encryption facility for the sake of e.tv's own business plans and financial well-being. For a court to support such a stance, in the face of the National Executive's decision about the ordering of public resources, and not paying for an encryption facility for subsidised STB's, would, of course, be at odds with what was said by the Constitutional Court in *National Treasury, supra*, as illustrated in the passages already quoted.

Some of the other role players who made written submissions to the Minister, mainly in January 2014, include: the SABC, M-Net, ACT-SA (seventh respondent), NAMEC (this appears to be the NAMEC faction constituting the sixteenth respondent, which opposes the idea of encryption), SACF, already referred to, SENTECH, Cell C, Telkom, Tellumat and SOS.

The question of encryption was dealt with in a number of these submissions, in addition to, of course, those made by e.tv. As can be seen from the list of these role players, it includes a number of the respondents now before the court who oppose the idea of encryption for FTA broadcasters in the DTT environment.

[102] I mention this because of e.tv's complaint that it was not fully consulted and given the opportunity to make further submissions before the impugned amendments were enacted. This is the basis of the fourth review ground, namely that the process preceding the amendments was not procedurally fair. In her opposing affidavit, the Minister deals with the subject as follows:

> "3.3.5 In its January 2014 written submissions to the Minister, the applicant made submissions relating to the mandatory or non-mandatory use of

the control system on STB's. In paragraphs 3.3 to 3.11 thereof, the applicant again made extensive submissions relating to the encryption of its broadcast signals.

13.36 In paragraphs 3.3 to 3.11 of its written submissions, the applicant made the same grounds in support of encryption as are contained in its present founding affidavit. In the premises, I respectfully submit that there was no obligation upon the Minister to again consult with the applicant on issues in respect of which the applicant had already made extensive written submissions. The suggestion that the Minister ought to have again consulted with the applicant in respect of such issues is unsustainable."

It is correct that the submissions by e.tv on encryption in those paragraphs mentioned by the Minister are, indeed, extensive, and largely correspond with the submissions in the founding affidavit, made in support of the benefits of encryption. Of course, those submissions are comprehensively criticised by, *inter alia*, M-Net and the SABC, as I have explained.

[103] At this point, it is convenient to record that it was common cause before me that, where the applicant seeks final relief on affidavit, the well-known "rule in *Plascon-Evans*" applies. This, of course, is a reference to *Plascon-Evans Paints v Van Riebeeck Paints* 1984 3 SA 623 (AD) where the following is said at 634E-I with reference to, *inter alia*, the following *dictum* from *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 4 SA 234 (C) at 235E-G which is quoted with approval:

> "... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order ... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."

The Appellate Division, as it then was, also re-affirms that this rule applies not only to interdicts but other forms of final relief sought on affidavit in motion proceedings. Consequently, it was common cause before me that the case made out by the respondents on the merits (or lack thereof) of encryption in the FTA DTT environment is to be accepted and the case presented by the applicant rejected.

[104] I return briefly to some further submissions made by the Minister with regard to the fourth review ground, namely that based on alleged procedural unfairness. For the sake of brevity, I will briefly summarise some of the submissions: as far as the encryption amendment is concerned, provision for encryption capability was removed from the policy as far back as February 2012. e.tv Did not at that stage approach the court to complain about the removal of the encryption capability from the policy in 2012. What the Minister did in March 2015, was to clarify the government's position due to the fact that extensive written submissions on encryption had already been made (as I described earlier). The Minister denies that there was no proper consultation with e.tv on the subject. The fact that Minister Carrim may have intended to reach a compromise as far as allowing STB's to have encryption capability is concerned (something which, as explained, I could not find support of in the record). The Minister was not bound to agree with FTA broadcasters that government

subsidised STB's will have encryption capability. The government decided as far back as in 2012 that it will not finance encryption capability on government subsidised STB's. The Minister denies e.tv's submission that the present amendments differ markedly from the previous state of affairs. e.tv Did not raise anything new in its founding affidavit that had not been raised in the written submissions of January 2014. The Minister submits that she is not in law bound to accept each and every proposal made to her by interested parties. She was only in law required to consider the written submissions made to her. This she has done. It is not suggested in the founding affidavit that the Minister did not consider and apply her mind to the proposals that were submitted in January 2014 by all interested parties.

[105] On this subject of consultation, it is useful to mention that counsel for M-Net, Mr Unterhalter and Ms Norton, in supplementary heads of argument, and on the subject of procedural fairness, referred me to some English cases namely that of *R v Shropshire Health Authority and Secretary of State ex parte Duffus* cited with approval in *R (Smith) v East Kent National Health Service Trust* [2002] EWHC 2640 (Admin) where it was pointed out that a consultation procedure will inevitably yield new proposals and there must be a limit to the repetition of consultation, among other things because there will be parties with a legitimate expectation that a decision will be taken. The following was said by the English courts:

> "A consultation procedure, if it is to be as full and fair as it ought to be, takes considerable time and meanwhile the underlying facts and projections are changing all the time. It is not just a question of an iterative process, which can speedily be run through a computer. Each consultation process if it produces any changes has the potential to give rise to an expectation in others,

that they will be consulted about any changes. If the courts are to be too liberal in the use of their power of judicial review to compel consultation on any change, there is a danger that the process will prevent any change – either in the sense that the authority will be disinclined to make any change because of the repeated consultation process which this might engender, or in the sense that no decision gets taken because consultation never comes to an end. One must not forget there are those with legitimate expectations that decisions will be taken."

In my view, this approach is particularly compelling where it is a matter of urgency for the digital migration process to get under way and to reach a conclusion. It is a matter of national importance. Encryption has been on the table at least since the 2008 publication of the policy. Many role players, including e.tv, have made substantial submissions on the pros and cons. Indeed, e.tv, at an earlier stage, even made written submissions condemning encryption. In this regard, it is useful to quote the following extract from M-Net's answering affidavit:

"37. In submissions to the Department of Communications dated 17 March 2008 (the 2008 e.tv submissions annexed as KW1) e.tv furnished the following reasons for its opposition to a control system with encryption (which it called a 'CA system'):

37.1 CA is a subscription television concept and is '*wholly unsuited to free-to-air television*';

37.2 the inclusion of CA in the basic free-to-air STB '*raises critical constitutional, economic, financial and competition issues*' and '*infringes on the right of viewers to freedom of expression*';

37.3 the inclusion of CA in the basic STB would add '*complexity and expense*' to the entire digital migration process;

37.4 '*the use of CA in a free-to-air environment is highly unusual and untested in comparable jurisdictions*';

37.5 '*it would ... cause unnecessary complications down the line, especially when integrated digital TV-sets are introduced into the market*'.

(As is evident from its founding affidavit, e.tv now holds a position which directly contradicts the views it expressed in 2008. It does not offer any meaningful explanation as to why its position has changed.)"

Of course, as I indicated earlier, Mr Budlender, correctly, reminded me that anyone is entitled to change its mind.

In its opposing affidavit, M-Net also, in later paragraphs, quote from the e.tv 2008 submissions where it laments the extra costs that will arise from the implementation of CA in the basic free-to-air STB. For the sake of brevity, I will not repeat the quotation (paragraph 69 of the M-Net affidavit) but will quote what is said in paragraph 70 by M-Net:

"At the time these submissions were made, e.tv anticipated that these costs would impact adversely on the future of its business:

'4.1.1.4 *e.tv is deeply concerned that the addition of extensive operating costs by the unnecessary inclusion of CA in the basic free-to-air STB will be passed to broadcasters. As a free-to-air broadcaster which is entirely dependent on advertising revenue*

and which has no access to public or state funding e.tv is concerned at the implications on the future of its business of the unnecessary inclusion of CA in the basic free-to-air STB.'"

I consider it unnecessary to deal with further extracts, presented by M-Net, from e.tv's 2008 submissions.

[106] In conclusion, e.tv has had a full bite at the cherry. It should not be seen to complain about a lack of consultation. It has made full use of its ample opportunity to express its views. It did so over a period of some seven years, covering both sides of the coin.

Each case must be considered on its own facts. In my view, the "consultation requirement" such as it may be, has been met in this particular case by the Minister and her predecessors.

(iii) <u>Was there compliance with the provisions of section 3(5) and other subsections of section 3 of the ECA?</u>

[107] Mr Chaskalson, for the eighth, fourteenth and fifteenth respondents who support the application, presented argument on the question of procedural fairness.

[108] Before turning to Mr Chaskalson's submissions with regard to compliance with section 3(5) of the ECA, and other subsections, I deal with another aspect of his argument, which overlaps with the section 3 argument. It is this:

"... where an organ of state is obliged to publish an instrument for public comment before promulgation, if it proposes to make far-reaching changes to

> the instrument following receipt of those comments, it must be re-published for comment before promulgation."

In this regard, counsel relies on the judgment in *Kouga Municipality v Bellingan* 2012 2 SA 95 (SCA) at 99F-I. This involved the publication by a municipality of a proposed by-law advertised in 2004, and another (amended) by-law advertised in 2006. It was held that the later changes to the draft by-laws made available pursuant to the first publication in 2004 were far-reaching. The learned Judge of Appeal then observes, at 99G,

> "As the court *a quo* correctly held, not every change has to be advertised otherwise the legislative process would become difficult to implement; but here the two sets of proposed by-laws were so markedly different that republication of the revised draft was necessary to meet the legislative requirements of the Constitution and the Systems Act."

The central submission of counsel, in developing this argument, is the issue which I have already dealt with at some length, namely that the impugned amendments reveal a marked change from what was suggested by Minister Carrim. Of course, the argument rests on the submission that Mr Carrim provided for subsidised STB's to be fitted with an encryption facility, whereas the impugned amendment decrees the opposite.

In his comprehensive heads of argument, counsel summarises the amendments proposed by Minister Carrim, as counsel sees them, and states the following:

"First, subsidised and non-subsidised Set-top boxes ('STB's') would have to include an '*STB control system*' that would have the capability to 'decrypt' encrypted broadcast signals."

The authority for this statement, which counsel relies on in his footnote 14, reads as follows: "See the amendment proposed to paragraph 5.1.2.7(a), volume 7, page 590." I have already dealt with this document but take the liberty to revisit the passage quoted by counsel, which forms part of Minister Carrim's proposed amendment published on 6 December 2013, as I have illustrated earlier:

"**Amendment of paragraph 5.1.2.7 of the Policy**

Paragraph 5.1.2.7 of the Policy is amended –

(a) by the substitution for paragraph 5.1.2.7 of the following paragraph:

'5.1.2.7 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;"

I fail to see any suggestion in this subparagraph relied upon by counsel to the effect that the STB control system, of subsidised and non-subsidised STB's, "would have the capability to 'decrypt' encrypted broadcast signals".

There is also a subparagraph (b), which counsel does not appear to rely on, but which may be of relevance:

> "(b) by the insertion after paragraph 5.1.2.7 of the following paragraph:
>
> '5.1.2.7(A) 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.'"

It may be, although no such submission was ever made to me, that the involvement of subscription broadcasters, who generally, it seems, make use of encryption procedures, as pointed out earlier in this judgment, could suggest that an encryption facility may be available. This is speculation. It was never illustrated to me where the Minister decrees that subsidised STB's will be fitted with an encryption facility. This I have dealt with at some length. In any event, if there was a hint of encryption in this publication dated 6 December 2013, which I still cannot find, it would have been put in realistic perspective by the 20 December 2013 statement by Minister Carrim, which I have also dealt with, where he says, *inter alia*:

> "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 ..."

[109] To fortify his submission that the differences between the proposed 2013 amendments and the BDM policy (presumably a reference to the impugned amendments) "are so stark" that the Minister was required to follow the procedure prescribed in section 3(5)(b), namely that the intention to amend had to be published in a gazette with an invitation to interested parties to submit written submissions, counsel makes the following further points:

(i) the "STB control amendment" (the one that has been abandoned) provides for the manufacture and use of STB's *without* any STB control system. This is clearly incorrect, It is obvious, from a reading of 5.1.2(A), with 5.1.2(B)(b) that the subsidised STB's will be fitted with an STB control system to protect the government investment in the subsidised STB's; and

(ii) the BDM policy (presumably including the impugned amendments) "does not provide for STB's to have technology to enable them (to) provide a government messaging service to users via (*sic*)". It is suggested that the 2012 policy provided for individual STB's to be "addressable", ie to facilitate government messaging services. This is also, with respect, clearly wrong: the SABS national standard, to which I have referred, and which, it is common cause, will be applicable to the subsidised STB decoders, will have the following main functional elements specified for security:

> "a) a secure over-the-air software and bootstrap loader;
>
> b) a mechanism to prevent STB decoders from functioning in non-RSA DTT networks;
>
> c) <u>STB control system that will enable mass messaging</u>." (Emphasis added.)

[110] Against this background, I am not persuaded that this case falls inside the ambit of the rule in *Kouga*, where the new enactments are so "markedly different" that republication of the revised document was necessary. This conclusion, in my view, must also be fortified by the fact that most, if not all, of the role players made detailed and lengthy written submissions to the Minister in January 2014 after the December 2013 publication of the planned policy changes. The Minister also states unequivocally that she considered all these submissions before deciding on the impugned amendments.

[111] It is also useful, at this point, to refer to an argument offered on this subject by counsel for M-Net. Without quoting all the judgments referred to, the argument can be summarised as follows: an interpretation of statutory procedural requirements in respect of policy formulation must take account of the central constitutional principle of the separation of powers. Section 85(2)(b) of the Constitution accords the executive the power to make policy, and the courts have recognised that a measure of deference is required in respect of the exercise of power. A key consideration is that the executive should not be unduly limited in the formulation of policy. Counsel then quote the following passage from *Premier, Mpumalanga v Association of State-Aided Schools* 1999 2 SA 91 (CC) at 109H-110B:

> "In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the

need to ensure the ability of the Executive to act efficiently and promptly."
(The emphasis is that of counsel.)

It should be recorded, however, that, in the same passage, the learned Judge cautions against flouting the important principle of procedural fairness. It seems that every case must, in this regard, be judged on its own facts. As counsel for M-Net put it, a proper balance has to be struck between the duty to consult and the need for decisions to be taken by government. It is also at this point of their argument, that counsel for M-Net mentioned the English authorities, to which I have referred, that courts must be slow to compel consultation on any change, and guard against the situation where "consultation never comes to an end". The details have been mentioned.

[112] As already pointed out, the eighth respondent (or at least one of the two factions) and the fourteenth and fifteenth respondents have both made submissions to the Minister on this subject. The fourteenth respondent even issued a press statement. I have dealt with the opportunities given to e.tv to make submissions. Given the circumstances of this particular case, and the urgency and importance of the matter, I have come to the conclusion that the "consultation requirement" has been properly met.

[113] I turn to the provisions of section 3(5) and other subsections.

[114] Section 3(5) provides:

"(5) When issuing a policy under subsection (1) or a policy direction under subsection (2) the Minister –

(a) must consult the Authority (read ICASA) or the Agency (read USAASA), as the case may be; and

(b) must, in order to obtain the views of interested persons, publish the text of such policy or policy direction by notice in the *Gazette* –

(i) declaring his or her intention to issue the policy or policy direction;

(ii) inviting interested persons to submit written submissions in relation to the policy or policy direction in the manner specified in such notice in not less than thirty days from the date of the notice;

(c) must publish a final version of the policy or policy direction in the *Gazette*." (Emphasis added.)

It is worth noting that subsection (5) was only inserted by legislation (section 3 of Act 1 of 2014) with effect from 21 May 2014, which was well after the 2008 publication of the policy, the 2012 published amendments and the December 2013 published intention of further amendments. It was also well after most of the role players made their written submissions during or about January 2014.

[115] Mr Chaskalson and his team argued that the Minister failed to comply with the provisions of section 3(5): there is no clear indication on the papers that she consulted with ICASA and USAASA, and it is common cause that she did not publish an invitation to interested persons to submit written submissions in relation to the amendments before enacting them. Counsel described this perceived failure as "fatal".

[116] I have already, at some length, dealt with the Minister's response in her answering affidavit. She referred to the extensive submissions already made by e.tv and others, also on the question of encryption. She denies that she did not consult with interested parties, although she does not specifically mention ICASA and USAASA. She pleads that she was not in law required to consult on the exact wording of the intended amendment. She was only required to consult about the issues in respect of which amendments were sought to be enacted, and these were covered in the December 2013 invitation. She pleads that the question whether she consulted with e.tv in relation to the impugned amendments must also be answered with reference to the policy published on 8 September 2008, the amendment published on 7 February 2012, another amendment published on 17 February 2012 and the December 2013 invitation to comment. She pleads that e.tv did not have to be consulted again (her emphasis) about encryption capability because encryption capability had already been removed from the policy in February 2012 and e.tv had made written representations in relation to encryption as set out in her answering affidavit (details of these I have quoted). To this can perhaps be added the clarification contained in the December 20 statement by Minister Carrim and the contents of the written submission to the Portfolio Committee.

In addition, the Minister pleads that she met with various stakeholders on aspects of the policy in an attempt to reach an agreement but no agreement materialised. She argues that it is not relevant whether e.tv took part in these meetings because consultation had already taken place as mentioned. She also argues that "it is not

entirely clear that section 3 places an obligation to consult each time there is an amendment to the BDM policy". I will revert to this subject.

[117] In view of the rule in *Plascon-Evans*, I must accept the Minister's version that she consulted with interested parties, considered all the written submissions and also consulted with stakeholders in an attempt to facilitate an agreement, and that she did all this before the March 2015 enactment of the amendments.

[118] I turn to making a few observations about section 3(5):

1. The subsection prescribes what the Minister must do when issuing a policy under subsection (1) or a policy direction under subsection (2). (Emphasis added.)

2. I first deal with the issuing of a policy direction under subsection (2), because, in my view, it is not applicable for present purposes.

   Subsection (2) was only enacted with effect from 21 May 2014. It stipulates that "The Minister may, subject to subsections (3) and (5), issue to the Authority (read ICASA) or, subject to subsection (5), issue to the Agency (read USAASA) policy directions consistent with the objects of this Act, national policies and of the related legislation in relation to –

   (a) the undertaking of an enquiry in terms of section 4(B) of the ICASA Act ...;

   (b) the determination of priorities for the development of electronic communications networks and electronic communications services or

any other service contemplated in chapter 3 (chapter 3 concerns the licensing framework);

(c) the consideration of any matter within the Authority's or the Agency's jurisdiction reasonably placed before it by the Minister for urgent consideration;

(d) guidelines for the determination by the Authority of spectrum fees; and

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

Subsection (3) stipulates that "no policy made by the Minister in terms of subsection (1) or policy direction issued by the Minister in terms of subsection (2) may be made or issued regarding the granting, amendment, transfer, renewal, suspension or revocation of a licence, except as permitted in terms of this Act". This is clearly not applicable for present purposes.

In the matter now before me, there is nothing on record about "policy directions" issued by the Minister to either ICASA or USAASA or both. It is also doubtful whether any of the examples mentioned in subsection (2), about what policy directions may be issued about, directly apply to this case. In any event, it is not even clear what exactly a "policy direction" is, because it is not defined in the Act.

Subsections (6), (7) and (8) also appear to be confined to provisions relating to policy directions. Subsection (6) stipulates that the provisions of subsection (5) do not apply in respect of any amendment by the Minister of a policy

direction contemplated in subsection (2) as a result of representations received and reviewed by him or her after consultation or publication in terms of subsection (5). Subsection (7) stipulates that subject to subsection (8) a policy direction issued under subsection (2) may be amended, withdrawn or substituted by the Minister. Subsection (8) provides that except in the case of an amendment contemplated in subsection (6) the provisions of subsection (3) and subsection (5) apply, with the necessary changes, in relation to any such amendment or substitution of a policy direction under subsection (7).

Consequently, it appears that the provisions of subsections (6), (7) and (8) are confined to the amendment, withdrawal or substitution of policy directions contemplated in subsection (2), which I have found not to be directly applicable to this case.

3. I now return to what I consider to be the main issue for consideration when deciding whether or not there was compliance with subsection (5). Subsection (5) instructs the Minister what to do "when issuing a policy under subsection (1)" (emphasis added):

(i) Of course, the reference to subsection (1) is important. It stipulates that the Minister may make policies on matters of national policy applicable to the ICT sector (emphasis added).

(ii) In my view, the Minister already took the step to make the policy in 2008.

The "contents" stipulation on the second page of *Government Gazette* no 31408 of 8 September 2008 only refers to one item: "Electronic Communications Act (36/2005): Broadcasting Digital Migration Policy".

On page 3, the introductory paragraph is short and sweet:
"I, Dr Ivy Matsepe-Casaburri, Minister of Communications, hereby in terms of section 3(1) of the Electronic Communications Act, 2005 (Act no 36 of 2005), make the Broadcasting Digital Migration Policy in the schedule."

The "schedule" is simply the main document entitled Broadcasting Digital Migration Policy for South Africa and dated August 2008.

The policy is a comprehensive affair: it contains a list of acronyms, a foreword by the Minister, acknowledgements and an executive summary as well as an introduction. Then follows a number of subjects under particular headings in the table of contents as well as a conclusion.

This document is far removed from anything resembling the amendments which came about in 2012 and 2015, let alone Minister Carrim's notification of proposed amendments (which were, in any event, never enacted).

(iii) In my view it is clear that what Minister Matsepe-Casaburri did in September 2008, namely to make the policy, is exactly what the legislature had in mind when enacting subsection (5). The subsection states, in clear and unequivocal terms, what the Minister must do when issuing a policy under subsection (1), which has to do with the making of the policy like the Minister did in 2008. The use of the word "make" in subsection (1) is even more clear and unequivocal. There is no need to look for an alternative word.

The *Concise Oxford Dictionary* defines "issue" as "send forth; publish, put into circulation, (notes, newspaper, etc)". This would seem to represent the initial act of launching or "creating" the notes or the newspaper.

The same dictionary defines "make" as "construct, frame, create, from parts of other substances" and, later, "cause to exist, bring about" and, later, "establish, enact (distinctions, rules, laws)".

This is a far cry from the definition of "amend" in the same dictionary: "correct error in (document); make proposed minor improvements in (motion etc. under discussion); make better; minor improvement in document, eg added article in US Constitution".

I also compared the definitions for the same words in volume 1 of the *Shorter Oxford English Dictionary*, which is a much more voluminous

affair. The relevant definitions are comparable. "Amend" for example is "correct (a textual error); better, improve; make minor improvements in (a parliamentary bill, a motion etc under discussion)". This is not what the Minister did in 2008 or what the legislature had in mind when enacting subsection (1) and subsection (5). It is what the Minister did in March 2015.

(iv) Subsections (1) and (5) are completely silent on the subject of amending the policy. Why should the act of amending the policy (what the Minister did in 2015) be read into the act of making or issuing (the same act, because the two subsections must be read together) the policy?

If the legislature had wanted to prescribe to the Minister what to do when (or before) amending the policy, it could have said so: it had no difficulty to provide for the issue of a policy direction, and then to prescribe what had to happen (or need not happen) in the event of the amendment of a policy direction. See subsections (6), (7) and (8). Indeed, in subsection (8) the legislature makes an amendment of a policy direction (barring an amendment in terms of subsection (6)) subject to the requirements of subsection (5). The legislature does nothing of the sort when it comes to a policy (as opposed to a policy direction) because the legislature, as pointed out, is completely silent on the subject of the amendment of a policy.

The legislature's determination to limit the provisions of subsection (5) to the issue of the policy (which, for reasons mentioned, is the same as making the policy) is evident from the provision in subsection (5)(b)(i) which only links the issue of the policy to the required publication in the *Gazette* declaring the Minister's intention to issue the policy and to call for submissions. Not a word about an amendment to the policy. (The underlining, in each instance, is obviously my own).

The author J R de Ville, *Constitutional and Statutory Interpretation* says the following on page 51:

> "8. **Statutory interpretation**
>
> 8.1 **The approach of the Courts**
>
> *Venter v R* (the reference is 1907 TS 910 at 913) is still regarded as the *locus classicus* insofar as the approach of interpretation of statutes by the courts is concerned. The aim of interpretation was there stated as being – 'to ascertain the intention which the legislature meant to express from the language which it employed. By far the most important rule to guide courts in arriving at that intention is to take the language of the instrument, or of the relevant portion of the instrument as a whole; and, when the words are clear and unambiguous, to place upon them their grammatical construction and to give them their ordinary effect.'"

(v) I have already expressed the view that the wording employed by the legislature in subsections (1) and (5) (and in subsections (6), (7) and (8) for that matter) are clear and unambiguous. The legislature gave unequivocal instructions as to the rules to be applied when it comes to the amendment of a policy direction but remained completely silent with regard to an amendment to the policy.

(vi) For all these reasons, I have come to the conclusion, and I find, that the provisions of subsection (5) do not apply to the amendments to the policy which form the subject of this case. In view of the authority referred to, I find that such a conclusion is in harmony with the intention of the legislature, when enacting subsections (1), (5), (6), (7) and (8). Indeed, it is also in harmony with the provisions of subsection (4):

> "The Authority (read ICASA) or the Agency (read USAASA), as the case may be, in exercising its powers and performing its duties in terms of this Act and the related legislation must consider policies made by the Minister in terms of subsection (1) and policy directions issued by the Minister in terms of subsection (2)." (Again, my emphasis.)

4. There is no complaint before me by the applicant that the Minister did not meet the requirements of subsection (5) when she made the policy in 2008, about seven years ago. This is not the case of the applicant.

It is also not the applicant's case that the Minister failed to consult with ICASA and USAASA when making the policy in 2008, as required by subsection (5)(a).

It is, in any event, clear from a general reading of the papers that ICASA and USAASA were involved in the process at all relevant times. The following references bear testimony to this:

(i) On 14 December 2012 ICASA promulgated the Digital Migration Regulations in *Government Gazette* no 36000 dated 14 December 2012. The introductory paragraph reads as follows:

> "I, Doctor Stephen Mncube, chairperson of the Independent Communications Authority of South Africa ('the Authority') hereby approve and publish the Digital Migration Regulations set out in the Schedule and made by the authority in terms of sections 30(2)(c) and (d) read with sections 4(1)(a), (b) and (d) of the Electronic Communications Act, 2005 (Act no 36 of 2005). The Broadcasting Digital Migration policy for South Africa which was issued by the Minister of Communications in terms of section 3(1) of the Act and published under *Government Notice* 958 and *Government Gazette* 31408 of 8 September 2008 (as amended and published under *Government Notice* 124 in *Government Gazette* 35051 of 17 February 2012) <u>has been considered by the authority</u>." (Emphasis added.)

(ii) On the strength of the powers vested in it by the ECA, USAASA issued the tender for the manufacture of STB's. On 6 January 2015, it issued a press statement, a copy of which is attached to the founding papers, which reads as follows:

> "The agency (read USAASA) further informed the Committee that in the interest of time it thought it was prudent to initiate the tender process calling for quotation for both encryption and non-encryption Set-top-boxes system.
>
> USAASA was mindful of the fact that a Policy decision had not been concluded, but was concerned about its ability to meet the deadline of 17 June 2015 as set by the International Telecommunications Union.
>
> In consultation with the Executive Authority, USAASA issued an invitation to tender that sought quotations for both control and non-control set-top-boxes. This was done to ensure that by the time a Policy Directive is finalised by Cabinet, time consuming administrative processes would also been concluded (*sic*)."

Indeed, even if I am wrong in concluding that subsection (5) does not apply to this case, it appears from the aforegoing, on the probabilities, that ICASA and USAASA were involved in the process at all relevant

times, so that, to that extent, there would have been at least substantial compliance with the requirements of subsection (5)(a). As to subsection (5)(b), I have found, for reasons mentioned, that the "consultation requirement" had, in any event, been met.

[119] For all these reasons I have come to the conclusion, and I find, that the impugned amendments were made pursuant to a process that was procedurally fair. It follows that the fourth ground of review cannot be sustained. It also means that one of the three "legs" on which a legality review is based, namely a lack of procedural fairness, has not been proved by the applicant. See the remarks by *Cora Hoexter* (already quoted) on page 123 of her work.

[120] I turn to the remaining two "legs" or requirements to be proved for a successful legality review. These are the issues of lawfulness and rationality.

Lawfulness

[121] I earlier dealt with the author *Cora Hoexter*'s overview of the subject when she said "the fundamental idea it expresses is that 'the exercise of public power is only legitimate where lawful'". She submitted that "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" (the author refers to the principle of legality). She then point out that "in the first of these, *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* (the reference is 1999 1 SA 374 (CC)) the court identified the principle of legality and described it as an aspect of the rule of law".

In *Fedsure*, the learned Judge says the following at 400D-F:

> "It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely to hold that fundamental to the interim Constitution is a principle of legality."

The central issue is that a body exercising public power (in the case of *Fedsure*, a municipality making original legislation in the form of budgetary resolutions), had to act within the powers lawfully conferred on it.

[122] In the present case, it is clear that the Minister, when enacting the impugned amendments, did so on the strength of the authority vested in her in terms of section 3(1) of the ECA. This also appears from *Government Notice* no 38583 of 18 March 2015 in which the amendments were published. In this sense, it seems to me that the requirement mentioned in *Fedsure* has been met by the Minister.

[123] The issue of lawfulness forms the basis of e.tv's first ground of review which is labelled as follows in the founding affidavit: "The encryption amendment is *ultra vires* the Minister's powers."

[124] Significantly, e.tv's case as far as this review ground is concerned is based entirely on what it considers to have been held in the so-called "e.tv judgment" to which I will refer hereunder.

It is convenient, for illustrative purposes, to quote the relevant paragraphs from the founding affidavit:

> "116. e.tv's First ground of review relates to the lawfulness of the Minister's decision. e.tv Contends that the impugned amendment (this is the encryption amendment) is *ultra vires* the Minister's powers.
>
> 117. This is made clear by the e.tv judgment. In the case, the South Gauteng High Court held at paragraph [37] that '*the Minister does not have the power to prescribe to FTA broadcasters how they should manage STB's*'. It held at paragraph [50] that neither does she have the power '*to make or prescribe binding decisions relating to STB control*' ...
>
> 120. I am advised to submit that:
>
> 120.1 it is an elementary principle of the rule of law and principle of legality that members of the executive may exercise no power and perform no function beyond that conferred upon them; and
>
> 120.2 a decision can be unlawful because either its purpose or effect is unlawful.
>
> 121. In the present case, whatever the intent of the Minister, the effect of her amendment is plainly *ultra vires* her powers.
>
> 122. On this basis alone, the Minister's decision to enact clause 5.1.2(B)(a) is unlawful. This is so both under sections 6(2)(a)(i) and 6(2)(f)(i) of PAJA and under the principle of legality."

I have held that this is not a PAJA review.

[125] What is glaringly absent from e.tv's case on the question of lawfulness is any reference whatsoever to section 3(1) of the ECA. This is where one finds the power conferred upon the Minister to legislate as she did.

[126] I turn to the "e.tv judgment".

It is (unreported) case no 34694/2012 heard by Pretorius AJ in the South Gauteng High Court on 22 October 2012. The judgment is dated December 2012. It is the case of:

E.TV (PTY) LTD	*APPLICANT*
AND	
MINISTER OF COMMUNICATIONS	*1ST RESPONDENT*
SENTECH LTD	*2ND RESPONDENT*
INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA ("ICASA")	*3RD RESPONDENT*
SOUTH AFRICAN BROADCASTING CORPORATION LTD ("SABC")	*4TH RESPONDENT*

[127] The case involves an attack on the then Minister's decision to instruct Sentech Ltd to assume responsibility for the STB control system for FTA digital terrestrial television.

[128] The relief sought in the notice of motion was:

"2. The decision of the Minister of Communications of 10 May 2012 to instruct Sentech Ltd to assume responsibility for the set-top-box control system for free-to-air digital terrestrial television is declared to be unlawful and of no force and effect and is reviewed and set aside;

3. it is declared that e.tv (Pty) Ltd and the South African Broadcasting Corporation Ltd and other free-to-air broadcasters are responsible for the set-top-box control system for free-to-air digital terrestrial television."

[129] The relief granted was along the lines of the prayers in the notice of motion. The second paragraph was made subject to the regulatory powers of ICASA.

[130] The reasoning of the learned Judge is based to a large extent, if not entirely, on the distinction between the roles, in terms of the ECA, of the Minister on the one hand and ICASA on the other. The learned Judge says the following:

"[32] The ECA makes a clear distinction between roles, power and of the Minister and ICASA. The Minister's role is limited to the development of policy. ICASA regulates."

And –

"[37] If one has regard to the clear distinction in the ECA between the authority and power of the Minister to make policy, and the power and obligation of ICASA to consider such policy when regulating the broadcasting industry, it is clear to me that the Minister does not have the power to describe (*sic,* should read prescribe) to free-to-air

broadcasters how they should manage their set-top-boxes. Even if she had such powers, her decision would have been administrative action as part of policy execution rather than policy formulation."

In this regard, the learned Judge refers, *inter alia*, to *Grey's Marine*, which I have dealt with. The learned Judge also states:

"[50] I have already found that the fact that the Broadcasting Digital Migration Policy has been published, does not give the Minister the right to prescribe to free-to-air broadcasters who should manage set-top-box control. The only authority that may regulate this, is ICASA ..."

[131] As far as I can make out, this case does not deal with subsidised STB's. It most certainly does not deal with the power of the Minister, as a member of the Executive, to make policy that will determine the technical make-up of the subsidised STB's, and to decide how the government's funds will be spent in this regard. It is useful to revisit what was said in *National Treasury* at 241F-H:

"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."

[132] The "terms of reference" which the Minister had in mind for Sentech (and which was successfully challenged on review) is contained in a letter which the Minister wrote on 10 May 2012 to the SABC chairperson. She states that her office investigated technologies required to perform STB control functions in the DTT network. The recommendations she received included the need for robust STB control in the DTT network to confirm the BDM policy, the appointment of Sentech which had "an existing STB control system used on their satellite transmission network, which can also meet the STB control requirements needed in the DTT network" and that the existing system at Sentech meets the requirements needed for the DTT project, so that a completely new system was not required. The subject of the financing of subsidised STB's did not arise.

[133] I find myself in respectful agreement with the submissions by counsel for M-Net, which I take the liberty to summarise: the Minister has not breached any binding *ratio* of the e.tv judgment. In the e.tv judgment, which did not concern policy made by the Minister under section 3(1) of the ECA, but a decision made by the Minister to appoint an entity to "*assume responsibility*" for STB control, the narrow issue before the court was whether the Minister was entitled to determine who should "*manage*" the control system in STB's (where, on the facts before the court, STB control "*management*" involved the selection and appointment of a suitable STB control vendor).

e.tv Relies on the court's statements that the Minister does not have the power to prescribe to free-to-air broadcasters how they should manage STB's, has no legal

power to prescribe or make binding decisions relating to STB control and ICASA is the only authority that may regulate who should manage STB control.

Counsel then make the following point: the Minister, in deciding, as a matter of policy, that the government subsidised STB's will not contain encryption capability, made no binding decisions relating to STB control, did not prescribe to free-to-air broadcasters how they should "*manage*" STB's and did not purport to regulate who should "*manage*" STB control. (The emphasis is that of counsel.)

[134] Counsel for the SABC also pointed out that the learned Judge, in the e.tv judgment, specifically emphasised that the Minister may make policy decisions on the subject. Nothing in the judgment undermines the clear text of section 3 of the ECA. In particular, nothing in the judgment serves to undermine the power of the Minister to make policy on "the application of new technologies pertaining to ... broadcasting services" and "any other policy which may be necessary for the application" of the ECA and the related legislation. On the contrary, the reasoning in the judgment affirms this power.

[135] In all the circumstances, it is clear, in my view, that the argument advanced by e.tv to the effect that the Minister's actions were unlawful, is misplaced: it is clear that she acted in terms of the powers conferred upon her by the ECA and, in that way, met the standard of lawfulness required in terms of the principle of legality. Consequently, the first review ground has to fail.

[136] I have dealt with the fourth review ground (procedural fairness) and the third review ground is based on the (abandoned) argument involving 5.1.2(A) which has to be read with 5.1.2(B)(b). In this, third, ground of review e.tv attacks the "non-mandatory STB control amendment", which features the argument about the "drafting error". I have dealt with this aspect and the fact that it was abandoned. I pay no further attention to the third ground of review.

[137] I turn to the only remaining ground of review which is labelled "the encryption amendment is irrational and unreasonable".

Is the encryption amendment irrational and unreasonable?

[138] As I understand the *Hoexter* overview, this is the only remaining requirement to be taken into account when deciding whether or not the legality standard has been met.

[139] What falls to be decided, is whether the Minister's decision to enact the "encryption amendment" (5.1.2(B)(a)), was rational and reasonable.

[140] I already touched on this subject in paragraph [52] of this judgment, when dealing with the argument by the respondents (which version I have to accept) that the use of an encryption facility in the FTA DTT environment is to be condemned in the strongest terms, and also flies in the face of the world-wide approach. It is against this background that the SAB submits, and I agree with the submission, that a choice by government (and the Minister) not to subsidise an encryption capability in STB's is entirely rational and reasonable. Equally, so the SAB submits as I have pointed out, 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.

[141] I can do no better than to summarise an extract from the argument submitted on behalf of the SABC:

1. Citizens should not be placed in a worse position after digital migration than they were before it. It should be possible, therefore, for them to receive the broadcasts that they received before migration, after migration.
2. Because the majority of the population will not be able to afford the STB's that will allow this to happen, government has decided to provide 5 million STB's for free. It has made this decision within the budgetary constraints that it operates under and subject to competing demands for state resources.
3. Because of the expense involved in government's commitment, it has decided to use a control system to protect its investment.
4. The SABS standard that gives effect to the control system does not specify encryption as an element of the security system. It is the government's view that encryption is unnecessary to protect its investment and to ensure smooth migration (to this may be added the compelling and wide ranging criticism of the use of encryption in the FTA DTT environment which criticism, no doubt, the Minister took into account because she states emphatically, and I must accept her version, that she considered the submissions made in January 2014 after Minister Carrim's invitation was published), and also consulted with role players.

5. Encryption software is very expensive. Using it will require subscriber management, which would give rise to financial and human resources costs for government.

[142] Counsel for the SABC also, correctly in my view, reminded me of what was said in *Albutt, supra*, at 313C-E, on the test for rationality:

> "What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution."

In this case, as counsel submitted, the means selected by government are indeed rationally related to the objective sought to be achieved.

[143] In all the circumstances, I am satisfied that the decision taken by the Minister, and the executive action she performed, were reasonable and rational so that this ground of review (the second ground in terms of the founding affidavit) is also not sustainable, and falls to be rejected.

[144] I add that, in their heads of argument, counsel for e.tv sought to introduce new grounds of review which, as pointed out by Mr Unterhalter, they were not allowed to do. The grounds for any review as well as the facts and circumstances upon which the applicant wishes to rely have to be set out in the founding affidavit – see *Telcordia Technologies Inc v Telkom SA Ltd* 2007 3 SA 266 (SCA) at 287A-B.

[145] In any event, I am not persuaded that these "new" grounds have any merit. They are summarised by Mr Unterhalter and Ms Norton in supplementary heads of argument:

1. The Minister misunderstood the effect of the encryption amendment. I see no basis for this argument: the Minister stated that she studied and considered all the written submissions made, including those dealing with encryption. She consulted a variety of role players. This evidence of the Minister must be accepted, in view of the rule in *Plascon-Evans*.
2. The encryption amendment is not rationally connected to the purpose the Minister sought to achieve. This argument I have just dealt with.
3. The encryption amendment increases the possibility of the wastage of public funds. On the version which I have to accept, the opposite is true.
4. The encryption amendment is not rationally connected to the information before the Minister. I see no basis for this argument. Counsel for M-Net also, correctly, point out that each of these "new grounds" rests on factual allegations which have not been canvassed in the respondents' papers because they were not raised in e.tv's founding affidavit.

Conclusion

[146] In all the circumstances, and for the reasons mentioned, I have come to the conclusion, and I find, that the application cannot be sustained, and falls to be dismissed.

Costs

[147] Mr Budlender argued that in the event of e.tv being unsuccessful, it should not be ordered to pay the costs of the respondents. He argued that this is a "constitutional

matter" and referred me to the case of *Biowatch Trust v Registrar, Genetic Resources, and others* 2009 6 SA 232. Mr Budlender also argued, surprisingly, that in the event of e.tv being successful, the respondents ought to be ordered to pay e.tv's costs. Mr Budlender made these submissions at the end of his address in reply, and did not deal with the subject in any detail. I consulted some of the authorities.

[148] In *Biowatch,* the constitutional court stated the following at 245C-246A:

> "In *Affordable Medicines* (the full reference is *Affordable Medicines Trust and others v Minister of Health and others* 2006 3 SA 247 (CC) at paragraph [139]) this Court held that as a general rule in constitutional litigation, an unsuccessful litigant in proceedings against the State ought not to be ordered to pay costs. In that matter a body representing medical practitioners challenged certain aspects of a licensing scheme introduced by the government to control the dispensing of medicines. Ngcobo J said the following:
>
> 'The award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations. One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. The *rationale* for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule. There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that

which is just having regard to the facts and the circumstances of the case. In *Motsepe v Commissioner for Inland Revenue* (the citation is 1997 2 SA 898 (CC) at 911E-912A) this Court articulated the rule as follows: "One should be cautious in awarding costs against litigants who seek to enforce their constitutional right against the State, particularly where the constitutionality of the statutory provision is attacked, lest such orders have an unduly inhibiting or ""chilling"" effect on other potential litigants in this category. This cautious approach cannot, however, be allowed to develop into an inflexible rule so that litigants are induced into believing that they are free to challenge the constitutionality of statutory provisions in this Court, no matter how spurious the grounds for doing so may be or how remote the possibility that this Court will grant them access. This can neither be in the interests of the administration of justice nor fair to those who are forced to oppose such attacks."" (Emphasis added.)

[149] In *Motsepe,* the applicant, who had been involved in a sequestration application, sought a referral of certain sections of the Income Tax Act, 58 of 1962, to the Constitutional Court, as the applicant was challenging the constitutionality of those sections. The application was dismissed with costs – see the judgment at 912A-G.

[150] As I mentioned earlier, Mr Budlender's submission on costs, which I referred to, came right at the end of the proceedings, so that I did not have the benefit of argument on this issue by any counsel. Counsel for e.tv did not ventilate the subject in their heads of argument and opposing counsel all asked simply for the application to be dismissed with costs, including the costs of two counsel.

Mr Chaskalson, for the eighth, fourteenth and fifteenth respondents, who support the application, pointed out that NAMEC is an industry body established to promote the local electronics industry, and in particular the involvement of black owned small and medium enterprises in the digital migration process. SOS is a civil society coalition that comprises a broad range of non-governmental organisations and individuals including the MMA (the fifteenth respondent) and they campaign for open, competitive and high quality public broadcasting that is in the public interest. Consequently, as public interest bodies, these three respondents are not seeking costs, irrespective of the outcome of the application, and are also asking for no costs orders to be made against them. I will respect the request. On the other hand, counsel for the sixteenth respondent, which is a faction of the eighth respondent, asked for costs against the applicant, in the event of the latter being unsuccessful. Although this is a most unusual situation, with the one faction asking for costs and the other not, I can see no reason, in principle, why the request of the sixteenth respondent should not be respected, in the event of a favourable result from its point of view.

[151] Without having had the benefit of argument on the subject, it still seems to me that the enquiry, in this case, will be whether there are circumstances that justify a departure from the "general rule" in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay the costs – *Biowatch* at 245E-G.

It also seems to me that the following remarks of the learned Judge in *Motsepe*, just before he pointed out that the rule was not inflexible, and went on to dismiss the application with costs, may also be of relevance in this particular case:

"One should be cautious in awarding costs against litigants who seek to enforce their constitutional right against the state, particularly where the constitutionality of the statutory provision is attacked ..." (Emphasis added.)

Motsepe at 911E-G.

Although this case does, in a strict sense, involve "constitutional litigation" because one has to consider a legality review, I have difficulty in recognising a "constitutional right against the state" in favour of e.tv, in terms of which the latter can claim such a constitutional right to insist on the subsidised STB's being fitted with an encryption facility. There is also no question of the constitutionality of any statutory provision being attacked.

As I attempted to illustrate earlier, the application appears to be inspired by pure commercial motivation. This much appears from e.tv's own allegations in the founding affidavit, which also contains no proper explanation why e.tv cannot simply dispense with encryption in the FTA environment, like all its opponents and most FTA broadcasters around the world, and like it has been doing up to now.

e.tv Also states in the founding affidavit that it was, at all relevant times, aware of the opposition to the notion of introducing encryption in the FTA DTT environment. e.tv Nevertheless elected to forge ahead with this application, on affidavit, with the spectre of *Plascon-Evans* looming in the background.

[152] In giving e.tv the benefit of the doubt, I shall refrain from holding that the litigation is "frivolous or vexatious" or that the application is based on spurious grounds.

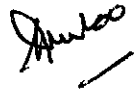
[153] Nevertheless, after due reflection, I have come to the conclusion that this is an appropriate case to deviate from the "general rule", inasmuch as it may be applicable to the present circumstances, and to order that the costs should follow the result so that the unsuccessful litigant has to pay the costs.

It remains to be added that, although the seventh respondent filed the "explanatory affidavit" referred to, and also had the benefit of Ms Pillay holding a watching brief, it did not actively take part in the proceedings, and also indicated in the explanatory affidavit, as I have mentioned, that it "neither supports nor opposes the relief sought by e.tv". In these circumstances it appears to me that it will be inappropriate to grant costs in favour of the seventh respondent.

The order

[154] I make the following order:

1. The application is dismissed.
2. The applicant is ordered to pay the costs of the first, fifth, sixth and sixteenth respondents which will include the costs flowing from the employment of two counsel.



W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

HEARD ON: 26 & 27 MAY 2015
FOR THE APPLICANT: S BUDLENDER,
ASSISTED BY J BERGER AND R TSHETLO
INSTRUCTED BY: NORTON ROSE FULLBRIGHT

FOR THE 1ST RESPONDENT: H MAENETJE SC
ASSISTED BY K TSATSAWANE
INSTRUCTED BY: GILDENHUYS MALATJI INC

FOR THE 5TH RESPONDENT: A R BHANA SC
ASSISTED BY M RAMAEPADI AND A FRIEDMAN
INSTRUCTED BY: BAFANA NCUBE INC

FOR THE 6TH RESPONDENT: D UNTERHALTER SC
ASSISTED BY M NORTON
INSTRUCTED BY: WERKSMANS ATTORNEYS

FOR THE 7TH RESPONDENT: Ms PILLAY (WATCHING BRIEF)
INSTRUCTED BY: WEBBER WENTZEL ATTORNEYS

FOR THE 8TH, 14TH AND 15TH RESPONDENTS: M CHASKALSON SC
ASSISTED BY G MARRIOTT AND L KELLY
INSTRUCTED BY: NORTONS INC

FOR THE 16TH RESPONDENT: R A SOLOMON SC
ASSISTED BY M GUMBI
INSTRUCTED BY: MOTA ATTORNEYS