CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 89/22 and CCT 92/22

Case CCT 89/22

In the matter between:

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

SENTECH SOC LIMITED Twelfth Respondent

MEDIA MONITORING AFRICA Thirteenth Respondent

SOS SUPPORT PUBLIC BROADCASTING Fourteenth Respondent

Case CCT 92/22

In the matter between:

MEDIA MONITORING AFRICA First Applicant

SOS SUPPORT PUBLIC BROADCASTING Second Applicant

and

e.tv (PTY) LIMITED First Respondent

MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES Second Respondent

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA Third Respondent

CHAIRPERSON: INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA Fourth Respondent

NATIONAL ASSOCIATION OF BROADCASTERS Fifth Respondent

SOUTH AFRICAN BROADCASTING CORPORATION LIMITED Sixth Respondent

VODACOM (PTY) LIMITED Seventh Respondent

MOBILE TELEPHONE NETWORKS (PTY) LIMITED Eighth Respondent

CELL C (PTY) LIMITED Ninth Respondent

TELKOM SA SOC LIMITED Tenth Respondent

WIRELESS BUSINESS SOLUTIONS (PTY) LIMITED t/a RAIN Eleventh Respondent

LIQUID TELECOMMUNICATIONS SOUTH AFRICA (PTY) LIMITED Twelfth Respondent

SENTECH SOC LIMITED Thirteenth Respondent

Neutral citation: *e.tv (Pty) Limited v Minister of Communications and Digital Technologies and Others; Media Monitoring Africa and Another v e.tv (Pty) Limited and Others* [2022] ZACC 22

Coram: Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Mlambo AJ, Theron J, Tshiqi J and Unterhalter AJ

Judgment: Mhlantla J (unanimous)

Heard on: 20 May 2022

Decided on: 28 June 2022

Summary: Analogue switch-off date — duty to give notice — procedural rationality

Remedy — review of Minister's decision — separation of powers — substitution not appropriate — setting aside of Minister's decision

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ORDER

On direct appeal from the High Court of South Africa, Gauteng Division, Pretoria:

1. Leave to appeal directly to this Court on an urgent basis is granted.
2. The appeal is upheld.
3. The order of the High Court is set aside and replaced with the following:
   "(a) It is declared that the announcement of 31 March 2022 as the final switch-off date of the analogue signal and the end of dual illumination issued by the Minister of Communications and Digital Technology on 28 February 2022 in terms of the Broadcasting

Digital Migration Policy (as amended), is unconstitutional, invalid and is set aside.

(b) It is declared that the Minister's decision to impose a deadline of 31 October 2021 to register for set-top boxes is unconstitutional, invalid and is set aside.

(c) The Minister must pay the costs of the applicants, including the costs of two counsel where so employed."

4. The Minister must pay the applicants' costs in this Court, including the costs of two counsel.

JUDGMENT

MHLANTLA J (Kollapen J, Majiedt J, Mathopo J, Mlambo AJ, Theron J, Tshiqi J and Unterhalter AJ concurring):

Introduction

[1] This matter concerns the process of television migration from analogue signal to digital signal. Before 1976, South Africans relied on the radio network for information, news and entertainment as there was no television broadcasting. This situation changed in 1976 with the introduction of television broadcasting, which was accessed through analogue television sets. The broadcasting signal in an analogue television set is received directly from an aerial or antenna and transmits through analogue signal. With the advent of technology, digital technologies were introduced in various aspects and areas of communication, including radio and television broadcasting.

[2] Digital migration is the process through which the broadcasting of television and radio is converted from analogue to digital technologies and frequency signals. Both frequency signals are found on the electromagnetic spectrum (spectrum) that is used to

transmit electronic communications and broadcasting. However, analogue technologies are only able to receive and communicate analogue signals, while digital technologies receive and communicate only digital signals. As a result, analogue television sets are unable to display information as received from digital frequencies without a device capable of converting digital transmissions to analogue transmissions. While the country migrates from analogue to digital frequencies, there is a "dual illumination" period. During this time, both analogue and digital transmissions are used; and continue until such a time when the analogue transmission is completely switched off, and the digital transmission is completely switched on.[1]

[3] On 4 April 2022, two urgent applications for leave to appeal directly to this Court against a judgment and order of the High Court of South Africa, Gauteng Division, Pretoria (High Court) were lodged.[2] As both concerned the same subject matter, they were consolidated and heard together. The applications concern the applicants' dissatisfaction with an order of the High Court that permits the Minister of Communications and Digital Technologies (Minister) to complete the digital migration process – moving from analogue to digital broadcasting – on 30 June 2022. The analogue switch-off was initially scheduled by the Minister for 31 March 2022, but that date was changed by the order of the High Court to 30 June 2022.

[4] The applicant in the first matter, under case number CCT 89/22, is e.tv (Pty) Limited (e.tv), South Africa's biggest independent free-to-air television broadcaster and the only non-state broadcaster of free-to-air television news in South Africa. The applicants in the second matter, under case number CCT 92/22, are two non-profit organisations, Media Monitoring Africa (MMA) and SOS Support Public Broadcasting (SOS). In the High Court, MMA and SOS were granted leave to intervene as

[1] It should be noted that, to date, the provinces of Free State, Northern Cape, North West, Mpumalanga and Limpopo have migrated from analogue to digital transmission. Thus, this dispute is centred around the digital migration of the remaining four provinces, namely, KwaZulu-Natal, Eastern Cape, Western Cape and Gauteng.

[2] *e.tv (Pty) Ltd v Minister of Communications and Digital Technologies*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 51159/2021 (28 March 2022) (High Court judgment).

co-applicants. Where I refer to the "applicants" in this judgment, it is to e.tv, MMA and SOS collectively.

[5] Not all the respondents cited in these applications participated in the proceedings before this Court. Those who participated were the Minister,[3] the Independent Communications Authority of South Africa (ICASA);[4] the Chairperson of ICASA;[5] Vodacom (Pty) Limited (Vodacom);[6] and Sentech SOC Limited[7] (Sentech). The Minister is the custodian of the process of digital migration and responsible for the analogue switch-off as well as all the processes preceding and succeeding it. ICASA was established in terms of section 3(1) of the Independent Communications Authority of South Africa Act,[8] and is the regulatory body empowered to release the available spectrum for use by the Mobile Network Operators (MNOs). Vodacom is an MNO in South Africa. Sentech is a state-owned company and a leading provider of electronic communications network services to the country's broadcasting and communications industry.

Background

[6] Although this matter comes to this Court in the year 2022, the process of digital migration can be traced back to the year 2006; and, in the specific case of South Africa, to 2007. South Africa resumed its membership of the International Telecommunication Union (ITU) in 1994.[9] In 2006, the ITU held its Regional Radio Communication Conference. Soon after this Conference, the government of South Africa began to formulate what would become its first Broadcasting Digital Migration Policy

[3] First respondent in CCT 89/22 and second respondent in CCT 92/22.

[4] Second respondent in CCT 89/22 and third respondent in CCT 92/22.

[5] Third respondent in CCT 89/22 and fourth respondent in CCT 92/22.

[6] Sixth respondent in CCT 89/22 and seventh respondent in CCT 92/22.

[7] Twelfth respondent in CCT 89/22 and thirteenth respondent in CCT 92/22.

[8] 13 of 2000.

[9] South Africa became a member of the ITU in 1910. However, in 1965 South Africa was excluded from all meetings due to the continued implementation of its apartheid policies. Upon the abolition of apartheid, South Africa once again became an active member of the ITU in 1994.

(BDM Policy), for which a public participation process was held in March and April 2007. This Policy was published in the Government Gazette in September 2008.[10]

[7] In 2007, Cabinet approved the dual illumination period, which was scheduled to commence on 1 November 2008. However, the government missed this deadline. In December 2012, the Digital Migration Regulations[11] were published in the Government Gazette and the commencement date for dual illumination was changed to 1 February 2016. While the BDM Policy had intended for full migration to be completed by November 2011, this was also not achieved. In the result, the BDM Policy was amended in 2012.[12] In terms of the 2012 amendment, government was set to complete digital migration by 17 June 2015, but this, too, did not materialise. As a result, the BDM Policy was further amended and published on 18 March 2015.[13] In terms of this amendment, the digital switch-on and analogue switch-off dates were "to be determined by the Minister of Communications in consultation with Cabinet".

[8] Modern television sets have a built-in digital tuner that allows them to receive digital transmissions. In order to receive digital transmissions, the old analogue television sets need a set-top box (STB), which is an instrument that converts digital transmissions to analogue transmissions, so that the signal may be received on analogue television sets. In the result, it is stated in the BDM Policy, and all its amendments, that these STBs would be made "affordable and available to the poorest TV-owning households", which had to register if they wished to receive state-sponsored STBs. Registration for the STBs was opened in 2015 and there was no closing date for registration.

[10] Broadcasting Digital Migration Policy, GN 958 *GG* 31408, 8 September 2008 (2008 BDM Policy).

[11] Digital Migration Regulations, 2012, GN 1070 *GG* 36000, 14 December 2012 (Regulations).

[12] Amendment of the Broadcasting Digital Migration Policy, GN 97 *GG* 35014, 7 February 2012 (2012 BDM Policy).

[13] Amendment of the Broadcasting Digital Migration Policy, GN 232 *GG* 38583, 18 March 2015 (2015 BDM Policy).

[9] The procurement of STBs began in 2015 and between 2016 and 2019, the Universal Service and Access Agency of South Africa (USAASA) procured 1.45 million STBs.[14]

[10] On 11 February 2021, and during the State of the Nation Address, the President of the Republic of South Africa announced that digital migration would be completed by the end of March 2022. On 29 September 2021, Cabinet approved the Minister's analogue switch-off implementation plan, in terms of which the analogue switch-off would occur by the end of March 2022. It was in accordance with this plan that the Minister eventually determined the analogue switch-off date to be 31 March 2022.[15]

[11] On 5 October 2021, for the first time, the Minister announced a deadline for the STB registration, which was 31 October 2021. For those who met the deadline, the STBs would be installed by the analogue switch-off date. However, for all those who registered after 31 October 2021, the STBs would be installed three to six months after analogue switch-off. This meant that those who failed to register by 31 October 2021 or registered thereafter would be disconnected from receiving analogue transmission. As a result, their analogue television sets would no longer be operational and they would not receive television services during that period.

[12] In December 2021, ICASA gave notice of its intention to hold an auction of portions of the broadcasting spectrum, referred to as the "digital dividend". In March 2022, ICASA proceeded with the auction of the spectrum. ICASA provisionally assigned portions of the digital spectrum to each successful bidder, including Vodacom. The provisional assignment ends on 30 June 2022 and on 1 July 2022, the permanent spectrum regimes will commence.

[14] USAASA is a state-owned entity established in terms of section 80 of the Electronic Communications Act 1 of 2014 (ECA) whose mandate is to ensure universal access to information and communications technology services.

[15] The analogue switch-off date was published in the Government Gazette, GN 1804 *GG* 45984, 28 February 2022.

[13] After the analogue switch-off date, broadcasters will not be able to transmit on the spectrum originally assigned to analogue, which was auctioned by ICASA. Broadcasters are therefore required to switch off their transmitters. The South African Broadcasting Corporation Limited (SABC) has already switched off some of its analogue transmitters and has migrated to digital. M-Net has switched off 84 transmitters and has also migrated to digital. e.tv has switched off only four out of 95 transmitters and is still broadcasting on analogue.

Litigation history

[14] On 12 October 2021, e.tv launched an urgent application in the High Court on the basis that the analogue switch-off would permanently prevent millions of people, who had not migrated to digital television transmission and who were not in possession of STBs, from receiving free-to-air television transmission on their analogue television sets. It sought wide ranging relief: a declarator that the Minister may not complete the digital migration process until she has complied with her constitutional obligations to provide STBs to persons in need; a declarator that the Minister must consult with affected parties before completing digital migration; an order reviewing and setting aside a final decision, if one is taken, in relation to the final date for analogue switch-off; and that the Minister must report to the High Court on steps taken to supply STBs and consult with affected parties. MMA and SOS applied and were admitted as intervening applicants.

[15] Before the High Court, the applicants argued that the digital migration process was tainted as it violated the rights enshrined in the Bill of Rights, particularly the right to receive social assistance under section 27 and freedom of expression as contained in section 16 of the Constitution. The applicants contended that the government had undertaken to assist approximately 3.75 million qualifying households in the digital migration process by providing STBs and installing these before the analogue switch-off. However, the applicants alleged that approximately 2.58 million qualifying households, comprising of over 8 million people, would not have migrated by the analogue switch-off date.

[16] The applicants further argued that the Minister had a duty to consult with various interested parties and stakeholders, inclusive of the applicants, before announcing the analogue switch-off date. They invoked this Court's decision in *KwaZulu-Natal Joint Liaison Committee*,[16] and contended that the import of this decision is that a state organ will be bound by its public promises. The applicants submitted that the Minister, and the government by extension, were bound by the undertaking to provide and install STBs, so as to ensure that no one is left behind when the analogue switch-off is implemented and could not renege from that promise as doing so "would be legally and constitutionally unconscionable".

[17] The High Court relied upon the minority judgment of *KwaZulu-Natal Joint Liaison Committee* and held that it "is more in line with the position in our law of contract and the law of property which recognises various rights and obligations".[17] To determine the nature and extent of the promise to establish if any rights and obligations were created, the High Court considered the 2008 BDM Policy, the 2012 BDM Policy, the 2015 BDM Policy and the statistics before it. It accepted that, out of 14 million television sets in South Africa, 10.5 million were compliant with digital transmission and 3.75 million were analogue.[18] It held, however, that no evidence was adduced to indicate the financial status of the households still using analogue television sets, for purposes of determining whether they qualify for the STBs.[19]

[18] The High Court held that the Minister did not adduce evidence to show what remained to be achieved before the March 2022 analogue switch-off date,[20] and noted the undertakings by the state to install 507 251 STBs by the end of March to cater for the households which qualify and had registered but had not been supplied with STBs.

[16] *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal* [2013] ZACC 10; 2013 (4) SA 262 (CC); 2013 (6) BCLR 615 (CC).

[17] High Court judgment above n 2 at para 34.

[18] Id at para 49.

[19] Id at para 50.

[20] Id at para 53.

The Court, whilst mindful of the undertaking, held that it had to consider the slow progress by the state thus far. The High Court further stated:

> "It would be unconscionable for any of these households to continue to be left behind prior to [analogue switch-off] and there is a significant probability of this happening given the slow installation progress made thus far, especially in the provinces that have already switched off".[21]

[19] Regarding the households which have not qualified, the High Court held that the applicants failed to provide the Court with any statistics that these households would qualify for STBs because neither the state nor the applicants have conducted any study to establish whether they qualify.[22] The High Court concluded that the offer by the state to register for the STBs is analogous to the offer and acceptance as stated by the minority in *KwaZulu-Natal Joint Liaison Committee*; therefore, this is binding on the state.[23] The High Court further held that those households which did not register do not qualify for STBs, and that because this was an undetermined number of persons who would be affected by the analogue switch-off, "it would be unreasonable to allow for a situation where this unknown variable is allowed to hold up a process that will eventually benefit all citizens".[24]

[20] With respect to the applicants' argument that the analogue switch-off will infringe the right to freedom of expression of many people, the High Court held that the state has done enough to provide STBs for all qualifying registered households.[25] On the duty to consult, the High Court held that the applicants had failed to show that a further consultation process with them would have ensured a rational, reasonable and

[21] Id at para 53.

[22] Id at para 54.

[23] Id at para 55.

[24] Id at paras 56 and 58.

[25] Id at para 60.

lawful digital migration process.[26] It further held that the state only has a duty to consult where it would be irrational to take the decision without consultation with industry experts.[27] The High Court thus dismissed the application.

[21] The final aspect considered by the High Court was an application in terms of rule 6(5)(e) of the Uniform Rules of Court for the admission of a statement by the SABC. This application was brought on the eve of the hand down of the judgment. The statement sought to be admitted had been issued on 25 March 2022, after the hearing in the High Court, in which the SABC expressed some concerns about the analogue switch-off date and the process leading up to the finalisation of the digital migration.[28] The High Court dismissed the application on the basis that it would be prejudicial to admit the statement as the respondents would not be afforded an opportunity to respond to the statement. It said, "in light of the [High] Court's order, this further evidence is not required".[29]

[22] Notwithstanding the dismissal of the application, the High Court extended the date for analogue switch-off to 30 June 2022. It said that this was to ensure that the households which have registered for STBs would access them before the analogue switch-off date. The Court did not explain how the extension period was determined. On costs, the High Court ordered e.tv to pay 50% of the first respondent's costs and pay the full costs of the second, third and sixth respondents. The Court held that the *Biowatch*[30] principle applied in respect of MMA and SOS, and thus made no order as to costs.

[26] Id at para 61.

[27] Id at para 62.

[28] On 5 April 2022, the SABC issued another statement which said that the statement of 25 March 2022 was not intended to be used by the applicants in the ongoing litigation. It further said that the statement did not exhaust agreed procedures between the SABC and the Minister, and as such the SABC apologised to the Minister for the oversight.

[29] High Court judgment above n 2 at para 70.

[30] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

In this Court

[23] Aggrieved by the decision of the High Court, the applicants have now approached this Court for direct leave to appeal on an urgent basis.

Issues

[24] The issues for determination are as follows:

(a) Do these applications engage this Court's jurisdiction?

(b) Should leave to appeal directly to this Court on an urgent basis be granted?

(c) If the answers to (a) and (b) are in the affirmative, then the following issues arise:

(i) Whether the rights under sections 16 and 27 of the Constitution have been infringed.

(ii) The nature of the Minister's power to determine the analogue switch-off date.

(iii) If the Minister's power is an executive one, did the Minister act rationally? If the power is administrative in nature, did the Minister adequately consult, as required by the Promotion of Administrative Justice Act[31] (PAJA) before taking the decision to determine the analogue switch-off date?

(iv) What is the appropriate remedy?

(v) Did the High Court err in its finding that the *Biowatch* principle does not apply to e.tv; therefore, mulcting e.tv in costs?

[31] 3 of 2000.

Analysis

Jurisdiction

[25] This Court has jurisdiction to decide constitutional matters and any other matter that raises an arguable point of law of general public importance that ought to be considered by it.[32] This matter concerns a review of the Minister's actions and a determination whether the Minister acted within the bounds of the Constitution. The Minister does not dispute that this Court has jurisdiction to entertain the matter. This is clearly a constitutional matter; therefore, the jurisdiction of this Court is engaged.

Direct appeal and urgency

[26] This Court has a discretion to determine whether direct leave to appeal to it should be granted.[33] This discretion entails an interests of justice enquiry. The applicants submit that a direct appeal is warranted because: (a) the appeal involves only constitutional issues and there are no material disputes of fact; (b) this matter does not concern or call for the development of the common law; (c) the appeal raises critical issues of public and constitutional significance; (d) the matter is urgent as the analogue switch-off date was determined by the High Court to be 30 June 2022; (e) the applications have strong prospects of success; (f) there is an urgent need to bring finality to this matter; and (g) although the Supreme Court of Appeal will be bypassed, this Court has the benefit of a judgment from the Full Court.

[27] The urgency of this matter is not in dispute. The Minister agrees that this matter is urgent due to fact that the switch-off date of 30 June 2022 is imminent and because ICASA has completed the auction of the spectrum. The spectrum ought to be available from 1 July 2022. I agree with the parties that this matter is without a doubt urgent. The extended date of 30 June 2022 looms and does not provide sufficient time for the

[32] Section 167(3)(b) of the Constitution.

[33] *Phillips v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) at para 30.

matter to first be determined by the Supreme Court of Appeal. Additionally, this is a constitutional matter and, given the wide public impact the judgment will have, it is in the interests of justice that direct leave to appeal on an urgent basis be granted. It remains for me to consider the merits of the appeal.

Merits

[28] I commence with a consideration of the nature of the Minister's powers and whether she acted within the purview of legality.

Nature of the Minister's power

[29] The applicants argue that the Minister's power to determine the deadline for the STB registration and the analogue switch-off date constitutes administrative action. According to them, the Minister had a duty in terms of section 6 of PAJA to consult with affected parties before determining the deadline for the STB registration and the analogue switch-off date. In the event that the decisions were not administrative action, but rather taken in terms of policy, the applicants argue that there was still a duty on the Minister to consult in terms of section 3(5) of the ECA.

[30] Before considering these submissions, it is necessary to determine whether the nature of the Minister's powers constitutes administrative or executive action.

[31] The Minister argues that her powers to determine the analogue switch-off date and the parameters of the digital migration process are quintessentially executive powers. In her answering affidavit filed in the High Court, the Minister stated that "[t]he Regulations empower the Minister to determine the analogue switch-off date". Regulation 3(1) states that "[t]he 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". However, when the Minister published the analogue switch-off date of 31 March 2022 in the Government Gazette on 28 February 2022, it was done under paragraph 3.3.1 of the BDM Policy. The Minister, therefore,

understood her power to determine the analogue switch-off date to be in terms of the BDM Policy. The Minister submits that she derives her power to make policies relating to information, communications and technology, such as the BDM Policy, in terms of section 3(1) of the ECA.[34]

[32] The Minister argues that the question concerning the nature of her powers was settled by this Court in *Electronic Media Network Limited*.[35] In that case, this Court had to consider whether the Minister had the power to effect an amendment to the 2008 BDM Policy and whether the necessary consultations under the ECA were undertaken before the policy was adopted.

[33] I do not understand *Electronic Media Network Limited* to have decided this issue as argued by the Minister. The question before the Court was "[whether the Minister]

[34] Section 3(1) of the ECA provides:

> "The Minister may make policies on matters of national policy applicable to the [information, communications and technology] sector, consistent with the objects of this Act and of the related legislation in relation to—
>
> (a) the radio frequency spectrum;
>
> (b) universal service and access policy;
>
> (c) the Republic's obligations and undertakings under bilateral, multilateral or international treaties and conventions, including technical standards and frequency matters;
>
> (d) the application of new technologies pertaining to electronic communications services, broadcasting services and electronic communications network services;
>
> (e) guidelines for the determination by the Authority of licence fees and spectrum fees associated with the award of the licences contemplated in Chapter 3 and Chapter 5, including incentives that may apply to individual licences where the applicant makes binding commitments to construct electronic communications networks and provide electronic communications services in rural and under-serviced areas of the Republic;
>
> (f) the promotion of universal service and electronic communications services in under-serviced areas;
>
> (g) mechanisms to promote the participation of [small enterprises] in the [information, communications and technology] sector;
>
> (h) the control, direction and role of state-owned enterprises subject to the Broadcasting Act and the Companies Act, 1973 (Act No. 61 of 1973); and
>
> (i) any other policy which may be necessary for the application of this Act or the related legislation."

[35] *Electronic Media Network Limited v e.tv (Pty) Limited* [2017] ZACC 17; 2017 (9) BCLR 1108 (CC).

had the legal authority to make the policy-determination now being challenged or exceeded her powers".[36] This Court, therefore, had to consider whether the Minister exceeded the bounds of legality when making the specific policy. This Court did not consider whether the nature of the Minister's powers is executive or administrative – it was decided on the assumption that the adoption of the policy was executive action. In the current matters before this Court, there is a dispute about the *nature* of the Minister's powers – that is, whether it is executive or administrative. In my view, the Minister's reliance on *Electronic Media Network Limited* is therefore misplaced. Nonetheless, I agree with the Minister that the decision to determine the analogue switch-off date was an exercise of executive power, for the reasons set out below.

[34] In *Motau*,[37] this Court held that when considering whether it is appropriate to subject the exercise of public power to scrutiny under a review, it is necessary to consider whether such scrutiny is appropriate given that the power bears on policy matters, to which courts should show judicial deference.[38] When determining whether the decision of the Minister was an executive function or administrative action, it is useful to consider what this Court held in *SARFU*:[39]

> "Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will . . . depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So too is the nature of the power, its subject matter, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is."[40]

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[36] Id at para 20.1.

[37] *Minister of Defence and Military Veterans v Motau* [2014] ZACC 18; 2014 (5) SA 69 (CC); 2014 (8) BCLR 930 (CC).

[38] Id at para 43.

[39] *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC).

[40] Id at para 143.

[35] While the Minister understood the source of her power to be the BDM Policy, the applicants contend that the Regulations confer the necessary power on the Minister to determine the analogue switch-off. The Regulations merely state that the analogue switch-off date will be published by the Minister. It does not confer the power on the Minister to determine the analogue switch-off date. Similarly, the BDM Policy states that the Minister will *announce* the analogue switch-off date after engaging with Cabinet. The Regulations and the BDM Policy, therefore, presuppose that the Minister has the necessary power to determine the analogue switch-off date. In my view, this power is located within the Minister's original constitutional policy-making powers, which is section 85(2)(c) of the Constitution. This section empowers the Minister to develop and implement national policy – this much was undisputed.

[36] The determination of the analogue switch-off date is the implementation of the BDM Policy by the Minister. In my view, the Minister's exercise of power when determining the analogue switch-off date is thus executive in nature. Appropriate judicial deference should therefore be shown by this Court. The question is then whether the Minister exercised this power rationally and lawfully.

[37] The classification of power as an executive function does not mean that there are no constraints placed upon it.[41] In *Democratic Alliance*,[42] this Court held that "[i]t cannot be suggested that a decision that would be irrational in an administrative law setting might mutate into a rational decision if the decision being evaluated was an executive one".[43]

[41] *SARFU* above n 39 at para 148.

[42] *Democratic Alliance v President of the Republic of South Africa* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC).

[43] Id at para 44.

[38] In the Minister's submissions, *Motau* is used as authority to argue that the decision the Minister took to determine the analogue switch-off date is a policy decision or closely connected to or "adjunct to her executive policy formulation function".[44] During the hearing, counsel for the Minister was asked whether any consultations were undertaken before determining a cut-off date to register for the installation of STBs before the analogue switch-off date. Counsel argued that consultation was not necessary as the Minister was merely exercising an "adjunct" power to the original policy power – which is to determine the analogue switch-off date. On the strength of the Minister's own submissions and reliance on *Motau*, an "adjunct" power is still an executive power which, at the bare minimum, must be rationally exercised. The decision to determine the 31 October 2021 deadline for registration was also the implementation of policy as an adjunct power to the Minister's policy function to determine the analogue switch-off date.

[39] Accordingly, there are two relevant decisions which must pass constitutional muster: (a) the decision to determine the analogue switch-off date; and (b) the decision to determine 31 October 2021 as the deadline to register for STBs and to be supplied with such STBs before the analogue switch-off date.

Legality

[40] In *Affordable Medicines Trust*,[45] this Court described the principle of legality as a constitutional control of the exercise of public power when it held:

> "The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution."[46]

[44] *Motau* above n 37 at para 48.

[45] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC).

[46] Id at para 49.

[41] In *Pharmaceutical Manufacturers*,[47] this Court held that "[r]ationality in this sense is the minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries".[48] This Court went on to say that when considering rationality, it is not up to the Court to substitute its opinion as to what would be appropriate because—

> "[a]s long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately".[49]

[42] In *Albutt*,[50] this Court said:

> "Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected . . . . 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."[51]

[43] Counsel for MMA and SOS argues that this Court can avoid the rationality exercise through the lens of *Albutt* by simply considering whether the Minister complied with her duty to consult in terms of section 3(5) of the ECA.[52] I do not agree.

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[47] *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).

[48] Id at para 90.

[49] Id.

[50] *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC).

[51] Id at para 51.

[52] The section provides:

> "(5) When issuing a policy under subsection (1) or a policy direction under subsection (2) the Minister—
>
> (a) must consult the Authority or the Agency, as the case may be; and

[44] The Minister only published the official analogue switch-off date in the Government Gazette on 28 February 2022. However, this decision was taken earlier, with Cabinet approving the analogue switch-off date in September 2021. The analogue switch-off date was, therefore, determined first, and only then did the Minister determine the deadline for registration of STBs. The STB registration process and the deadline for registration form part of the process leading up to the analogue switch-off. These were part of the procedure required to execute the decision to implement analogue switch-off by 31 March 2022. This, in my view, is different to the making of policy, this is a decision concerning the process of implementing the policy. Section 3 of the ECA regulates ministerial policies and policy directions. The implementation of policy is distinct from either ministerial policies or policy directions and hence does not fall within section 3 of the ECA. The implementation of policy must nevertheless still measure up to the rationality standard set by this Court in *Albutt* and other procedural rationality jurisprudence.

[45] e.tv argues that the Minister had a duty to consult the public, including the applicants, before determining both the STB registration deadline and the analogue switch-off date. e.tv submits that, in two previous applications, the High Court confirmed that the analogue switch-off date "shall be made after a process of engagement with the affected parties ha[d] been concluded".[53] According to e.tv, the High Court failed to consider whether the Minister had a duty to consult before determining the STB registration deadline and, further, the High Court only decided the

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(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 30 days from the date of the notice;

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

[53] *Minister of Telecommunications and Postal Services v Acting Chair, Independent Communications Authority of South Africa* 2016 JDR 1848 (GP) at para 58 and *Telkom SA SOC Limited v Independent Communications Authority of South Africa*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 66778/2020 (8 March 2021) at para 68.

question whether the Minister had a duty to consult before determining the analogue switch-off date. e.tv submits that the High Court incorrectly accepted that since the decision was based on policy, there was no duty to consult. It contends that the process of consultation regarding the analogue switch-off 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".

[46] In her answering affidavit, the Minister denied that she was required to "undertake consultations or take her decision [to determine the analogue switch-off date] in a procedurally fair or procedurally rational manner in terms of the principle of legality". However, although she was not required to, she continued to consult with affected parties regarding "aspects that need[ed] to be considered for the completion of the digital migration process".

[47] In her submissions, the Minister continues to hold the stance that she was not required to consult regarding the determination of the analogue switch-off. She submits that "there is no general requirement for [her] to consult with the public on the exercise of her executive powers as a matter of the principle of legality". Moreover, the Minister submits that the BDM Policy does not contemplate that she should consult affected parties regarding the final analogue switch-off date; instead, she is only obligated to consult with Cabinet. The Minister also submits, that although she was not required to do so, she consulted with e.tv and other broadcasters regarding the analogue switch-off plan and date. And, the Minister highlights, e.tv was offered numerous opportunities to make submissions on the proposed analogue switch-off date and plan. It bears noting, however, that there is no mention of similar consultations with MMA, SOS or other similar interested groups.

[48] The Minister refers to several consultations that took place leading up to the 2008 BDM Policy to illustrate that proper consultations were undertaken before the analogue switch-off date was determined. In my view, this argument is misplaced. The consultations that took place during the preparation of the BDM Policy are not

equivalent to consultations to *determine* the analogue switch-off *date.* By their very nature, consultations to determine the analogue switch-off date would involve different aspects than consultations in preparation of the BDM Policy. For example, critical questions raised in consultations before the analogue switch-off date would have sought to determine the number of persons who qualify to receive STBs, who would like to register for STBs before the analogue switch-off date and how long it would take, at the current rate of installation, for all the households that wish to register to receive STBs to be supplied with such.

[49] The principle of legality has been extensively developed in our jurisprudence and is of application here too. This Court has stated that, while determining whether a functionary exercised her powers correctly, used to be a question answered in common law, the question is now answered under the Constitution and in terms of the principle of legality.[54] This position was confirmed by this Court recently in *Notyawa*,[55] where this Court said that "[t]he Constitution demands that all government decisions must comply with it, including the principle of legality which forms part of the rule of law, and which is one of our constitutional founding values".[56]

[50] In *Fedsure*,[57] this Court held that the principle of legality, as covered by the rule of law, "is generally understood to be a fundamental principle of constitutional law".[58] And, although the *Fedsure* decision was relying on and referring to the interim Constitution, this principle was transposed to the era of the final Constitution in *Pharmaceutical Manufacturers*.[59]

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[54] *Affordable Medicines Trust* above n 45 at para 50.

[55] *Notyawa v Makana Municipality* [2019] ZACC 43; (2020) 41 ILJ 1069 (CC); 2020 (2) BCLR 136 (CC).

[56] Id at para 38.

[57] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC).

[58] Id at para 56. See also: *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40; 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC) (*Gijima*) at para 386 and *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC); 2019 (6) BCLR 661 (CC) (*Buffalo City*) at para 36, which relied on and applied the *Fedsure* principle.

[59] In *Pharmaceutical Manufacturers* above n 47 at para 17, Court referred to the finding in *Fedsure*, but in relation to the final Constitution

[51] With reference to this matter, and in the light of the Minister's submissions that her decision was an executive one made in terms of section 85 of the Constitution, her decision in relation to the analogue switch-off date must comply with the Constitution in order to be lawful. I emphasise, lawfulness demands compliance with the Constitution. It cannot be denied that switching off analogue transmission is an integral part of digital migration; more than being connected to it, it is part of it. Therefore, digital migration policy discussions must include an opportunity where the affected parties are given notice and afforded an opportunity to make representations on the analogue switch-off date.

[52] The decision concerning the analogue switch-off date is not a mechanical determination as the facts of this case show. Important interests are at stake. Following *Albutt*, it was not procedurally rational for the Minister to set the analogue switch-off date without notice to the industry and affected parties, like MMA and SOS, to obtain their views on the matter.

[53] In the result, the Minister's decision not to give notice and take account of the representations received regarding the analogue switch-off date with the public or affected parties is unlawful.

[54] The applicants made further submissions to this Court on the potential infringement of constitutional rights, namely, the rights to social security and freedom of expression. The Minister submits that the right to freedom of expression is not violated as all qualifying households will receive STBs, but the date upon which they will receive their STBs depends entirely on the date when they registered for these. As to these rights-related averments advanced by the applicants, this Court held in *New National Party*[60] that, when it is found that the legislative scheme is rational, but that it

[60] *New National Party of South Africa v Government of the Republic of South Africa* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC).

has the effect of infringing on rights, reasonableness (the section 36 enquiry) becomes relevant.[61] Because I find that the decision of the Minister to determine the analogue switch-off date is unlawful, it is not necessary to deal with the arguments raised by the applicants that the analogue switch-off will infringe on the rights to freedom of expression and social security.

[55] Before determining the appropriate remedy, I deem it necessary to consider the registration process for STBs as well as the issue of supplying STBs to all qualifying households ahead of the analogue switch-off date.

The registration for STBs

[56] The applicants submit that millions of indigent South Africans will be left without access to television and will experience what is termed "a television blackout" as a result of the Minister's failure to investigate the impact of the unreasonable deadline of 31 October 2021 as the STB registration cut-off date. The parties rely on this Court's decision in *Democratic Alliance* to argue that a failure to consider a material factor during the process leading to a decision may render both the process and the decision irrational.

[57] MMA and SOS submit that there are three categories of people who will be affected by the analogue switch-off date, namely: (a) the people who qualify for STBs but have not registered; (b) the people who have registered before 31 October 2021 or 10 March 2022, but whose STBs have not been installed; and (c) the people who do not qualify for STBs, and who are unable to obtain STBs or new generation television sets due to the global chip shortage. According to MMA and SOS, the High Court's order provided little to no protection for these categories of people.

[58] In respect of the first group, MMA and SOS submit that only 40% of qualifying households are registered, thus at least 2.26 million households or approximately

[61] Id at para 24.

7.5 million people will be left without access to television as at 30 June 2022. With regard to the second group, the High Court accepted that households which registered between 1 November 2021 and 10 March 2022 will be cut-off until 30 September 2022. The High Court also accepted that given the current rate of installation, it is likely that not all households which registered for STBs will have their STBs installed before 30 June 2022. In order to ensure that all qualifying households have installed STBs before the analogue switch-off date, there would have to be an increase in the rate of installation between 800% and 2600%. The third category of people – persons who do not qualify for state-sponsored STBs and are required to self-migrate – are also at risk of being cut-off due to the economic impact of Covid-19, the global chip shortage and the increase in price and demand for electronics.

[59] Further, they submit that since the analogue switch-off date is being reviewed for its rationality, this Court is required to assess whether there is a rational connection between the decision and the purpose it aims to achieve. However, the Minister failed to provide reasons for announcing the STB registration deadline without advance warning, and the analogue switch-off date as being 31 March 2022. No substantive justification is proffered on the papers.

[60] In response, the Minister submits that the STB registration process was designed to determine how many people wanted and needed STBs, and were qualified to receive the benefit. Therefore, as I understand the Minister's submissions, the STB registration process and the October deadline was the method utilised to collect the necessary information to determine the analogue switch-off date. Alternatively, the Minister submits that even if the process did have some flaws, they were not of such a nature so as to render the entire digital migration process irrational. The Minister submits that, as the High Court found, it is through the registration process that households are required to "raise their hand" to be counted.

[61] It is settled law that both the process by which the decision is made and the decision itself must be rational.[62] In the media statement released by the Minister on 5 October 2021, she said: "[g]iven the low numbers of registered beneficiary households, Cabinet approved a last call for registration with a cut-off date of 31 October 2021, this call is also made fully aware of the impact of the Covid-19 pandemic on household incomes". Based on this statement, the Minister elected to set the October deadline because of the low registration rate. A further reason was proffered by the Minister in her submissions before this Court, which was that the process had been open since 2015, meaning that the deadline set was not irrational. For these two reasons – low intake and registration being open since 2015 – to rationally support the Minister's decision, the registration had to be effective in serving the purpose of informing qualifying households of the need to register, the steps to be taken, and, importantly, the consequences of not registering by 31 October 2021. I am not persuaded that it can be said that the process leading up to 31 October 2021 was sufficient. I say so for the following reasons.

[62] The number of households that may be eligible for STBs is estimated to be 3.75 million households. This figure is not disputed by the Minister. It is stated that 1.2 million households registered and qualified for STBs before the deadline of 31 October 2021. A further 260 868 households registered after 31 October 2021. By relying on statistics from StatsSA, the applicants submit that there are approximately 3.3 individuals per household in South Africa, and all the available figures before this Court are submitted as household figures. Based on these figures, there are currently approximately 2.5 million households that will either lose access to television on the analogue switch-off date, or must self-migrate to digital television. The Minister has not conducted any study to investigate the reason why these households have not registered, and merely makes an inference that they must have self-migrated.

[62] *Democratic Alliance* above n 43 at para 34.

[63] It is not up to this Court, in terms of rationality, to second guess the method utilised by the Minister. The method chosen to gather the necessary information to make an informed decision on the analogue switch-off date was, according to the Minister, the STB registration process. However, what this Court must consider is whether the "means selected are rationally related to the objective sought to be achieved".[63] Therefore, can it be said that the STB registration process and the deadline, in the manner in which it was conducted, is rationally related to the objective sought to be achieved, being the transition to digital television, without causing millions of persons to lose access to television on the analogue switch-off date?

[64] Requiring registration for STBs is an entirely permissible requirement, provided that people are properly informed and given reasonable opportunity to register. The Minister argues that registration for STBs has been open since September 2015, and therefore the three weeks' notice period for the deadline of the STB registration process is reasonable. This submission, however, ignores two indeterminates. Between September 2015 and 4 October 2021, persons were invited to register for a benefit and no deadline was set for such registration. Furthermore, registration was for them not to lose access on analogue switch-off – an uncertain event happening on an undetermined date. There was no sense of urgency imposed on the public by the Minister before the announcement on 5 October 2021. Rather, the process of analogue switch-off has a regrettable history of delays and postponements. I will consider the steps taken by the Minister between 2015 and 2021 to inform the public of the need to register for STBs.

[65] The Minister submits that, since 2015, the Department of Communications and Digital Technologies (Department) conducted awareness campaigns through what is known as "Imbizo Campaigns". Seven provinces were the target of these campaigns, namely: Northern Cape, Free State, Mpumalanga, Limpopo, KwaZulu-Natal, Eastern Cape and the North West Province.[64] It is reported that 33 campaigns were held

[63] *Albutt* above n 50 at para 51.

[64] The Minister did not indicate why Gauteng and the Western Cape were not included in these campaigns.

between 2015 and 2017. During these campaigns, communication was based on the analogue switch-off target date of 2017, which was not met. In 2018, two campaigns were held in the Free State. Between 2019 and 2020, campaigns were held, but the Minister did not specify how many were held. In 2019, the Department and the Department of Cooperative Governance concluded a memorandum of understanding and, through this partnership, an awareness campaign which included field registration, was conducted. Visits to faith-based organisations in remote parts of the country were conducted, and door-to-door campaigns were held. The Minister also states that the Department and the telecommunication companies have participated in an awareness campaign by sending bulk text messages. The Minister did not provide the particulars of the recipients of these text messages or the contents thereof.

[66] It is common cause that for a period of more than two years from January 2019 to October 2021, no STBs were installed by the Department. The installations only commenced again in October 2021. Counsel for the Minister argues that there is a difference between a pause in the installation of STBs and the registration of STBs. Notionally, I agree. The registration of STBs was still open during this period. However, one might wonder what the purpose of registering for STBs is if the Department is not undertaking the necessary installations to give effect to the registration.

[67] I am not in a position to make any determination on the methods used by the Minister to make the public and, in particular, the indigent members thereof, aware of the need to register before the analogue switch-off date. This is squarely within her executive domain. Although the evidence does not indicate the reach of these steps, it is clear that some steps were taken. However, these steps were taken without a sense of urgency due to the looming deadline. In my view, in considering the rationality of the process, due emphasis should be placed on the steps taken by the Minister after the President announced, during the State of the Nation Address, that the analogue switch-off would be completed by March 2022. The steps taken before the announcement of the final analogue switch-off date and the deadline for registering for

STBs are not irrelevant; however, I place emphasis on the steps taken after February 2021 as this is the time that persons were required to be notified of the imminent loss of access to television on a set date, and not a theoretical date in the future.

[68] There is insufficient evidence before this Court on the steps taken by the Minister between February 2021 and October 2021 to notify the public of the analogue switch-off date planned for March 2022 and the need to register with a sense of urgency. Counsel for the Minister pointed this Court to a statement by the South African Post Office which states:

> "Post Offices countrywide have seen a dramatic increase in members of the public who want to apply for a subsidised television decoder, or set-top box. This follows the announcement earlier in the year that South Africa will switch to digital transmissions in early 2022.
>
> . . .
>
> The government plans to switch the whole of South Africa to digital television broadcasts by April next year. You will then need a set-top box to continue watching TV with your current television set."

[69] This statement offers little assistance. It advises the public that there is a need to register for STBs; however, no indication of any immediate deadline to register for STBs is given. The statement merely states that to avoid being cut off, one requires an STB and that the analogue switch-off will happen early in 2022.

[70] During October 2021, the Minister launched a campaign focused on three areas: public relations, advertising and digital communications. This campaign was set to commence in October 2021 and continue until 31 December 2021. The campaign, intended to notify persons of the need to register for STBs to ensure access before the analogue switch-off date, only started after 5 October 2021 and carried on until December 2021. The effect of this is that persons who were notified through this campaign in November or December and registered for STBs, would receive their

benefit within three to six months after the analogue switch-off date. These persons would lose access to a benefit already enjoyed.

[71] In that same media statement where the 31 October 2021 deadline was announced, the Minister stated that a list of compatible digital televisions will be shared on several websites and with the Digital Migration Call Centre. The statement further indicated that the Digital Migration Call Centre's "contact details will be shared within the month of October 2021". As a result, households which were uncertain whether their television sets were compatible with digital transmission would only have been able to, on an unknown date in October, contact the Digital Migration Call Centre to enquire about the compatibility of their television sets. In the event of incompatibility, they would still have been required to register before the end of October 2021. The period provided for all these enquiries was plainly insufficient.

[72] The effect of the Minister's submissions is that she inferred that millions of indigent persons in South Africa were aware of the 31 October 2021 deadline, they were duly informed of the consequences of not registering by that date and accordingly, made an informed and conscious decision not to register for state-sponsored STBs. Regrettably, I cannot agree with this submission. In my view, the process leading up to the 31 October 2021 deadline did not provide adequate opportunity for affected households to register and, as a result, the process is tainted with procedural irrationality.

[73] In *Democratic Alliance*, this Court held:

> "The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also

> everything done in the process of taking that decision, constitute means towards the attainment of the purpose for which the power was conferred."[65]

[74] As the process was defective, the Minister did not have the necessary information before her about the number of persons who qualified and wished to register for STBs before the analogue switch-off date. In *Democratic Alliance*, when dealing with rationality and ignoring the relevant factors, this Court postulated a three-stage enquiry. It held:

> "If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the means to achieve the purpose for which the power was conferred. And if that failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole. There is therefore a three stage enquiry to be made when a court is faced with an executive decision where certain factors were ignored. The first is whether the factors ignored are relevant; the second requires us to consider whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and the third, which arises only if the answer to the second stage of the enquiry is negative, is whether ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational."[66]

[75] In applying the first enquiry, it is clear that the number of households which qualify for STBs, which have not registered but wish to do so before the analogue switch-off date, is a relevant consideration. On the Minister's version, in her statement of 5 October 2021, she stated:

> "To give effect to a successful Digital Migration and Analogue Switch-off processes, 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."

[65] *Democratic Alliance* above n 43 at para 36.

[66] Id at para 39.

[76] The Minister, therefore, recognised that for a "successful" migration process to be achieved, persons who are required to migrate to digital can do so and will not be negatively affected by the analogue switch-off. The number of households which are required to register for STBs is accordingly, without a doubt, a relevant consideration.

[77] The second enquiry, whether the failure to consider the material concerned is rationally related to the purpose for which the power was conferred, also tells against the Minister's decision. It cannot be said that the Minister's failure to adequately provide an opportunity for persons to be informed about the need to register before the deadline – and thus to obtain accurate information about households requiring STBs – is rationally connected to a successful migration process. Without obtaining and considering such information, the Minister was not in a position to determine an analogue switch-off date that would mitigate the harm caused by such a switch off, which the Minister accepted was amongst the central goals of a successful migration process.

[78] On the last enquiry, the Minister argues that even if the process was flawed to a certain extent, it does not colour the entire process with irrationality. I disagree. The flaws in the process leading up to the determination of the analogue switch-off date meant that the determination was made without any reliable sense of its impact on millions of indigent persons, whose currently working television sets will be rendered useless. If a central purpose of the analogue switch-off decision is to mitigate the adverse impact of switch-off, a process that failed to provide guidance on the number of households requiring STBs is inevitably coloured with irrationality. It follows that the decision to impose the registration deadline is irrational.

[79] I emphasise that what I am saying is not whether another means to achieve the end should have been used. That enquiry goes beyond what this Court is empowered to do. What I do hold is that the means employed by the Minister meant that her decision was made without any reliable indication of the households requiring STBs, and that she therefore failed to take a relevant consideration into account. The Minister

was at large to determine how such information was obtained. What she could not do, however, and what tainted her decision with irrationality, was to adopt a process which meant that the analogue switch-off date was determined without considering the numbers of households which would be adversely affected by such switch off.

[80] I must point out that when determining a time period for further registration of STBs, this process is not required to start from scratch, and the Minister may legitimately take into account the opportunities already afforded to qualifying and indigent persons to register. However, what is required, is a reasonable opportunity to be duly informed of the need to register and to take action to effect such registration. As to how this process must take place, this is within the executive sphere and within the competency of the Minister.

[81] Now that I have found that the Minister's decision to determine the analogue switch-off date is unlawful, and the registration of the STBs and the imposed deadline is irrational, it is apposite to consider what remedial actions should be taken.

Remedy

[82] The first point of call in considering the appropriate remedy is a declaration of invalidity. Section 172(1) of the Constitution states:

> "When deciding a constitutional matter within its power, a court—
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
> (b) may make any order that is just and equitable, including—
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[83] The diction of section 172(1)(a) makes a declaration of invalidity of the Minister's conduct mandatory. In *Economic Freedom Fighters*,[67] this Court held:

> "Declaring law or conduct inconsistent with the Constitution and invalid is plainly an obligatory power vested in this Court as borne out by the word 'must'. Unlike the discretionary power to make a declaratory order in terms of section 38 of the Constitution, this Court has no choice but to make a declaratory order where section 172(1)(a) applies. Section 172(1)(a) impels this Court, to pronounce on the inconsistency and invalidity of, in [that] case, the President's conduct and that of the National Assembly. This we do routinely whenever any law or conduct is held to be inconsistent with the Constitution."[68]

[84] In the ordinary course, a declaration of invalidity is usually followed by a just and equitable order in accordance with section 172(1)(b). In the case of review applications, such as the one before us, the natural and conventional consequence would entail setting aside the impugned decision or conduct.[69]

[85] On this score, it would be just and equitable for the declaration of invalidity to be followed by the setting aside of the decision of the Minister concerning the registration date and the analogue switch-off date, as well as the order of the High Court.

[86] Over and above the remedy of setting aside the Minister's decision and the order of the High Court, the applicants have enjoined this Court to extend its just and equitable relief to: (a) ordering the Minister to engage in a consultation process with affected

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[67] *Economic Freedom Fighters v Speaker, National Assembly* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC).

[68] Id at para 103. See also *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 201.

[69] See *Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd* [2009] ZASCA 8; 2009 (4) SA 628 (SCA) at para 11, where it was held that "[o]rdinarily, where there has been a reviewable irregularity in the award of the tender, an unsuccessful tenderer would be entitled to call for the award to be set aside". See also *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 at 115, which held:

> "Whenever a public body has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them."

parties, before determining an analogue switch-off date; (b) ordering the Minister to comply with her constitutional obligations to provide those South Africans presently reliant on analogue broadcasting with alternative means to access terrestrial broadcasting before analogue switch-off is completed; and (c) ordering the Minister to file a report with the High Court to explain the steps taken to provide those alternative means. In addition, e.tv also seeks an admission of the SABC's statement.

[87] Vodacom, ICASA and Sentech oppose the relief sought by the applicants on the basis that the relief sought – the declarators preventing the Minister from completing analogue switch-off until certain steps have been taken – is, in substance, interdictory relief brought under the guise of declaratory orders. They submit that granting the interdictory relief is undesirable as the applicants have not met all the requirements of a final interdict.

[88] Further, ICASA records that it auctioned the spectrum in March 2022 and issued licenses to the successful bidders by 7 May 2022. ICASA has also secured provisional spectrum for terrestrial broadcasting uses; however, such provisional spectrum regime is set to end on 30 June 2022. ICASA submits that, as of 1 July 2022, the mobile network operators (MNOs), that have successfully submitted bids for the spectrum and have been licenced by ICASA, are expected to use the auctioned spectrum in accordance with their licence conditions. It is on these bases that ICASA opposes this application and any relief that would effectively halt the digital migration process. Sentech submits that the analogue switch-off cannot be postponed indefinitely as it will be difficult to source the necessary parts to continue maintenance of the analogue system.

[89] With respect to the applicants' first and second requests, this Court cannot grant them. The broader relief sought would inevitably require this Court to dictate to the Minister that certain nuanced and specific steps must be taken. What the applicants are in effect asking of this Court is to prescribe the procedure that the Minister must follow before determining the analogue switch-off date. According to this extended relief

sought, the Minister must first consult all affected parties and provide alternative means to access terrestrial broadcasting before determining the analogue switch-off date. This would be tantamount to substitution, which would not only be inappropriate under the circumstances of this matter but would also go beyond the scope of justice and equity and would violate the principle of the separation of powers.

[90] It is a well-established principle that courts should "be reluctant to substitute their decision for that of the original decision maker",[70] save for appropriate or exceptional circumstances.[71] This Court has endorsed the decision in *Johannesburg City Council*,[72] where it was held that "[t]he ordinary course is to refer back because the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary".[73]

[91] In *Trencon*,[74] this Court laid out the conditions for substitution. It held—

> "given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The

[70] *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* [1998] ZACC 20; 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC) (*Premier*) at para 50.

[71] In *Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape* 2007 (6) SA 442 (Ck) at para 46, the Court aptly held that—

> "courts, when considering the validity of administrative action, must be wary of intruding, even with the best of motives, without justification into the terrain that is reserved for the administrative branch of government. These restraints on the powers of the courts are universal in democratic societies such as ours and necessarily mean that there are limits on the powers of the courts to repair damage that has been caused by a breakdown in the administrative process."

[72] *Johannesburg City Council v Administrator, Transvaal* 1969 (2) SA 72 (T). See *Premier* above n 70 at para 50.

[73] *Johannesburg City Council* id at 76D-G.

[74] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC).

> ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties."[75]

[92] Most pertinent to this case are the first and second factors. With respect to the first factor – whether a court is in as good a position as the administrator or decision-maker to make the decision – a primary consideration is whether the court is seized with all the relevant information and whether the decision in question still requires some level of expertise. "A court will not be in as good a position as the administrator where the application of the administrator's/decision-maker's expertise is still required and a court does not have all the pertinent information before it." [76] A court will also not be in such a position where the decision to be made is so polycentric or policy-laden so as to demand deference to the decision-maker.[77]

[93] On the second factor – whether the decision of an administrator is a foregone conclusion – this Court has determined that a decision will be a foregone conclusion

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[75] Id at para 47.

[76] Id at para 48.

[77] Id at para 50. At para 43, the Court outlined the need for judicial deference due to institutional competence. It held:

> "Indeed, the idea that courts ought to recognise their own limitations still rings true. It is informed not only by the deference courts have to afford an administrator but also by the appreciation that courts are ordinarily not vested with the skills and expertise required of an administrator."

See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 46, citing *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Limited* [2003] ZASCA 46; [2003] 2 All SA 616 (SCA) at para 47, where this Court held that—

> "a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal."

See also *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) at para 95 and *Doctors for Life* above n 68 at para 37.

"where there is only one proper outcome of the exercise of an administrator's discretion"[78] and, in *Johannesburg City Council*, it was found that a foregone conclusion could result where "it would merely be a waste of time to order the tribunal or functionary to reconsider the matter".[79] It must be noted that the second factor will be impeached if it has been determined that the court is in as good a position as the decision-maker.[80]

[94] From the content of the first and second factors, it is evident that this Court is not in as good a position as the Minister to make the decisions, since it is not in possession of all the facts and information that the Minister would require to make the decision concerning the process that must be followed to reconcile the date for the analogue switch-off and the final registration date for STBs with the prescripts of legality. The Court is also not seized with all the relevant statistical data and budgetary considerations, nor is it seized with the logistical information, which it would require to be placed in the same position as the Minister for decision-making purposes. It is also evident that these decisions are largely polycentric, and thus require deference.[81] Further, it is clear that there can be no foregone conclusion, since there is a plethora of decisions that can be taken to remedy the unlawful conduct and, additionally, the first factor has been impeached by the Court's lack of pertinent information.

[95] Given the weight of these factors and the mandatory language of *Trencon*, it is clear that the facts and circumstances of this case militate against substitution.

[96] As the first and second requests for extended relief have been rejected, it follows that the third request – ordering the Minister to file a report with the High Court to explain the steps taken to provide those alternative means – cannot be entertained, as it

[78] *Trencon* above n 74 at para 49.

[79] *Johannesburg City Council* above n 72 at 76D-G.

[80] *Trencon* above n 74 at para 50, wherein it was held that "there can never be a foregone conclusion unless a court is in as good a position as the administrator".

[81] *International Trade Administration Commission* above n 77 at para 95.

is largely contingent on the second request. Thus, the extended relief sought by the applicants is inappropriate.

[97] The impropriety of substitution is similarly applicable to the High Court, as at the time of its judgment, the High Court also suffered from the lack of pertinent information, which plagues this Court. It was also not in the same position as the Minister for decision-making purposes when it set a new analogue switch-off date. The High Court has not proffered an explanation or basis for substitution. Consequently, the High Court's decision falls to be set aside.

[98] In so far as the SABC's statement is concerned, this Court need not make pronouncements on the admission of the SABC's statement, as the probative value of this statement has been rendered nugatory by this Court's finding that the Minister's conduct does not meet the requirement of rationality.

[99] Although the submissions by Vodacom, Sentech and ICASA carry some weight and while I am mindful of the time constraints and the need to balance the interests of all the parties concerned, such considerations cannot be a basis for this Court to endorse a process and decisions that have been tainted with irrationality or illegality. The Court also has an obligation to safeguard the interests of more than two million indigent households which have been impacted by the registration process and will undoubtedly be affected by the analogue switch-off. Moreover, the concerns raised by Vodacom, Sentech and ICASA largely strike at the urgent need for the Minister to take action to reconcile the analogue switch-off planning and STB process with the demands of rationality. Thus, in granting relief, this Court does not purport to delay the process; it merely leaves the ball in the Minister's court.

[100] Therefore, the demands of justice and equity require that the Minister's decision be declared invalid and set aside. The decision of the High Court also falls to be set aside. It would be just and equitable to leave the implementation of this judgment to

the Minister to determine the analogue switch-off date in a manner that is consistent with the prescripts of legality.

Concluding remarks – conduct of e.tv

[101] The respondents, in particular the Minister, argue that e.tv has persistently obstructed the digital migration process and that it has launched this application under the guise of representing the indigent population, while in reality, it is only concerned with its own narrow commercial interests. The Minister submits that granting the additional relief sought by e.tv would encroach on the doctrine of separation of powers and effectively prioritise e.tv's narrow commercial interests over the public interests. Vodacom and ICASA support this argument. Vodacom further argues that in previous litigation launched by Telkom, e.tv had supported an expedited analogue switch-off date and is now making a complete about-turn.

[102] While these submissions bear consideration, it must be noted that this Court is not called upon to make a pronouncement on e.tv's intentions in bringing this application. This Court is required to objectively consider the rationality of the decision taken by the Minister in determining the analogue switch-off date. This exercise was supported by the submissions of MMA and SOS, two non-profit organisations with no vested commercial interests, who act in the public interest.

[103] In granting the relief of setting aside the analogue switch-off date, this Court is cognisant of the fact that digital migration will not be effected on 30 June 2022. This relief should not be construed as an invitation for any of the parties before this Court to bring about a further delay of digital migration, through whatever means. All parties agree that there is a need for South Africa to migrate to digital and for the analogue switch-off to imminently take place. Analogue switch-off is an urgent, and unfortunately much delayed, national priority. Therefore, once adequate notice is given to the public to make informed decisions on whether to register for an STB, digital migration should proceed without further delay.

Costs

Appeal on costs

[104] e.tv seeks an order setting aside the costs order of the High Court. The High Court applied the *Biowatch* principle to MMA and SOS; however, it held that as e.tv was not acting in the public interest, *Biowatch* did not apply. It ordered e.tv to pay 50% of the Minister's costs and 100% of ICASA's, the Chairperson of ICASA's, and Vodacom's costs – inclusive of the costs of three counsel where employed.

[105] The scope and content of the *Biowatch* principle has become trite; albeit, for purposes of this case, it bears repeating. Essentially, the general rule is that in constitutional litigation involving private parties and the government, "if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs".[82] This Court has confirmed that when considering whether the *Biowatch* principle applies, the crucial consideration is not the character of the parties, but the nature of the litigation at issue.[83]

[106] This matter concerns the review of the Minister's conduct and decisions relating to the analogue switch-off date and the STB registration deadline. It is now common cause that legality reviews of this nature fall squarely within the realm of constitutional issues.[84] Although it is reasonably conceivable that e.tv has a commercial interest in this matter, the nature of this litigation is constitutional which is for the benefit of millions of indigent persons in South Africa. On this premise, and based on the facts, circumstances and outcome of the matter, the *Biowatch* principle applies. Therefore, the costs order of the High Court cannot stand, as there was no basis for not applying the *Biowatch* principle.

[82] *Biowatch* above n 30 at para 22.

[83] *Economic Freedom Fighters v Gordhan; Public Protector v Gordhan* [2020] ZACC 10; 2020 (6) SA 325 (CC); 2020 (8) BCLR 916 (CC) at para 77.

[84] See *Gijima* above n 58 and *Buffalo City* above n 58.

[107] The High Court awarded the costs of three counsel. I see no reason why the costs of three counsel is warranted.

Costs in this Court

[108] Before this Court, e.tv seeks costs of three counsel. MMA and SOS also seek costs of this application for leave to appeal. Vodacom has opposed the costs order sought by e.tv, on the basis that e.tv pursued litigation for self-serving and purely commercial ends. Vodacom further submits that e.tv has no basis for seeking costs against it, as Vodacom is also a private party engaged in debating the same issues in the same litigation.

[109] The applicants have been successful; therefore, they are entitled to their costs. However, there are no compelling reasons to justify the award of costs of three counsel. Therefore, the Minister must pay the applicants' costs including the costs of two counsel.

Order

[110] The following order is made:

1. Leave to appeal directly to this Court on an urgent basis is granted.
2. The appeal is upheld.
3. The order of the High Court is set aside and replaced with the following:
   "(a) It is declared that the announcement of 31 March 2022 as the final switch-off date of the analogue signal and the end of dual illumination issued by the Minister of Communications and Digital Technology on 28 February 2022 in terms of the Broadcasting Digital Migration Policy (as amended), is unconstitutional, invalid and is set aside.
   (b) It is declared that the Minister's decision to impose a deadline of 31 October 2021 to register for set-top boxes is unconstitutional, invalid and is set aside.

(c) The Minister must pay the costs of the applicants, including the costs of two counsel where so employed."

4. The Minister must pay the applicants' costs in this Court, including the costs of two counsel.

For the Applicant in CCT 89/22:	G Marcus SC, M du Plessis SC, A Coutsoudis, S Pudifin-Jones and C Moodley instructed by Nortons Incorporated
For the Applicants in CCT 92/22:	N Ferreira and K Harding-Moerdyk instructed by Rosengarten and Feinberg Attorneys
For the First Respondent in CCT 89/22 and Second Respondent in CCT 92/22:	T Motau SC, B Makola SC, B Lekokotla, P Smith and B Dhladhla instructed by State Attorney, Pretoria
For the Second and Third Respondents in CCT 89/22 and Third and Fourth Respondents in CCT 92/22:	W R Mokhare SC, M Majozi and C Lithole instructed by Kunene Ramapala Incorporated
For the Sixth Respondent in CCT 89/22 and Seventh Respondent in CCT 92/22:	F Snyckers SC, D Turner and A Msimang instructed by Cliffe Dekker Hofmeyr Incorporated
For the Twelfth Respondent in CCT 89/22 and Thirteenth Respondent in CCT 92/22:	A B Rossouw SC and G Jansen van Vuuren instructed by NM Aboo Attorneys