and the Legislature, in this case at provincial level. It was held that the executive (or provincial cabinet) had issued a so-called policy determination which amended, diluted or led to the undoing of a legislative act by the Board. It was held, therefore, that by an executive act, a legislative act had been amended, diluted or undone. This had been beyond the power of the cabinet – at 510F-H.

[83] Counsel for the SABC point out that in explaining this approach, the learned Judge of Appeal said the following in *Akani* at 509B-F:

> "The word 'policy' is inherently vague and may bear different meanings. It appears to me to serve little purpose to quote dictionaries defining the word.

To draw the distinction between what is policy and what is not with reference to specificity is, in my view, not always very helpful or necessarily correct. For example, a decision that children below the age of 6 are ineligible for admission to a school can fairly be called a 'policy' and merely because the age is fixed does not make it less of a policy than a decision that young children are ineligible, even though the word 'young' has a measure of elasticity in it. Any course or program of action adopted by a government may consist of general or specific provisions. Because of this I do not consider it prudent to define the word either in general or in the context of the Act. I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between Legislature and Executive will disappear."

[84] In developing their rather complicated argument (namely that the impugned amendments are not reviewable) counsel for the SABC also referred me to the case of *The Minister of Education v Harris* 2001 4 SA 1297 (CC). As far as I can make out, this has nothing to do with a PAJA review or the question of administrative action as intended by the PAJA definition. The case was decided a few months after *Akani*. It also has to do with the separation of powers between the executive and the legislature. Broadly speaking, the Minister of Education is empowerd by section 3(4)(i) of the National Education Policy Act 27 of 1996 to determine national policy for "the determination of the age of admission to schools". It was held that the

Minister was not empowered by the Act to require provinces to adopt national policy to amend provincial legislation in conformity with national policy.

Counsel urged me to bear in mind that the Constitutional Court, at 1304B-E, emphasised the distinction between the determination of guiding policy, on the one hand, and its translation into legally binding enactments, on the other.

[85] It is with all this in mind, that counsel argue that the impugned amendments are not reviewable under PAJA. I have already come to the same conclusion by simply referring to the exclusion of the Minister's executive action in making the policy in terms of section 3(1) of the ECA, from the PAJA definition of administrative action.

Nevertheless, the main thrust of counsel's argument appears to be this: in terms of section 3(4) of the ECA, ICASA, in exercising its powers and performing its duties in terms of the ECA and the related legislation, must consider policies made by the Minister in terms of section 3(1) and policy directions issued by the Minister in terms of section 3(2).

Counsel submit that the making of policies in terms of section 3(1) of the ECA does not adversely affect the rights of the public and does not have a direct external, legal effect. They argue –

> "A policy does not take the form of a legislative instrument. ICASA may choose to follow some of what is in the policy, but not other parts. At the time when a policy is made, therefore, it cannot be said that it impacts directly and immediately on members of the public. Only if ICASA decides to make

regulations in respect of the subject-matter of the policy will there be any direct impact on the public or any party."

Counsel for the SABC argue that in this case, e.tv has presented no facts to suggest that the policy has a direct external legal effect.

[86] It is on this basis, essentially, as I have formulated the argument on behalf of the SABC, that only if ICASA decides to make regulations in respect of the subject-matter of the policy will there be any direct impact on the public or any party. Consequently, at least at this stage where no regulations have been promulgated, the conduct of the Minister falls outside the ambit of the PAJA definition of administrative action, so that the impugned amendments do not fall to be reviewed in terms of PAJA.

[87] Where I have already found that this is not a PAJA review because of the exclusion, in terms of section 85(2)(b) of the Constitution in particular, from the PAJA definition of administrative action, the impugned amendments are not reviewable under PAJA, it is not necessary, at this point, to decide the argument advanced on behalf of the SABC. I will revert to this argument when dealing with the question whether or not the amendments are reviewable in terms of the principle of legality. I now turn to that subject, but before doing so, and in conclusion on this particular point, it is useful to take notice of what the learned author Cora Hoexter, *Administrative Law in South Africa*, 2nd edition, has to say about executive powers and functions at pp235-237, and her remark that the section 85(2) powers (with the exception of those listed in section 85(2)(a)) resort under executive powers and functions.

[88] When considering whether the exercise of executive powers is reviewable on the principle of legality, it is useful, in my view, to record at the outset that there is no requirement that the action under attack must "adversely affect the rights of any person" and "have a direct, external legal effect", which requirement forms the basis of counsel's argument that a PAJA review is not applicable.

[89] It is also useful to quote the words of *Hoexter*, *op cit* at p122:

> "But legality also has a wider meaning that goes *beyond* administrative action, and this is probably the more common usage of the term today. Here it refers to a broad *constitutional* principle of legality that governs the use of *all* public power rather than the narrower realm of administrative action. This principle of legality (or 'legality and rationality') is an aspect of the rule of law, a concept implicit in the interim Constitution and a founding value of our constitutional order in terms of section 1(c) of the 1996 Constitution. The fundamental idea it expresses is that 'the exercise of public power is only legitimate where lawful'. Its detailed content has to be worked out from the Constitution as a whole, and this is a continuing process that the Constitutional Court embarked on in a series of cases involving non-administrative action."

For the sake of brevity I refrain from quoting the authorities listed by the learned author in the footnotes.

[90] It seems that the legality principle has been extended by the courts to include the requirement of procedural fairness, the subject which I am now attempting to decide.

[91] It appears that procedural fairness can be considered as part of the rationality element of the legality enquiry, or even as part of the lawfulness requirement or, even as a requirement on its own. *Hoexter*, p123, puts it as follows:

> "More recently, in *Albutt v Centre for the Study of Violence and Reconciliation* (my note: the reference is 2010 3 SA 293 (CC)), the Constitutional Court further expanded the principle of legality by treating procedural fairness as a requirement of *rationality*. In this important case, which concerned a special dispensation for pardoning politically motivated offenders, the court held that it would be irrational for the President to exercise his pardoning power without first hearing the victims of the offences. It is worth pointing out that it is also possible for aspects of procedural fairness to be brought in via the requirement of lawfulness, as was done for instance in *Competition Commission of SA v Telkom SA Ltd*, (my note: the reference is [2010] 2 All SA 433 (SCA)) or indeed for procedural fairness to be acknowledged as a requirement in its own right. Natural justice is, after all, an accepted part of the rule of law."

[92] In arguing that the impugned amendments are also not reviewable in terms of the principle of legality, and while recognising that the notion of "direct, external legal effect" is not encompassed in the doctrine of legality, counsel for the SABC submit that "our courts have long accepted that the issue of ripeness is applicable to judicial reviews of all varieties".

Counsel point out that the SCA (in *Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd* 2012 2 SA 16 (SCA) at paragraph [17]) has approved the following characterisation of the test given by the author *Baxter*:

"The appropriate criterion by which the ripeness of the action in question is to be measured is whether prejudice has **already resulted** or is **inevitable**, irrespective of whether the action is complete or not." (The emphasis is that of counsel.)

They emphasise that the constitutional court has also recognised the importance of ripeness when it comes to the appropriateness of the court hearing a constitutional matter (*National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others* 2000 2 SA 1 (CC) at paragraph [21]). Any review in terms of the doctrine of legality, counsel correctly point out, is a constitutional matter.

[93] Counsel then submit that, for the same reasons as advanced in respect of PAJA, a review in terms of the doctrine of legality is not now ripe for determination. "The considerations leading to the conclusion that the impugned amendments have no direct, external, legal effect, also demonstrate that the impugned amendments are not ripe for review under the doctrine of legality", so they argue.

Counsel point out that it appears from the papers that the Minister indicated in her answering affidavit that she intends to issue an instruction not to use encryption to the manufacturers of STB's, taking part in the tender which has been set in motion. Counsel also repeat the earlier argument that ICASA has not yet made regulations and that there is "no reasonable expectation" that it will do so before the STB manufacturing process commences.

The closing argument of counsel on this point is then crafted as follows:

"If the Minister issues any instruction to Set-top box manufacturers in due course, then it will be necessary to decide, at that stage, whether her instruction amounts to administrative action. If it does not, then it will no doubt be reviewable under the doctrine of legality because, at that stage (and not now), prejudice to e.tv's interests will have arisen or be inevitable. Since it is unclear now what the instruction, if any, will be, that stage cannot yet be said to have arisen."

[94] I have the following difficulties with this argument:

(1) As pointed out, the requirement of "direct, external, legal effect", is not a pre-requisite for a legality review. This much is conceded by counsel. Yet, counsel appear to persist with its reliance on the alleged importance of this notion when they seem to marry it to the issue of ripeness in this particular case. I repeat what they said in their heads of argument:

> "The considerations leading to the conclusion that the impugned amendments have no direct, external, legal effect, also demonstrate that the impugned amendments are not ripe for review under the doctrine of legality."

(2) In any event, on *Baxter*'s criterion by which the ripeness of the action in question is to be measured, I am of the view that at least on e.tv's version which still has to be tested, prejudice has already resulted or is inevitable: the Minister has, in mandatory terms, published an amendment to the policy to the effect that government subsidised STB's shall not have an encryption facility, and it is common cause that a tender process is under way. Cabinet has

approved this policy. The BDM process must also get under way as a matter of urgency, and is something that affects the whole country, for the reasons mentioned. Against this background, I consider the argument by counsel that e.tv must wait until the Minister issues an instruction to STB manufacturers before e.tv can launch a review application, to be artificial and unconvincing in these particular circumstances.

(3) As far as the ICASA regulations are concerned, this is governed by the provisions of section 4 of the ECA. As I read this section, it provides that ICASA may make regulations "with regard to any matter which in terms of this Act or the related legislation must or may be prescribed, governed or determined by regulation". I find no provision that ICASA must make regulations (emphasis added). This is also in line with submissions made by counsel for the SABC and, in later supplementary heads of argument, by counsel for M-Net. It must follow that ICASA may elect never to make regulations on this subject of government subsidised STB's. On counsel's argument, which I am revisiting, that "only if ICASA decides to make regulations in respect of the subject-matter of the policy will there be any direct impact on the public or any party", it means that there may never be the required "direct, external, legal effect" opening the door for a review challenge. This approach appears to me to be unsustainable: I cannot see how it can be understood that the Minister and cabinet can be held to ransom as it were by an indecisive communications authority when a matter of national importance, such as the production of government subsidised STB's, has to be attended to urgently.

I understood all counsel before me to subscribe to the view that the Minister was acting in terms of section 3(1) of the ECA which empowers her to "make policies on matters of national policy applicable to the ICT sector ..." The ICT sector stands for Information, Communications and Technology sector. I add immediately that this does not mean that she was "issuing" a policy because she was, in real terms, only "amending" the existing policy. I will revert to this point at a later stage. Nevertheless, it appears to be common cause between all the parties that she was acting in terms of section 3(1) and that she was empowered to do so. See my later remarks about "make", "issue" and "amend".

Moreover, section 3(4) of the ECA only provides that ICASA and USAASA, as the case may be, in exercising their powers and performing their duties in terms of the Act and the related legislation (of course, in terms of the Act, ICASA has the power to, if it so chooses, issue regulations) must consider policies made by the Minister in terms of section 3(1) and policy directions issued by her in terms of section 3(2). I do not read this to mean that either ICASA or USAASA are empowered to shoot down in flames a policy made (or amended) by the Minister, with the approval of cabinet, with regard to the make up of government subsidised STB's.

I add that in terms of the Independent Communications Authority of South Africa Act no 13 of 2000 ("the ICASA Act"), and more particularly section 4 thereof it is also provided that ICASA may make regulations on any matter consistent with the objects of this Act and the underlying statutes or that are

incidental or necessary for the performance of the functions of the Authority (emphasis added) – see section 4(3)(j).

(4) I also have difficulty in determining the relevance of counsel's apparent reliance on the issue of the Separation of Powers (as in *Akani* and *Harris*). I do not see this as a case of an executive act amending, diluting or undoing a legislative act. The executive member, herself, initiated the legislation. It appears to be common cause that the Minister acted in terms of section 3 of the ECA. Both the Minister and ICASA exercise their powers in terms of the same legislation (with the latter also operating in terms of the ICASA Act, as I have mentioned).

Moreover, I have difficulty with the argument that the enacted amendments are not binding. I revisit the words of the learned Judge of Appeal in *Akani*:

> "I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in oder to bind the public, policy should normally be reflected in such instruments."

It seems to me, where this policy was made (or amended) in terms of section 3(1) of the ECA, a step falling within the powers of the Minister, and duly promulgated and published, the amendments have become "legislative instruments", and are not mere "policy determinations". As such, they seem to me to "bind the public".

(This, of course, is subject to the question as to whether or not the requirement of procedural fairness has been met.)

Unfortunately, the terms "policy determination" or "policy direction" or "policy" are not defined in the ECA.

(5) e.tv Based its case on the three pillars on which a legality review is to be conducted: lawfulness, rationality and procedural fairness, as previously pointed out. In my view this opens the door, for all the reasons mentioned, for a legality review to be launched under these particular circumstances. Put differently, the impugned amendments (or the remaining one) is reviewable in terms of the principle of legality.

[95] I now revert to the main issue of procedural fairness before turning to the subjects of lawfulness and rationality.

(ii) **Was e.tv consulted before the amendments were enacted?**

[96] In the founding affidavit, the fourth (and last) review ground offered by e.tv is that "the impugned amendments were made pursuant to a process that was not procedurally fair".

[97] It is submitted by e.tv that the proposed amendments to the BDM policy, in respect of which comments were invited by former Minister Carrim in December 2013, were not adopted. Instead, so it is argued, and without embarking on any further public consultation process, the present Minister published the BDM policy with

amendments that are "so different from what was proposed over fifteen months ago (ie in December 2013) that a further public consultation process was required". It is argued that the making of such a policy must take place in a manner that is procedurally fair and allows for public comments to be made and taken into account. In this regard, e.tv relies on the provisions of section 4 of PAJA (which I have found not to apply) and section 3(5)(b) of the ECA and "the principle of procedural rationality that applies to the exercise of all public power".

[98] I will return hereunder to a more detailed discussion of the provisions of section 3 of the ECA.

[99] The main thrust of e.tv's complaint appears to be that what the present Minister published, was so "markedly different" from that which Minister Carrim published for public comments, that a further process of public consultation ought to have been launched before the Minister enacted the impugned amendments.

[100] I turn to "the process under Minister Carrim" as it is referred to by e.tv.

In the first place, of course, Minister Carrim's proposals were never enacted because he was replaced by the present Minister, as I have pointed out. The process under Minister Carrim is therefore different from what happened in the 2008 published policy providing 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", and the published amendments of 2012 in terms of which encryption capabilities were expressly excluded and it was only provided

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". It is therefore not clear what the status of the "Carrim proposals" are, given the fact that they were never enacted.

The proposed amendments of Minister Carrim, which is hailed by e.tv as "internally consistent and co-herent policy" represented, according to e.tv, "the compromise sought by requiring STB's to be able to allow for the encryption of broadcast signals, but leaving broadcasters free to decide whether to encrypt their signals and make use of the STB control system contemplated by the unamended BDM policy". Of course, the Minister's proposed amendment 5.1.2(C), which is not under attack in the review application, contains a similar provision namely "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".

In the record, I cannot find a basis for e.tv suggesting that Minister Carrim's proposed amendments "was the compromise sought by requiring STB's to be able to allow for the encryption of broadcast signals, but leaving broadcasters free ..." (emphasis added): the actual proposed amendments of Minister Carrim, of 6 December 2013, appearing in *Government Notice* no 37120, contain the following statements (I do not quote the actual paragraph numbers for the sake of brevity):

- "To avoid challenges in implementing the Digital Migration program, caused mainly by differences between broadcasters and also between some manufacturers, the use of a control system is not mandatory. However, the STB's will have a control system to protect government's investment in the

subsidised STB market and the local electronics industry and, with rapid technological changes, for future use by broadcasters who might not want to use it on implementation."

(This appears to me to be very much in line with what the present Minister enacted.)

- "In order for households to continue to receive television services on their current analogue TV sets after the analogue signal is switched off, Set-Top-Boxes (STB's) which convert the digital signals into analogue signals, are required." (Nothing to do with encryption.)

- "To avoid subscription broadcasters unfairly benefiting from the STB control system, government's investment in the STB control system will be recovered from those subscription broadcasters that choose to make use of the STB control system."

  (This appears to be aimed at the subscription broadcasters and not at FTA broadcasters.)

- "Have a robust STB control system that –

  (a) is not mandatory for use by broadcasters in the transmission and management of their broadcasting services;

  (b) can be used to ensure that consumers do not have to own multiple boxes for both current and future broadcasting services; and

  (c) can provide long term benefits to the broadcasting industry as a whole."

- "Enable access to a secure bootloader mechanism to ensure access to the STB control system by broadcasters on the DTT platform that choose to make use of the STB control system."

  (As I understand the position, the "bootstrap loader" is part of the STB control system proposed by the SABS, already mentioned, for subsidised STB's and has nothing to do with encryption.)

The Minister's amendment proposals, as published, appear to be based on submissions by the South African and Communications Forum, ostensibly attached to the Department of Communications, dated December 2013. Similarly, I could find nothing in those proposals, neither was I referred to anything specifically, that suggest that STB's should contain encryption capabilities. I add that, in its submission, this Forum ("SACF") points out that it represents six STB manufacturers in its Industrial Development Working Group, all of which have significant black ownership and are certified at level 2 or 3 for BEE rating. SACF points out that it has engaged vigorously to ensure that emerging manufacturers who would like to participate are not shut out of the government order for subsidised STB's as well as any commercial opportunities. I mention this, because it is clear from, for example, the argument advanced by the sixteenth respondent, representing a number of influential black organisations, that the black manufacturers are united in their opposition to the idea of introducing an encryption facility to the STB's. Against this background, it is unlikely that the SACF would have supported the introduction of such encryption capabilities for the subsidised STB's.

In the founding affidavit, e.tv relies on a statement issued by Minister Carrim on 20 December 2013 in which, according to e.tv, the Minister "set out the basis upon which the STB control requirement was to be retained and its use made non-mandatory". The statement is attached to the founding papers. The statement, dated 20 December 2013, goes under the heading "Digital Television: on Set Top Box Issues". Much of what is stated in this document is a repetition of what is contained in the published proposed amendments from which I have quoted. These are two extracts from the statement which I consider to be of some significance for present purposes:

- "We have not made a decision about the *management* of a control system. Nor do we refer at all to conditional access or encryption as methods of implementing STB control. We are saying that broadcasters are *free* to decide whether they want to use control or not. There is no compulsion. So we cannot see how we are going against the court order (my note: this is a reference to the so-called 'e.tv judgment' to which I will later refer). Furthermore, we have proposed generic control, which refers to any system which can be used to control the functions of a STB. We are not proposing a particular or specific system." (Emphasis added.)

- Under a subheading "SABC-MultiChoice agreement", the following is said:

  "The SABC does not want to use a control system. So the agreement with MultiChoice will not be affected. Our advice is that the commercial agreement only deals with the encryption of SABC channels and not with whether the STB's that are used for viewing SABC services have a control system or not. So the SABC is free not to use

> the control system in the transmission and management of its channels, and its agreement with MultiChoice will not be affected." (Emphasis added.)
>
> It is clear from my earlier discussion on the SABC's submissions, that the latter is directly opposed to the introduction of an encryption facility for the STB's subsidised by the government.

Against this background, I see nothing in Minister Carrim's 20 December 2013 statement (ostensibly relied upon by e.tv) which could have brought e.tv or any of the other role players under the impression that government subsidised STB's were to be provided with an encryption capability.

Finally, and what may have been Minister Carrim's last throw of the dice on this particular subject, one finds, attached to the founding papers, a presentation by the Communications Department, dated 18 February 2014, on the "Broadcast Digital Migration Amendments Gazetted on 6 December 2014". This is quite a lengthy document, but I find nothing in this presentation which would suggest the provision of encryption capabilities for government subsidised STB's. The presentation is one to the Portfolio Committee on Communications. The following statements in this presentation appear to me to be significant for present purposes:

- The Portfolio Committee was reminded that the 2008 BDM policy stated that the STB's would have a control system to:
  - "(i) protect government's investment in subsidised STB's;
  - (ii) protect consumers from low quality non-conformant STB's;
  - (iii) unscramble encrypted signals;

(iv) stimulate local electronic manufacturing industry;

(v) prevent the STB's from being used outside South Africa and to disable stolen STB's;

(vi) allow for mass and unique messaging, inter-activity with government."

(Emphasis added.)

The presentation then goes on to state:

> "In 2012, an amendment to the BDM policy was gazetted to soften the use of the STB control system. For example, encryption was dropped but STB control maintained to ensure that STB's conform to SABS (South African Bureau of Standards) standards." (Emphasis added.)

- Nowhere in this presentation (which was launched under the watch of Minister Carrim) do I find any indication to the effect that "encryption was re-introduced" or something similar. The last mention of encryption, as far as I can see, was the announcement that "encryption was dropped". This is also in line with what Minister Carrim said in his 20 December 2013 statement that

> "We have not made a decision about the *management* of a control system. Nor do we refer at all to conditional access or encryption as methods of implementing STB control ..."

[101] Against this background, I have difficulty in finding such a "marked difference" between Minister Carrim's proposals and what is contained in the impugned amendments that it necessitated a further public participation process before the impugned amendments could be enacted. This conclusion is perhaps fortified by the

fact that a number of role players made submissions to the Minister, mainly in January 2014, following the proposals of Minister Carrim. For example, in their lengthy submission dated 5 January 2014, e.tv, *inter alia*, makes the following statement:

> "The SABC went on to say that 'the SABC, e.tv and other free-to-air broadcasters may independently and individually decide how they wish to manage their STB's'. This could perhaps have been better put by substituting the words 'manage their STB's' with the words 'manage their signal'. That is in fact the position that the department has now arrived at – free-to-air broadcasters can now decide how they wish to manage their signal and whether that signal will be encrypted. e.tv Can see no reason why those broadcasters opposing encryption, having been given the right to choose whether or not to encrypt their signals, should continue to object to STB control."

At the risk of repetition, I repeat what was said in the impugned amendment 5.1.2(C), which is not subject to the review attack, that individual broadcasters may at their own cost make decisions regarding encryption of content.

In their submission, e.tv also says the following:

> "For the record, e.tv states that it will be making use of the STB Control system to encrypt its DTT channels irrespective of whether other free-to-air channels choose to do so."

This is fighting talk. The only difficulty I have with this statement is that e.tv, for the reasons mentioned earlier, now appears to insist on the government funding the