IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No:
GP Case No: 51159/2021

In the matter between:

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

FOUNDING AFFIDAVIT: URGENT DIRECT APPEAL

I, the undersigned,

PHILLIPA RAFFERTY

do hereby make oath and declare as follows:

1 I am the Group Executive Legal and Regulatory of eMedia Investments (Pty) Ltd., the holding company of the applicant, e.tv (Pty) Ltd. ("**e.tv**"). I am duly authorised to depose to this affidavit on e.tv's behalf.

2 The facts contained in this affidavit are true and correct and fall within my personal knowledge, unless otherwise indicated or apparent from the context. To the extent that I rely on information provided to me by others, I believe such information to be correct and I ask for same to be admitted. Any legal submissions are made on the advice of e.tv's legal representatives, which advice I believe to be correct.

SUMMARY OF THIS APPLICATION: URGENT DIRECT APPEAL TO PROTECT THE RIGHTS OF MILLIONS OF INDIGENT SOUTH AFRICANS

3 This is an urgent direct appeal to this Court against the High Court's dismissal of an urgent application instituted by e.tv. The central issue in this case is the constitutional rights of millions of indigent and vulnerable South Africans who are reliant on analogue television broadcasting to access news, information and entertainment. These millions of South Africans are imminently to have their televisions signals cut off through a precipitous and unlawful analogue

switch-off ("**ASO**") by the Minister of Communications and Digital Technologies ("**Minister**") in violation of their constitutional rights. This has occurred in circumstances where the Minister has failed to comply with her constitutional obligations and has not justified this significant and widespread violation of rights, and has taken the decision to switch-off analogue transmission in a manner which is procedurally and substantively unfair. This renders the Minister's ASO determination constitutionally invalid, and requiring just and equitable relief.

4 e.tv seeks to directly appeal to this Court on an urgent basis, to require the Minister to comply with her constitutional obligations to respect, protect, promote and fulfil the rights in the Bill of Rights, and for the protection of these millions of South Africans and to protect e.tv's own rights, as set out in the founding papers in the High Court.

5 In brief, e.tv asserts that the Minister bears an obligation under section 7(2) of the Constitution not to retrogressively deprive South Africans of rights that they have previously enjoyed, including the right to receive information, a component of the right to freedom of expression (guaranteed and protected in terms of section 16).[1] This obligation is heightened in the circumstances of

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[1] See South African National Defence Union v Minister of Defence and Another 1999 (4) SA 469 (CC) at para 7; S v Mamabolo (e.tv and Others Intervening) 2001 (3) SA 409 (CC) at para 37; and Islamic Unity Convention v Independent Broadcasting Authority and Others 2002 (4) SA 294 (CC) at paras 25-30. See also the minority judgment of Mokgoro J in Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others 1996 (3) SA 617 (CC) at paras 25-27:
"But my freedom of expression is impoverished indeed if it does not embrace also my right to receive, hold and consume expressions transmitted by others. Firstly, my right to express myself is severely impaired if others' rights to hear my speech are not protected. And secondly, my own right to freedom of expression includes as a necessary corollary the right to be exposed to inputs from

this case where the Minister has, for nearly a decade, made repeated, serious promises that those who are reliant on analogue broadcasting and who do not have the means to self-migrate to a digital television or decoder will be provided with a government-sponsored set-top box, to ensure that they are not left in the dark come ASO. Remarkably, the High Court chose to ignore a majority decision of this Court dealing with the binding effect of such promises – expressly choosing to reject the majority views of this Court in favour of the minority.

6 Despite these constitutional obligations, and despite the public promises of various successive Ministers, the Minister on 28 February 2022 gazetted an ASO date of 31 March 2022 that would leave millions of indigent South Africans without access to television broadcasting.

7 On the Minister's own version, based on her Department's assessment of what the Minister averred were the most reliable statistics available, there are at least **3.75 million** indigent **households** that may be eligible for government assistance. Of those, only 660 661 households had received set top boxes as at 10 March 2022. The rest – some **3.1 million households** or **10.23 million people**[2] – face a blackout as at the date of ASO.[3]

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others that will inform, condition and ultimately shape my own expression. Thus, a law which deprives willing persons of the right to be exposed to the expression of others gravely offends constitutionally protected freedoms both of the speaker and of the would-be recipients."

[2] The StatsSA data records that there are on average 3.3 people per household in South Africa.

[3] The Minister went on at the hearing to undertake to at least install a further 610 000 boxes before ASO (which at that stage was just two weeks away); however, the High Court did not consider the Minister's promises feasible. Accordingly, the Court ordered her to do so by the extended ASO date of 30 June 2022. Even assuming that the Minister's undertaking will be effected (which we dispute on her own evidence of the rate of rollout), **8 million** people will be left behind.

8 e.tv approached the High Court on an urgent basis to ensure that these millions of South Africans, who are reliant on the Government to "digitally migrate" them, and who have been promised the necessary social assistance (in the form of Government-provided set-top-boxes ("**STBs**") to access digital television) are not to be left behind, while the wealthier members of society migrate into a new digital future.

9 The digital migration process, which will be concluded on the ASO date, is, as the Government's own Digital Broadcasting Policy recognises, the process of migrating our nation and its people to the devices that will allow them to access digital television, once analogue television is switch-off. A key component of that process is ensuring that indigent South Africans – who cannot afford to "self-migrate" by buying expensive televisions or data services from mobile operators – are provided with the means through STBs to continue watching the news, sport and entertainment on their analogue televisions.

10 e.tv argued that the Minister's actions are plainly unconstitutional, unreasonable, irrational, and unfair:

10.1 The Minister failed to consult properly with it or the public in relation to both the date for analogue switch-off, proclaimed on 28 February 2022 as being 30 March 2022, and the belated announcement on 6 October 2021 to impose an early cut-off date of 31 October 2021 for the indigent to register for Government installed set top boxes – which the

Government has repeatedly committed to provide to *all* indigent households.

10.2 The cut-off date for registration was imposed with no more than three weeks' notice (and for the majority of beneficiaries much less, if any notice), with the predictable result that literally millions did not register in time.

10.3 The result of this unilaterally and precipitously imposed deadline is that less than one third of households who qualify for the critical set top boxes (being 1.2 million out of 3.75 million) would be provided with a STB.[4] And even for those who had made the deadline, as at 10 March 2021, just three weeks before the ASO deadline, the Minister begrudgingly (only after the first day's full argument) indicated to the Court that she had installed only 660 661 boxes – little more than *half* of the number required for the registered households alone (ignoring the late registered households and the remaining millions of indigent South Africans).

11 e.tv's application was supported by Media Monitoring Africa and SOS Support Public Broadcasting ("**MMA and SOS**"), public interest NGOs, who intervened in the application in the public interest and placed evidence before the court regarding the unconscionable impact that an unreasonably imposed switch-off would have on the rights of the affected South Africans.

[4] Minister's answering affidavit, paras 256-259.

12 The High Court (per Acting Justice Msimang, Acting Justice Lukhaimane and Acting Justice Le Roux) dismissed e.tv's application (order 2) and ordered e.tv to pay costs (order 6). A copy of the judgment is annexed marked "**CC1**".

13 For the reasons discussed below, e.tv seeks leave to appeal against the dismissal of its application, including its application to adduce further evidence (**order 2**), and the order that it pay costs (**order 6**).

14 In dismissing the application, the High Court found that millions of South Africans who will lose access to television broadcasting entirely have "*no standing*" to challenge the decision.[5] But the Court then went on to accept that there was a potential risk to rights posed by the Minister's insistence on 31 March as the hard switch off date. The Court thus felt moved to grant a three-month extension of the ASO date (till **30 June 2022**) because it was clear that the Government had not adequately catered for even those indigent households who had managed to register for set-top boxes before the artificial cut-off imposed by the Minister on almost no notice.

15 But its concern was limited to those that had managed to register on time, as reflected in its extension of the ASO date. The rest of its judgment reflects a refusal to deal at all with the main thrust of the argument of the applicants (e.tv and the intervenors) that the Minister's decision and promulgation of the ASO date constituted a breach of section 7(2) of the Constitution and an impermissible and unjustifiable retrogressive deprivation of rights. Not a word

[5] Judgment, para 56.

is said about this central feature of e.tv's case, and which part of the case was firmly supported by MMA and SOS.

16 The effect of the judgment is that the Minister's ASO proclamation is effectively suspended for three months, but that the unlawfulness of the proclamation remains. Indeed, the extension is simply intended to allow the Minister time to install set-top boxes for those who registered by 31 October 2021 (a date selected without consultation and on no proper notice). The 30 June 2022 date is similarly arbitrary: it was not proposed by any of the parties, but selected by the Court in circumstances where, as I explain below, there is no evidence that the Minister will be able to meet the deadline (and what evidence there is, suggests she cannot come close to meeting it).

17 The judgment expressly ensures that all other indigent South Africans who rely on analogue television, in the millions, will be cut off and lose access come 30 June 2022. This includes at least over 260 000 households (representing over 800 000 South Africans) that registered between 31 October and 10 March 2022, since the judgment only requires them to be provided with STBs three months after the extended ASO date of 30 June 2022. And it extends to many millions more -- some 3.1 million households or 10.23 million people – who are clearly indigent and who have not registered under the Minister's deadline of 31 October 2021.

18 In reaching this decision, as I demonstrate below, the High Court ignored, or refused to apply, the binding and applicable authority of this Court in relation to the state's constitutional duties, including the duty to respect, promote and

fulfil the constitutional rights, to justify any limitation of those rights, and to fulfil promises lawfully and seriously made.

19 In the circumstances, the High Court's judgment justifies the urgent attention and correction of this Court. This must occur prior to 30 June 2022, to vouchsafe the right of millions of indigent South Africans.

20 It is therefore necessary and in the interests of justice for this Court urgently and finally to determine the appeal, as the ultimate guardian of the Constitution and the rights enshrined therein. Indeed, the effect of the High Court judgment, if left unchallenged, is to give a judicial imprimatur to the switch-off on 30 June 2021 that will retrogressively leave millions of South Africans who currently access television broadcasting through analogue means without access to television.

21 e.tv seeks to have this wrong corrected by this Court, and to ensure that the Minister complies with her constitutional obligations to conduct a lawful ASO process, to provide set-top boxes to those who require them *prior* to switch-off, to protect vulnerable and indigent South Africans against retrogressive violations to their rights, and properly and transparently to account to the country and the Court about the steps taken to fulfil those obligations.

22 The risk to millions of people is not only highlighted by MMA and SOS alongside e.tv. It is also the concern of the SABC, a respondent in this very matter. Indeed, after the High Court hearing, but *before* judgment, the public broadcaster, SABC, issued a public media statement. While the High Court

erred in refusing to admit it, the SABC's statement highlights the significant constitutional issues at stake, the material threat to the rights of millions of indigent South Africans, and the need for the transparent accounting by the Minister. The SABC felt compelled to challenge the Minister publicly, recording that:

> "The SABC believes that the extension of the ASO timetable will ensure that no South African is left behind or denied access to Free-To-Air television and public television services. The plan to switch off all ATV transmitters by 31 March 2022, despite the slow progress of STB registrations and installations, **presents an unsustainable risk to the rights of millions of indigent households**.... **A premature switch-off will deprive millions of people from important public television services. ...** As at February 2022 only 165,000 STBS **out of the 2.9m indigent households** (5.7%) had been installed in the four outstanding provinces. **This number is simply too low for the SABC's ATV services to be switched off in the four largest provinces, at this stage.** The SABC engages with the Digital Migration Project mindful of its inescapable constitutional and legal obligations to the people of South Africa. The corporation will do everything possible within the Intergovernmental Relations Framework and the law **to safeguard its interests and protect the rights of every citizen to access public television services**."[6]

23 These are the words of an organ of state, not e.tv, MMA or SOS. It too sees the "unsustainable risk to the rights of millions of indigent households", the "inescapable constitutional and legal obligations to the people of South Africa", and the need to "protect the rights of every citizen to access public television services". The fact that it felt compelled to express these concerns publicly, demonstrates the significant constitutional and public importance of this case, and the urgency.

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[6] After the application to adduce this evidence was lodged, e.tv's attorneys became aware that in MMA and SOS's separate application to place this information before the High Court, the SABC issued a letter in which it indicated that it did not wish to become involved in these proceedings. No such letter has to date been received by e.tv's attorneys.

24 This country finds itself at a watershed moment with the move to digital television. That process has been rushed and mismanaged, in a way that threatens to violate the rights of millions of poor South Africa. The High Court has, with respect, ignored these severe and unjustified consequences. Given that the ASO date is now imminent (having merely been pushed out till 30 June 2022, but with the Minister flouting her obligations, refusing to accept duties of candour or consultation, and with no realistic possibility (on her own evidence) to ensure that millions are not left behind, it is essential that this Court as the ultimate guardian of the Constitution, and final arbiter, urgently determines this matter.

25 In what follows, I address:

25.1 the parties;

25.2 the background to the application – the stalled digital migration process and the precipitous rush to completion;

25.3 the interests of justice and prospects of success – in addressing these I will set out e.tv's grounds of appeal and the appropriate constitutional relief that the High Court should have granted;

25.4 the need for a direct appeal to this Court;

25.5 urgency, and the conditional leave to appeal application to the SCA that will be instituted out of an abundance of caution, should this Court refuse leave to appeal.

PARTIES

26 The Applicant is **e.tv**, with its principal place of business at 5 Summit Road, Dunkeld West, Johannesburg. e.tv is South Africa's biggest independent and free-to-air television channel and the only non-state broadcaster of free-to-air television news in South Africa. Established in 1998, e.tv is the most viewed English television channel in South Africa.

27 The First Respondent is the **MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES** (*"Minister"*). The Minister is cited in the application as the responsible Minister under the Electronic Communications Act 36 of 2005 (*"ECA"*) and because she is the custodian of the digital migration process, which forms the subject of this application. It is the Minister who took the ultimate decision regarding the digital migration process and who gazetted the date for analogue switch-off, originally as 31 March 2022 (subsequently extended by the High Court to 30 June 2022). The Minister's offices are at iParioli Office Park, 1166 Park Street, Hatfield, Pretoria.

28 The Second Respondent is the **INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA** (*"ICASA"* or *"the Authority"*), established in terms of section 3(1) of the Independent Communications Authority of South Africa Act 13 of 2000 (ICASA Act). Its registered offices are at 350 Witch-Hazel Ave, Eco- Park Estate, Centurion.

29 The Third Respondent is the **CHAIRPERSON OF ICASA**, with his principal place of business at 350 Witch-Hazel Ave, Eco-Park Estate, Centurion.

30 I will refer to the Second and Third Respondents collectively as "*ICASA*".

31 The Fourth Respondent is the **NATIONAL ASSOCIATION OF BROADCASTERS** ("*NAB*"), a voluntary association with its principal place of business at 410 Jan Smuts Avenue, Burnside Island Office Park, Building No 8, Ground Floor, Craighall, Randburg.

32 The Fifth Respondent is the **SOUTH AFRICAN BROADCASTING CORPORATION LIMITED** ("*SABC*"). The SABC is a public company with limited liability and incorporated in terms of the company laws of South Africa, and the Broadcasting Act 4 of 1999. The SABC's main place of business is at Broadcasting Centre, Henley Road, Auckland Park, Johannesburg. The SABC is a public free-to-air terrestrial television broadcaster.

33 The Sixth Respondent is **VODACOM (PTY) LIMITED** ("*Vodacom*"). Vodacom is a private company, registered and incorporated in accordance with the company laws of South Africa. Vodacom's registered office and place of business is at Vodacom Corporate Park, 082 Vodacom Boulevard, Voda Valley, Midrand, Gauteng. By all measures, i.e. network capacity, subscribers, and gross revenue, it is the largest of all the mobile operators. It commands more than 50% of gross revenues in this market and is the dominant cellular provider in South Africa.

34 The Seventh Respondent is **MTN (PTY) LIMITED** ("*MTN*"). MTN is a private company, registered and incorporated in accordance with the company laws of South Africa. MTN's registered office and place of business is at 216 14th

Avenue, Fairland, Roodeport, Gauteng. MTN is the second largest mobile operator by revenue, subscribers, and network capacity. Together, Vodacom and MTN command over 76% of the subscribers in this market and over 78% of the annual gross revenues in the mobile market. The mobile market is thus characterised as effectively being a duopoly.

35 The Eighth Respondent is **CELL C (PTY) LIMITED** ("*Cell C*"), a private company, registered and incorporated in accordance with the company laws of South Africa. Cell C's registered office and place of business is at Waterfall Campus, corner Maxwell Drive and Pretoria Main Road, Buccleuch, Gauteng.

36 The Ninth Respondent is **TELKOM SA SOC LIMITED** ("*Telkom*"). Telkom is a company registered in terms of the company laws of South Africa, with its registered address at Highveld Technical Park, 61 Oak Avenue, Centurion, Gauteng.

37 The Tenth Respondent is **WIRELESS BUSINESS SOLUTIONS (PTY) LIMITED T/A RAIN** ("*Rain*"). Rain is a private company, registered and incorporated in accordance with the company laws of South Africa. Rain's place of business is at The Main Straight 392 Main Road, Block D, Bryanston, Sandton.

38 The Eleventh Respondent is **LIQUID TELECOMMUNICATIONS SOUTH AFRICA (PTY) LIMITED** ("*Liquid*"). Liquid's registered office and place of business is at 401 Old Pretoria Main Road, Midrand, Gauteng.

39 The Twelfth Respondent is **SENTECH SOC LIMITED** ("*Sentech*"), a state-owned company offering digital content delivery services to public and commercial entities, with its main place of business situated at Sender Technology Park, Octave Road, Honeydew, Gauteng. Sentech was cited in the High Court application given that it is the entity responsible for giving effect to analogue switch-off by turning off the analogue transmitters, and given that there is an extant contract between e.tv and Sentech in terms of which Sentech broadcasts e.tv's television programmes through its analogue transmitters.

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

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

42 The Thirteenth and Fourteenth Respondents intervened in the proceedings brought by e.tv and were joined as the Second and Third Applicants before the High Court.

43 Of the other respondents, only the Minister, ICASA, and Vodacom participated in the proceedings before the High Court, opposing the relief sought by e.tv and MMA.

THE DIGITAL MIGRATION PROCESS

44 In simple terms, digital migration is a process of moving (migrating) from the use of analogue forms of broadcasting to digital ones. At the end of the digital migration process, which terminates on the analogue switch off date, all analogue television broadcasting will cease. When this occurs, e.tv's current allocation of the necessary analogue frequency spectrum for its analogue broadcasting will come to an end. There will be no more analogue broadcasts of e.tv's channel, SABC, local community television, or any other channels.[7]

45 The process of digital migration commenced some 14 years ago in 2006. The original aim was for the process to be completed in 2011, but the programme suffered what the Minister decried as "*serious setbacks*". In 2016, the "*dual illumination period*" commenced, which entails the simultaneous analogue and digital broadcasting of existing television channels on a simulcast basis; however, thereafter the process of digital migration once again ground to a halt until early 2021.

46 Currently 36% of the television audience in South Africa (over 5 million households), who are mostly indigent and reliant on Government to provide

[7] Digital Migration Regulations, GN 1070 in *GG* 36000 of 14 December 2012.

them with set-top boxes, still access television solely through analogue broadcasting, and cannot "self-migrate" because of their socio-economic status. It is because of that reality, that Government has accepted an obligation to assist them.

Public promises of set top boxes throughout the digital migration process

47 Throughout the 16-year process of digital migration, the Government and the various incumbent Ministers have had to face the fact that many millions of South Africans cannot afford to migrate to digital, without social assistance. In other words, without Government assistance they would be deprived of their existing access to all broadcasting. For that reason, the Government repeatedly and publicly committed to the provision of set-top boxes (or other means of accessing digital broadcasts) for those who are reliant on analogue broadcasting and cannot afford to self-migrate, and to do so *before* the analogue switch off takes place.

48 These promises are contained in:

48.1 The 2008 Broadcasting Digital Migration Policy;

48.2 The 2012 amendment to the Digital Migration Policy;

48.3 The 2015 amendment to the Digital Migration Policy (I note that the High Court erred in holding that in the Digital Migration Policy, as amended in 2015, "*no commitment was made with (sic) the provision*

of STBs".[8] But the Court is clearly wrong: the Digital Migration Policy, as amended in 2015, continued to retain the promise that:

> *"2.1.4 Government has decided, as a matter of policy, to consider finding the means to make STBs affordable and available to the poorest TV-owning households. This support by Government should be seen as part of its commitment to bridging the digital divide in South Africa. The Government has therefore decided, as mandated by section 88(1)(a) of the Electronics Communications Act (ECA), to subsidise poor TV households through the Universal Service and Access Fund (USAF)."*[9])

48.4 Various public announcements by the Minister, in which it has been confirmed that the Government will provide set top boxes to those households that are dependent on social grants or earning R3500 per month or less (which Government's own publicly announced estimates put at 3.75 million households), including as recently as 5 October 2021 where the Minister recorded:

> "*2.1 The government undertook to assist beneficiary households (households earning total salary of less than R3500 per month) with installation of set-top-boxes to ensure universal migration. The process of registering beneficiary households to be supported commenced in 2015 and to date 1.184 million qualifying households have been registered out of an estimated 3.75 million qualifying households (as per StatsSA 2018 data).*"
>
> And further:
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> "4.1 *To give effect to a successful Digital Migration and Analogue Switch-off, we have to ensure that everyone who needs to migrate from analogue to digital is ready to do so and are not negatively affected by the Switch-Over from Analogue to digital.*"

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[8] Judgment para 42.
[9] Broadcasting Digital Migration Policy Published under GN 958 in GG 31408 of 8 September 2008, as amended by GN 97 in GG 35014 of 7 February 2012, as amended by GN 232 in GG 38583 of 18 March 2015. Emphasis added.

48.5 On oath before the High Court where the Minister indicated her intention to "*ensure that all qualifying households receive STBs*" and that government "*will not be leaving any South Africans behind*"; and

48.6 On oath before this Court in ***Electronic Media Network Limited*** with this Court recording "*Set top boxes will be required for the foreseeable future until television sets with the technology to unscramble digital signals are accessible to all.* ***These boxes will thus be needed by the financially under resourced, for as long as television sets with signal unscrambling capabilities are beyond reach.***"[10]

The 6 October 2021 scramble – register in three weeks or be left behind

49 After years of inaction about the digital migration process, on 6 October 2021, the Minister made two announcements out of the blue:

49.1 First, that a cut-off date for the registration for set-top boxes which the Government had promised to provide to indigent viewers of analogue television, would now be imposed, and that this cut-off date was set for three weeks later, at 31 October 2021 (***the STB registration cut-off date***). This meant that any person who failed to register by 31 October 2021, would not receive a set-top box or means to access digital television prior to the switch-off date;

[10] Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others [2017] ZACC 17; 2017 (9) BCLR 1108 (CC) (8 June 2017) para 9, emphasis added.

49.2 Second, that the analogue switch-off date was planned for 31 March 2022. This was followed by a proclamation in the Government Gazette on 28 February 2022 of the 31 March 2022 ASO date.

50 The Minister did not consult the public on either of these dates. MMA and SOS confirm that they too were never consulted, despite the fact that they are obviously public interest organisations that have special expertise in this field and well known to the Minister and the Department as being involved in the digital migration process. In particular, there was no attempt to consult with members of the public reliant on Government providing them with STBs, as to the fact that the STBs provision, which had been stalled for years, now would effectively be reinvigorated overnight and would, for the first time, have a registration cut-off date imposed that would result in them losing access to their own televisions.

51 The simple point is this: digital migration can and should happen. But it must happen in a constitutionally complaint and appropriate manner. That requires that Government take reasonable steps to provide set top boxes to access digital television as per its own promises to the public, rather than imposing a hard and cynically short deadline which had the obvious result of leaving many millions of people behind. Reasonable efforts were required to ensure that vulnerable South Africans are digitally migrated – and that is what Government repeatedly over years promised to do, what e.tv seeks in its appeal to hold Government to, and what this Court's jurisprudence around section 7 of the Constitution affirms.

THE INTERESTS OF JUSTICE AND PROSPECTS OF SUCCESS

52 This is a constitutional matter, as the High Court judgment recognised. There is no debate that the matters in dispute in the appeal are constitutional issues. The central question in this appeal is whether the Minister's exercise of public power in relation to the determination of the analogue switch-off date, is constitutionally compliant, or whether as e.tv contends it is unconstitutional and violates and threatens the fundamental rights (in particular the right to freedom of expression) of millions of South Africans. Linked to this is the question of what the appropriate, just and equitable relief is required in terms of sections 38 and 172 of the Constitution, if e.tv, MMA and SOS are correct. Moreover, the issues are of great constitutional and public importance, both to the parties and to the South African public more broadly. Central to this matter are the fundamental rights of substantial numbers of the poor and vulnerable in our society.

53 In this section of the affidavit, I demonstrate that the fundamental flaws in the High Court judgment (which constitute e.tv's grounds of appeal) show that there are both good prospects of success before this Court, and that it is in the interests of justice for leave to appeal to be granted to this Court.

Constitutional duties – ignored entirely

54 e.tv's application was founded on five constitutional duties which rest on the Minister as an organ of state, and which had to be taken into account by the Minister when determining the ASO date:[11]

54.1 The first duty is the duty in section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights.[12]

54.1.1 The obligation to "*respect*" rights prohibits all organs of state from interfering with or violating any constitutional right unless that interference can be justified in terms of section 36(1) of the Constitution – the limitations clause.[13]

54.1.2 Moreover, section 7(2) also places a positive obligation on government, for section 7(2)'s "*obligation goes beyond a mere negative obligation not to act in a manner that would infringe or restrict a right. Rather, it entails positive duties on the State to take deliberate, reasonable measures to give effect to all of the fundamental rights contained in the Bill of Rights.*"[14]

54.2 The Minister's second duty is to observe the basic values and principles governing public administration;[15]

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[11] These were set out by e.tv in Oral Argument and in a document entitled "e.tv's References to Oral Argument" which was filed before the hearing, and to which extensive reference was made by Mr Marcus SC and Mr du Plessis SC, who appeared for e.tv, in argument.
[12] Section 7(2) of the Constitution.
[13] Mlungwana v S 2019 (1) BCLR 88 (CC); 2019 (1) SACR 429 (CC) para 42.
[14] Glenister v The President of the Republic of South Africa and Others 2011 (3) SA 347 (CC) para 102 (minority), read with paras 177, 178, and 189 (majority). See also Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC) (**Metrorail**) paras 66 to 72.
[15] Section 195 of the Constitution; Van der Merwe and Another v Taylor 2008 (1) SA 1 (CC) at paras 71-72.

54.3 The third duty resting on the Minister is to lead by example;[16]

54.4 The fourth duty is the requirement to be candid in litigation;[17] and

54.5 The fifth duty is the duty on the Minister to honour undertakings, lawfully and seriously made.[18]

55 The High Court completely failed to deal with any of these obligations, and implications thereof, for the constitutionality of the Minister's conduct. Despite the application having been argued over two days, and all parties having filed extensive heads of argument on the issues, the High Court did not in its judgment refer to any of the authorities that the applicants (e.tv and MMA and SOS) had relied upon, save for its incorrect and inappropriate reference to the ***KZN*** case (where, as I set out below, the High Court stridently held that the majority of this Court had got it wrong and impermissibly elected to rely on the separate minority view of Froneman J), and a passing reference to ***Scalabrini***.[19]

56 In ***Barnard Labuschagne Inc,*** this Court recently had occasion to criticise a High Court that failed to take into account relevant authorities and principles that had been drawn to its attention.[20] This Court stated: "*Since all the*

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[16] Van der Merwe (supra) at para 71; Mohamed and Another v President of the Republic of South Africa and others 2001 (3) SA 893 (CC) at para 68.
[17] Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC) at para 156; MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute 2014 (3) SA 481 (CC) at para 82.
[18] KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal 2013 (4) SA 262 (CC) (including para 37)
[19] Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others 2013 (6) SA 421 (SCA) para 72
[20] Barnard Labuschagne Incorporated v South African Revenue Service and Another [2022] ZACC 8 at para 29

relevant authorities were drawn to the High Court's attention, it is unacceptable that it did not discuss them and either follow them or explain why it thought they were distinguishable." As in ***Barnard Labuschagne***, the High Court in these proceedings neither discussed the authorities relied upon by e.tv; nor did it explain why it thought they were distinguishable.

57 The High Court's failure to consider the five constitutional principles relied upon by e.tv, and to apply (or distinguish) the authorities is, respectfully, telling. Had those duties properly been considered and applied, it is submitted that the High Court could not have reached the conclusion that it did.

58 In relation to the first duty, the High Court judgment does not mention section 7(2) of the Constitution – either in relation to the positive obligations on the Minister or the negative obligations not to take steps that infringe rights which are currently enjoyed. Nor does the judgment deal at all with the limitations clause. Section 36 is not mentioned. Nor does the judgment acknowledge the fact that retrogressively depriving the public of the past enjoyment of a right, including socio-economic rights,[21] or in the present matter, access to public broadcasting, will be unconstitutional, unless it can be justified by the Minister under section 36 of the Constitution (the limitation would have to be in terms of a law of general application and be reasonable and justifiable).

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[21] Jaftha v Schoeman, Van Rooyen v Stoltz 2005 (2) SA 140 (CC) (***Jaftha***) para 34, emphasis added.

59 The High Court did not apply the test in ***Metrorail***[22] concerning the "*reasonableness*" of the Minister's steps, even in circumstances where the Minister had on oath before the High Court admitted that she was bound by the requirements of section 7(2). In failing to apply section 7(2), the High Court respectfully viewed the application before it through the wrong lens, and not through the lens of the Constitution, through which the issues are properly situated.

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

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

60.2 The facts make it clear that the Minister regarded the 31 March 2022 date, not as a reasonably determined date by when indigent South Africans had migrated with the provision of STBs, but as a "deadline"

[22] Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC) (**Metrorail**) paras 66 to 72.

that she was required to meet in fealty to the President's announcement in the State of Nation Address in January 2021. The Court seems to accept that this is precisely what happened[23] – without regard to the unreasonableness and impropriety of the Minister who set that date based on the President's announcement, and without regard to whether in fact the government had done enough to ensure that no indigent South Africans would be left behind.

60.3 This unreasonably manifested itself most clearly in the sudden decision to impose the 31 October 2021 cut-off date.

60.4 It is evident that these millions of South Africans (the qualifying indigent households) cannot afford to self-migrate by purchasing expensive digitally enabled televisions or satellite boxes and satellite dishes (there are no digital terrestrial television STBs in stores). This is precisely why the Government promised to provide these millions of South Africans with free government STBs – to recall, those who qualify are SASSA grant beneficiaries and households earning R3500 or less per month.

60.5 The Minister's sudden imposition of a cut-off date for registration for government STBs (when previously there had been none, and in circumstances, when no ASO date had yet been determined), with almost no notice, meant millions were unable to register by 31 October

[23] Judgment para 61 (read with para 45): "On the 5th October 2021 the Minister made a media statement that during [State of the Nation Address] 2021 the President announced the 31st March 2022 as the switch-off date for analogue." Para 45
"The target ASO date was announced by President Ramaphosa during the State of Nation Addresses in 2021 and 2022. The Minister determined and announced the date as required by the policy." Para 61.

2021 (indeed, although notionally the Minister first announced this sudden imposition on 6 October 2021 (mere weeks before the cut off), many of even the initial announcements in the relevant media were made as late as 29 October 2021, just two days before the cut off).

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

60.7 In the absence of explanation, on the evidence the only plausible (but constitutionally impermissible) reason for imposing a cut-off date, on no notice and months before even determining the ASO date, was to reduce the number of persons that the Government would need to migrate before the ASO date (whenever it was set).

60.8 The Minister's entire case is hinged on the contention (which the High Court seems to have accepted) that the sudden imposition of the cut-off date was reasonable (even absent consultation), since registration had been open to indigent households since 2015. But this suggestion is contrived, given the true facts:

60.8.1 It is not in dispute that the digital migration process stalled for a long period.

60.8.2 Thus, while notionally the registration window was opened, there was no indication that the Government in fact intended to proceed with migration any time soon, or by when it would be necessary for anyone to need a STB as a critical means to continue watching what was by then enjoyed ongoingly on a daily basis by millions of South Africans on their analogue TVs.

60.8.3 The best indication of this is the fact that despite the notional registration window being open since 2015, the Government stopped installing STBs in January 2019, and only appears to have restarted in October 2021, thus leaving hundreds of thousands of registered indigent households without STBs, for years, even though they had registered.

60.8.4 In other words, between January 2019 and October 2021 registration was evidently pointless, since the Government itself seems to have given up on providing STBs as an essential part of the toolkit for digital migration.

60.8.5 Worse, the facts reveal that even some of those households that had registered in 2015, had still not had their STBs installed by October 2021 (some six years later!).

60.8.6 At no point, prior to the sudden announcement of a registration cut-off date (with at most three weeks' notice, but in practice probably only a few days at best) had the Government ever suggested a cut-off date would be imposed, or that it would again proceed with installing STBs, which had stalled in

January 2019. It was not in dispute that the digital migration process had ground to a halt at that point until it was reinvigorated in late 2021.

60.8.7 In summary: by January 2019 the digital migration process had ground to a halt. Far from sensing or knowing or being told that there was a continuing need to ongoingly register for STBs or visit their Post Offices to obtain one else their televisions would be rendered redundant, the public generally, and the poor in particular, had been lulled into thinking that the process of digital migration was in neutral, if it was alive at all.

60.8.8 Yet all of that suddenly changed, without warning and without consultation (which includes the duty of fair and reasonable notice), with the Minister claiming that it is reasonable to expect indigent households to radically arrange their affairs to register on no, or almost no, notice. The cynical suggestion is that the vulnerable and the poor were holding the Government back from meeting its (by then not even publicly or lawfully declared) date of 31 March 2022 for ASO, and needed to be chivvied along to meet the deadline – when in fact all the delays, false starts, and restarts to that date, were the Government's fault, not that of the millions of South Africans who looked to it for guidance and clarity about ASO. The irrationality and unreasonableness are palpable.

60.9 Not only is it unreasonable to treat millions of South Africans in this way, it is also a failure of the Minister's obligations under section 7(2) of the Constitution. That is made clear by the fact that the Minister conducted no research or survey to identify why so many indigent households had not registered by 31 October 2021 – other than for the obvious reasons, they had no notice of the cut-off date, or did not properly understand what was required of them (or that the registration and installation process had begun again after almost three years of stalling and inaction).

60.10 Indeed, the High Court accepted the Minister had failed to undertake any such survey, yet appeared to accept that it was constitutionally permissible for the Minister simply to set the analogue switch off date, without knowing how many millions of indigent South Africans would be left behind and cut-off from their previous access to broadcasting.

61 This Court has also recently affirmed in ***Chairperson of UNISA v AfriForum***,[24] the duty by an organ of state to put up evidence to show reasonableness when a decision is taken to remove a benefit by changing a policy, in that case the ability to learn in Afrikaans.

62 In the current matter, this Court is not dealing with the limitation of a socioeconomic right (such as education or language), but most directly with the right of freedom of expression, which includes the right to receive information. That right is clearly violated if and when the Minister imposes an ASO date without ensuring that indigent South Africans will continue to have

[24] Chairperson of the Council of UNISA v AfriForum NPC 2022 (2) SA 1 (CC).

the means to access television broadcasting. Therefore, it was incumbent on the Minister to justify the limitation of the rights of millions of South Africans that rely on analogue televisions to watch free-to-air television, all the more so given the Government's continual promises in this regard.

63 Moreover, it is trite that part of that justification must consider a proportionality analysis to determine if there are less restrictive means that could have been employed, that do not disproportionately harm indigent South Africans.[25] None was done – by the Minister, or the High Court.

64 In ***Bato Star*** this Court emphasised that one of the factors relevant to whether a decision was reasonable was "the impact of the decision on the lives and well-being of those affected'." Moreover, the SCA has emphasised that "[i]t has been stated that 'proportionality is a constitutional watchword' and as was observed by Plasket J in *Ehrlich*, quoting with approval the views of Prof Jowell, **unreasonable administrative action includes 'those that are oppressive in the sense that they "have an unnecessarily onerous impact on affected persons or where the means employed (albeit for lawful ends) are excessive or disproportionate in their result"'**.[26] The SCA went on to emphasise that, where means used were "wholly disproportional to the end [the organ of state] sought to achieve" (such that the organ of state "used 'a sledgehammer to . . . crack a nut'"), its failure **"to**

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[25] See section 36(1) (see in particular (e)) of the Constitution; see also Makwanyane 1995 (3) SA 391(CC) para 104.
[26] Medirite (Pty) Limited v South African Pharmacy Council and Another (197/2014) [2015] ZASCA 27 para 20

attempt to justify the use of a sledgehammer, its action must be regarded as unreasonable."[27]

65 The same is true here: the determination of the ASO date, the determination of the STB registration cut-off date, and the Minister's concomitant failure to ensure the promised provision of STBs to millions of poor South Africans, is oppressive and has a disproportionate impact on the poor and vulnerable – it is they, who are reliant on analogue broadcasting, and on the Government to provide STBs, because they cannot afford to self-migrate.

66 This conclusively demonstrates the Minister failed to comply with her obligations under section 7(2) to take reasonable steps to respect, protect and fulfil the rights of millions of indigent South Africans, and the Minister has failed to justify the limitation of section 16 rights for millions of South Africans.

67 All of this demonstrates the need for this Court urgently to come to their assistance.

The KZN principle – ignored by the High Court by rejecting this Court's judgment

68 The doctrine that a state organ will be bound by its seriously and lawfully made public promises has become known as the "*KZN Principle*".[28] The KZN principle recognises that a seriously and lawfully made promise by the state to make a payment or to do something is enforceable against the state when

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[27] Medirite para 20

[28] The principle arises from this Court's decision in KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal 2013 (4) SA 262 (CC); see too Pretorius and another v Transport Pension Fund and others 2018 ZACC 10 at para 30.

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

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

70 e.tv argued before the High Court that the undertaking to provide set-top boxes to the millions of households who are not otherwise able to access free-to-air broadcasting services falls within the KZN principle, and the promise by the Government that analogue switch-off will not occur unless and until those who cannot otherwise afford access to digital broadcasting have been provided with set-top boxes, is one which is enforceable.

71 The High Court dealt with the KZN Principle from para 30. After setting out the facts of ***KZN Joint Liaison***, the High Court recorded that this Court "*accepted that the promise may not give rise to an enforceable agreement between the parties but because it constituted a publicly promulgated promise to pay once the due date of payment of a portion thereof had passed it created a duty to pay, albeit unilaterally. This means that once a promise is made for payment on a particular date and the promise is not retracted before that date then there is a legal obligation unilaterally enforceable at the instance of those who were intended to benefit from the promise.*"[29]

[29] High Court judgment, para 32.

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

73 This Court has affirmed that compliance with binding decisions of this Court by lower courts is not optional, it is obligatory, and failure to do so is a violation of the rule of law, a foundational value of the Constitution.[30] Therefore, it was not open to three Acting Justices in the High Court to reject the binding legal determinations of this Court in ***KZN Joint Liaison***.

74 Had the ***KZN Principle*** been properly applied, as enunciated by the majority of this Court, the High Court could not have reached the conclusion that it did.

75 The ***KZN principle*** obliges the Minister to honour her promises, like the promise to provide set top boxes to all those who need them and particularly all qualifying indigent households. These were made as recently as the press release of 6 October 2021 and in her affidavits before the Court. These each "*clearly constituted an undertaking*" that was "*seriously given, in the*

[30] See Ruta v Minister of Home Affairs 2019 (3) BCLR 383 (CC) para 21; Barnard Labuschagne Incorporated v South African Revenue Service and Another [2022] ZACC 8 para 6; Turnbull-Jackson v Hibiscus Court Municipality [2014] ZACC 24; 2014 (6) SA 592 (CC) at para 54

expectation that it would be relied upon". And like paying subsidies, once the Minister has undertaken to do so, it is "*unconscionable*" for the Minister to go back on an express promise when measured against the constitutional standard of reliance, accountability and rationality, more particularly where the result would be to deprive literally millions of South Africans of their constitutional rights including the right to receive information.

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

Consultation

77 e.tv argued before the High Court that it and the public had a right to be consulted (including by fair notice) prior to two decisions being taken by the Minister.

77.1 The first decision was the 6 October 2021 decision to close the registration window for registration for set top boxes on 31 October 2021 – just three weeks from the date of the cut-off announcement. It was common cause before the High Court that there was *no* consultation at all prior to this determination.

77.2 The second was the ASO date, which the Minister gazetted on 28 February 2022, for implementation on 31 March 2022. This announcement took everyone by surprise – apparently not even the Minister's legal team was aware thereof (they were forced to file their heads of argument late, without condonation, to take account of the belated announcement).

78 e.tv argued that the right to be heard in the face of a potentially prejudicial decision is of ancient origin and formed part of the common law,[31] and that the *audi alteram partem* principle has been described as the procedural aspect of the rule of law.[32] Given the far-reaching consequences of the Minister's decisions on the rights of individuals, e.tv asserted that the failure to consult vitiated the two decisions, violated the dignity of those persons who were affected by, and denied the Minister the chance to improve her decision-making by knowing exactly what the impact thereof might be on an unsuspecting public.

79 The High Court judgment deals with consultation only tersely.[33] The High Court found that the digital migration process had gone on for a long time, and that the "*formulation of policy is an executive competency and the duty to consult will only arise in circumstances where it would be irrational to take the decision without further input from industry experts*".[34] The High Court found further that "*there is nothing that prevents [the Minister] from [determining the switch off date]*".[35]

80 The High Court judgment does not deal *at all* with the first of the two decisions in respect of which it was asserted that consultation was required – namely the termination date for the registration of set top boxes, and the reasoning in

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[31] Administrator, Transvaal and others v Traub and others 1989 (4) SA 731 (A) at 748; R v Chancellor, Masters and Scholars of the University of Cambridge; (1723) 1 Strange's Reports 557 at 587; 93 ER 698 (KB) at 704; Mpande Foodliner CC v Commissioner for the South African Revenue Service and others 2000 (4) SA 1048 (T) at 1065 – 1066, para 39.
[32] Walele v City of Cape Town 2008 (6) SA 129 (CC) at para 27.
[33] Judgment, paras 61 to 63.
[34] Judgment, para 62.
[35] Judgment para 63.

relation to the second decision – that there is nothing that prevents the Minister from determining the ASO date – is superficial at best.

81 Nor is there any discussion in the judgment of the particularly acute obligation on government to follow a fair process where the effect of governmental action is to deprive persons of an *existing* service – in this case, the right to freedom of expression, inclusive of the right to receive information,[36] given effect to in the provision of access to free-to-air television.[37]

82 Had those authorities been properly dealt with, let alone acknowledged, by the High Court, then it could only have come to the conclusion that the Minister was duty bound to give the public proper notice of decisions that were about to impact severely on their lives and rights, seek their views on those decisions, and show them proper respect and improve her own decision-making in the process.

83 While difficult to discern the reasoning, the Court appears to have accepted the Minister's argument that there was no duty to consult, because the Minister's ASO decision was merely a policy determination which the Minister alleged she was empowered to make in terms of the Digital Migration Policy.

84 This was wrong for several reasons:

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[36] Section 16

[37] See Joseph and Others v City of Johannesburg and Others 2010 (4) SA 55 (CC) at par 34; Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae) 2005 (1) SA 530 (CC) at par 38.

84.1 First, the Policy was not the source of the Minister's power to make the ASO determination, the Digital Migration Regulations were.[38] The Regulations expressly provided that the ASO must be "determined and published"[39] and that the ASO date must be "published by the Minister in the Gazette."[40] Policy cannot be a source of power. And, the Digital Migration Policy, in question, had been held by this Court to be merely a guide and non-binding.[41]

84.2 Second, the same Court (the Gauteng High Court, Pretoria), had in two separate judgments, held that the Minister's determination of the ASO date "shall be made ***after*** **a process of engagement with the affected parties** has been concluded".[42] Those affected parties, certainly includes the millions of indigent South Africa, reliant on analogue television, who stood to lose their access to public and free-to-air television come the ASO date, and were reliant on the Government to migrate them. The High Court in this matter not only had those cases drawn to its attention by e.tv, and they were included in the papers as annexures, but since they were decisions by the same court, it was bound by them unless it found them clearly wrong. This the High Court

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[38] They expressly provide that:
"the "dual illumination period" is "the period commencing on the date of Digital Terrestrial Television switch-on, as determined and published by the Minister and **ending on the date or dates of analogue television switch-off *as determined and published by the Minister***". **Section 1**
"The date for the commencement of the dual illumination period **as well as the date for the final switch-off of the analogue signal will be published by the Minister in the Gazette.**" **Section 3(1)**

[39] Section 1 of the Digital Migration Regulations.

[40] Section 3(1).

[41] *Electronic Media Network Limited v e.tv* 2017 (9) BCLR 1108 (CC) paras 35 and para 178

[42] Minister of Telecommunications and Postal Services v Acting Chair, Independent Communications Authority of South Africa and Others; Cell C (Pty) Ltd v Acting Chair, Independent Communications Authority of South Africa and Others and Others [2016] ZAGPPHC 883 (30 September 2016) (*Minister of Telecommunications)* (Sutherland J) para 58, Telkom v ICASA [2021] ZAGPPHC 120 (8 March 2021) para 68

did not do – it appeared simply to ignore the decisions. The Court's ignoring of these decision was therefore impermissible, and in violation of the rule of law.

84.3 Third, the Court failed to have regard to this Court's decision in ***Ed-u-College***,[43] where this Court made clear that it was necessary to distinguish between different ways in which policy can be formulated. In particular, this Court held that where policy was formulated in "*a narrower sense*" – i.e. "*where a member of the executive is implementing legislation*" – this will often constitute administrative action.[44] The High Court not only failed to have regard to that decision, which was drawn to its attention, but failed to explain why this Court decision would not find application in relation to the Minister's determination of the ASO date, which was evidently an administrative decision.

85 There was no consultation at all regarding the imposition of the 31 October deadline, or the change in government policy to provide set-top boxes as a prior predicate condition for migration to occur without a deleterious impact on the poor. And in relation to the analogue switch-off date, the process of consultation was, at best, a sham in respect of e.tv, and non-existent in relation to the public and groups that represent the public, like MMA and SOS.

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[43] Permanent Secretary of the Department of Education of the Government of the Eastern Cape Province and Another v Ed-U-College (PE)(Section21) 2001 (2) SA (1) (CC).
[44] **Ed-U-College** at para 18

86 I say that the process was a sham because it is clear that the Minister had already made up her mind about the digital migration process and ASO date. The fact that consultation was not meaningful can be illustrated in the following set of undisputed facts:

86.1 The Minister presented an ASO Plan to the Digital Migration Steercom on 20 September 2021. This plan was for wholesale ASO to occur on 31 March 2022, and was the first time that the Minister had committed before the Steercom to a date or methodology for ASO. It bears emphasis that ASO would entail the ending of all analogue broadcasting in South Africa not just in the spectrum bands IMT700MHz to IMT800 MHz, but also in the spectrum bands below IMT700MHz. This is relevant as ICASA is currently involved in an auction of certain portions of the IMT700MHz to IMT800MHz spectrum bands to mobile network operators, but not all parts of the IMT700 to IMT800 bands form part of the auction process and the spectrum below IMT700MHz used for analogue broadcasting is not implicated by this auction process, given that it has not been earmarked for future use by mobile network operators.

86.2 When e.tv saw this plan, it immediately asked for an opportunity to comment on the plan and to present an alternative plan for ASO. The Minister indicated that she would allow e.tv such an opportunity, and set the date for e.tv's submission as 1 October 2022.

86.3 e.tv accordingly prepared a workable and rational, alternative plan for presentation to the Minister. e.tv's alternative plan is to engage in a

staggered switch-off: to commence by switching off transmitters in the "valuable" spectrum that is subject to being auctioned by ICASA to mobile network operators under its ITA (Invitation to Apply) process, but to continue to allow broadcasters to use the *under-700Mhz* spectrum,[45] which has not been earmarked for mobile network operators, pending the lawful and rational finalisation of the migration process.[46]

86.4 However, in the intervening period, on 29 September 2022 – before e.tv had even had an opportunity to make its presentation or the Minister could consider them and take them into account – the Minister placed her own plan before Cabinet for approval, and Cabinet approved her plan. This rendered e.tv's 'opportunity' to make submissions futile, because it is clear that the Minister, and indeed Cabinet, had already determined the relevant date and process to be followed. e.tv's "*consultation*" on 1 October 2021 was meaningless.

87 The Minister's conduct in this regard, in being seen to consult, without keeping an open mind, and in circumstances where the decision had already been taken, falls far short of the requirements of meaningful consultation set by this Court.[47]

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[45] Where necessary any analogue transmitters in the 700Mhz and 800Mhz bands that could not be switched off, could be re-tuned to below the 700Mhz band. Indeed, as e.tv explained in its affidavits it had sought permission from ICASA to retune certain of its analogue transmitters that fell in these bands to frequencies below the 700Mhz band.

[46] Mobile operators have no interest in spectrum which is below IMT694MHz because this spectrum cannot currently be used for mobile networks.

[47] See Joseph and Others v City of Johannesburg and Others 2010 (4) SA 55 (CC) at par 34; Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local

88 The Minister's failures in this regard are made worse by the fact that e.tv had asked for an opportunity to consult with the Minister and to be appraised of the Minister's plans no fewer than 6 times through letters sent before the High Court proceedings were launched, but these requests were simply ignored and the Minister proceeded to go ahead and take the decision without taking into account e.tv's views and e.tv's rights. The Minister effectively indicated that she would *not* consult with e.tv and would see e.tv in court. Indeed, this was clear evidence that the Minister was unwilling to engage in any meaningful consultation with an open mind and receptive attitude. Rather, as indicated above, the Minister was intent on simply racing towards the ASO date unilaterally announced by the President, absent any consultations.

89 Furthermore, as I have said, MMA and SOS confirmed that they too had not been consulted on the registration date or the ASO.

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

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

91 It is submitted that the judgment of the High Court commits a fundamental constitutional error in relation to its analysis of the numbers of households requiring the installation of set-top-boxes, and gets the onus back to front.

Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae) 2005 (1) SA 530 (CC) at par 38.

92 When seeking to understand how many millions of households (representing on average 3.3 South Africans per household) will lose access to free-to-air broadcasting as a consequence of the analogue switch off, it is important to distinguish two sets of numbers, which are self-reinforcing. None of the numbers are in dispute.

93 The **first set of numbers** that are relevant are the numbers in relation to the **households in South Africa who currently receive free-to-air television via analogue transmission**, i.e. the number of households that evidence shows currently have not migrated to digital transmission. These figures are accurate, current and confirmed on affidavit by the expert body (the Broadcasting Research Council) that prepared them. The Minister does not challenge their accuracy.

93.1 There are currently **15.8 million television households** in South Africa (which is over 90% of the population).

93.2 It is undisputed that **36%** of the **TV households**, **that is 5.7 million households**, still receive free-to-air televisions via analogue transmission.

94 The **second set of numbers** that are relevant are the numbers in relation to eligible indigent television households that are entitled to receive Government installed STBs:

94.1 The Minister's Department's own estimate given the latest numbers from Stats SA from 2018, is that there are currently at least **3.75 million**

households who are eligible for and have been promised government STBs (given that they earn a particular amount or less: R3500 per month).

94.2 This represents over 12 million South Africans (there being 3.3 people per household).

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

96 By 10 March 2022 (after 7 years of the set-top box programme) the Government had installed only **660 661** set top boxes, leaving more than **half a million households** of people who had managed to register before the 31 October 2021 cut-off without a set-top box, just 3 weeks before ASO was to occur.

97 Moreover, there had been an additional 260 868 registrations as of 10 March 2022 (representing some 850 000 South Africans), and the Court accepted that the Government would not provide STBs to them (even by the extended ASO date).

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

the 3.75 million that are eligible **(some two-thirds of eligible households),** that will still require STBs from Government, and will lose access come 31 March 2022.

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

100 This finding, and the conclusions drawn from it – that the 2.58 million households had no entitlement to a set top box and no standing before the High Court[48] – is unsustainable. Not only is it openly at odds with fundamental constitutional obligations and rights, it is also directly contradicted by the undisputed evidence before the High Court.

101 Given the nature of this litigation, a constitutional matter where the central issue is the limitation of the rights of millions of South Africans, it is not for the applicants (e.tv or MMA or SOS) to produce any further evidence. If required, it is for the Minister to do so – in order to justify her decision. Indeed, once the legality of the Minister's actions was placed in issue - as they clearly are - then it was incumbent on the *Minister* to explain the facts, not e.tv.

[48] High Court judgment, para 56.

102 This applies, *a fortiori*, where, as in this matter, the Minister must justify the limitation of the rights of millions of indigent South Africans.[49]

103 The Minister's failure to do so, demonstrates that the violation and/or threatened violation of rights was unconstitutional.

104 In any event, with respect, the High Court misunderstood the facts. It held, that: "The Statistics indicated that there are 3.75 million analogue television sets that receive analogue transmission. There are no statistics that indicate the financial status of the households. The Statistics do not indicate how many households meet the criteria set by government or the USA Fund."[50]

105 The true facts, as revealed in the Minister's answering affidavit, is that **3.75 million figure**, is the number estimated by the Department of households that do require government assistance because they are indigent television households (As the Minister says: "**On the basis of the data provided by StatsSA, the Department estimates that there may be *at least* 3.75 million households that may be eligible for Government assistance in the digital migration programme**.").[51] The Minister defended the use of StatsSA figures ("**StatsSA produces data specifically for evidence-based decision making**. Given that StatsSA conducts a census every five years,

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[49] Kalil NO v Mangaung Metropolitan Municipality 2014 (5) SA 123 (SCA) at para 30[49]; Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC) at paras 663 and para 664; Moise v Greater Germiston Transitional Local Council 2001 (4) SA 491 (CC) at para 19; Minister of Justice and Constitutional Development, National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others 2004 (5) BCLR 445 (CC) at para 65.
[50] Judgment para 25.
[51] Minister's answering affidavit para 254.

the latest available figures on which Government can reasonably rely are from 2018."[52]).

106 And the fact that the latest independent expert evidence showed that over 5 million households currently only received analogue broadcasting, clearly demonstrates that the vast majority of the indigent households could not afford to self-migrate (that is, they needed a STB in order to continue watching their televisions).

107 The constitutionally important point is that even the High Court accepted that there was uncertainty as to the precise extent of the number of indigent South Africans who would have their rights violated. But such uncertainty as there was (and leaving aside what the undisputed numbers in fact revealed), demonstrated the constitutional need for the High Court to grant the relief sought, including the reporting relief against the Minister, to protect the violation or threatened violation of significant numbers of indigent South African's rights.

108 The numbers are huge. Just focusing on registered households, the Court accepted that over 260 000 households (**over 850 000 indigent South Africa**), who had managed to register between 31 October 2021 and 10 March 2022, would certainly lose "their receipt of information on their analogue tv's"[53] until months after even the Court-extended ASO date (which the Court effectively sanctioned without any regard to their rights).

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[52] Minister's answering affidavit para 255.
[53] Judgment para 69.

109 So, the constitutional impropriety of the Minister's conduct in relation to all the indigent households, and the impermissibility of allowing the Minister to rely on registrations and the 31 October 2021 cut-off, is clear. What the Minister would have this Court believe (and the High Court appears to have erroneously accepted) is that the Minister gave the eligible but "*unregistered*" a fair chance by telling them they had to speedily register within 3 weeks (although most had no notice), and that the 8 million or more indigent South Africans, who are reliant on social grants and are the poorest in our society, somehow made an informed choice not to take government up on its offer of having free STBs installed in order to allow them to continue receiving television.

110 This is an astounding suggestion, not consistent with the constitutional obligations of the Minister, not supported by any evidence, and in fact contradicted by the evidence. This is so for at least these reasons:

110.1 As indicated above, it is not in dispute that independent research confirmed that **36%** of **TV households**, **that is 5.7 million households**, still receive televisions via analogue transmission – <u>these households have, undeniably, not self-migrated</u>.

110.2 Therefore, any implied suggestion that these poor and vulnerable South Africans have elected not to receive, or do not require, Government assistance, can be rejected.

110.3 The numbers show the truth. The <u>only way to explain why so many millions of households still only receive analogue television, is because</u>

they have been unable to migrate themselves, being poor and reliant on Government. This is clear even if the Minister has refused to conduct any proper, let alone independent, research.

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

112 Tellingly, since Government had failed to undertake any proper research or study to confirm exactly how many indigent households still required STBs, the High Court was bound to acknowledge that "there are still households deserving of STB's out there although the exact number is unknown."[54]

113 But once there are deserving, poor and vulnerable households (and potentially as many as 2.5 million, if not more, given Government's own estimate and its own evidence), then the duty was on the Minister and the Court hearing the case not only to respect, protect, promote and fulfil their rights, but also for the Court to fashion a remedy to ensure that they were

[54] Para 54.

properly accounted for (including by way of the reporting relief sought by e.tv, following the example set by this Court in ***Black Sash***[55]).

The belated evidence by the Minister after the first day of the hearing – confirming that millions will be left behind

114 Given the Minister's continued failure to place relevant evidence before the Court, in violation of her constitutional obligations, in e.tv's replying affidavit the Minister was *specifically* and *pertinently* invited to file an affidavit setting out the relevant details regarding installations and registrations in respect of STBs. The Minister filed nothing, leaving the Court and the parties in the dark.

115 Then the Minister belatedly sought leave during the first day of the hearing to file a further affidavit. That affidavit was filed only late in the evening after the first day of the hearing – and without any explanation for why it had not been filed earlier, despite the High Court at the hearing on the first day indicating that it expected that explanation).

116 The Minister's affidavit contained little by way of proper evidence and was replete with bald allegations and unsubstantiated hearsay. This and the many extraordinary features of the Minister's affidavit were highlighted by e.tv in an urgent responding affidavit drafted overnight, and filed the next morning (before the start of the second day of the hearing). MMA and SOS also filed a responding affidavit that drew further attention to deficiencies and improbabilities in the Minister's evidence.

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[55] Black Sash Trust v Minister of Social Development and Others [2017] ZACC 8; 2017 (3) SA 335 (CC).

117 Astoundingly, the Minister's affidavit revealed that even for those households that *had* registered (by the Minister's own unilaterally and imperiously imposed cut-off of 31 October 2021), the Minister had only made 103 707 installations from 31 October 2021 to 14 March 2022. In other words, it took the Government some **4.5 months** to install 103 707 STBs. That worked out to approximately **23 000 per month**, at the date of the Minister's further affidavit. That was not an historic rate; *that was the current rate* – just two weeks before ASO.

118 Therefore, the Minister's affidavit belatedly revealed that this meant that even for those who were registered by 31 October 2021, there were still **507 251 households** (representing **over 1.6 million South Africans**) who had not received STBs.

119 Given the current installation rate (only 23 000 per month), and absent any factual foundation to support the Minister's bald allegations that the Government would be able to install **half a million** STBs across the country by the ASO date, just 15 days away, even the High Court found that the Minister's predictions and vague assurances could not be accepted.

120 The High Court, therefore, suspended the ASO date for three months and ordered the Minister to install all 507 251 STBs by 30 June 2022.

121 But this was a constitutionally impermissible approach, since on the current installation rate before the Court (the only specific and unquestionable evidence available), the Government had only been able to achieve **23 000 installations per month.**

122 At that rate, the Government would come nowhere close to installing 507 251 STBs in three months. That was (and remains) true even if there were to be a substantial increase in the installation rate.

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

124 This is critical: for, on the current rate, as confirmed by the Minister's own affidavit, it would take the Government **almost two years (22 months!),** at a rate of 23 000 per month, to install 507 251 STBs. Therefore, before the Court could have responsibly accepted that the Minister could achieve approximately a **700% (seven-fold) increase** in installation rate, further reporting and evidence would have been required. In the absence of such evidence, the High Court could not simply determine that a three-month suspension of the ASO date was sufficient. As the High Court itself recognised, it had insufficient facts before it to do so. In the circumstances, the date was arbitrary; indeed, the date was not even proposed by the Minister.

125 Of course, all of this further confirms the constitutional appropriateness and necessity of the relief sought by e.tv, which the High Court refused to grant, and which remains necessary before this Court: setting aside of the ASO date coupled with declaratory and reporting relief in order to protect the rights not

merely of those **half a million** households who managed to register before the imposed 31 October deadline, but **the quarter** of **a million** households that registered between then and 10 March (and who the High Court was happy to allow to be left without access to broadcasting), and **the many millions** more indigent households who had been promised that government would ensure they would not be left behind (which, the Court impermissibly found had no rights or standing), but now would be cut off come the ASO date.

126 In short, the approach taken by the Minister and endorsed by the High Court is anathema to this Court's constitutional jurisprudence, including the need to show concern for the poor. It is clear on the Minister's own showing that significant numbers of South Africans would have their rights violated by the imposition of the ASO date, since the Minister had failed to ensure that they were provided the means to access digital television.

127 If more certainty was required then it was for the Minister to provide, to justify her actions, and discharge her duty of candour. She failed to do so, and by that absence of justification it was incumbent on the Court to grant appropriate and just and equitable relief by setting aside the ASO determination, and granting the necessary declaratory and reporting relief sought by e.tv and MMA and SOS.

The failure to set aside the gazetted ASO determination – given the inability to migrate indigent South Africans by 31 March 2022

128 e.tv, MMA and SOS had sought an order declaring the Minister's ASO determination of the ASO date to be constitutionally invalid (thus setting it aside).

129 The Court refused to give that relief, it held that "*The Minister announced the switch-off date as 31st March 2022. There is nothing that prevents her from doing so.*"[56]

130 This was clearly incorrect, for the reasons given above: what "prevents [the Minister] from doing so" were the constitutional obligations upon her to avoid the retrogressive violation of many millions of South Africans' rights to continue to enjoy their current access to broadcasting, and the duty to properly consult with affected persons.

131 However, the High Court's determination that there was nothing stopping the Minister declaring the ASO date for 31 March 2022 and its refusal to set aside the ASO date, was impermissible and inconsistent with the Court's own findings.

132 The Court held that:

132.1 At least those indigent household that had managed to register by 31 October 2022, had a right to receive STBs prior to the ASO date.[57]

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[56] Judgment para 63, read with para 55.
[57] Para 69.

132.2 The Court held that the facts before it demonstrated that the Government would not be able to install the remaining 610 958 by the 31 March 2022, the ASO date determined by the Minister.

132.3 Government's "*projections are not supported by any statistics or evidence of on-the-ground arrangements that could suggest that the projections made are capable of being met by 31st March 2022.*"[58]

132.4 "*It appears that the government will require more time to be able to install the STB's.*"[59]

132.5 "*It would be unconscionable for any of these households to continue to be left behind prior to ASO and there is a significant probability of this happening given the slow installation progress made thus far*".[60]

132.6 The ASO date, therefore, needed to be extended by three months "*to give the government sufficient time to complete the installations of the outstanding STB's.*"

133 These findings clearly demonstrate that the Minister when setting 31 March 2022 as the ASO date, had unconstitutionally created a situation where hundreds of thousands of indigent householdings (running to almost 2 million South Africans – 610 000 households, with 3.3 persons per household), were likely to be cut off, and would have unconstitutionally (and unconscionably)

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[58] Para 66.
[59] Para 66.
[60] Para 53.