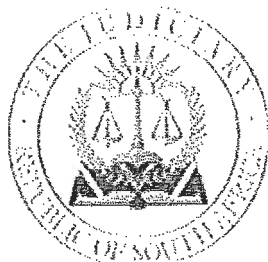


REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 51159/2021

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: YES/ YES
28/3/2022	

In the matters between:

e.tv (PTY) LTD**Applicant****MEDIA MONITORING AFRICA****First Intervening
Applicant****SOS SUPPORT PUBLIC BROADCASTING****Second Intervening
Applicant**

and

**MINISTER OF COMMUNICATION AND DIGITAL
TECHNOLOGIES****First Respondent****THE INDEPENDENT COMMUNICATIONS
AUTHORITY OF SOUTH AFRICA****Second Respondent****CHAIRPERSON: INDEPENDENT COMMUNICA-
TION AUTHORITY OF SOUTH AFRICA****Third Respondent**

NATIONAL ASSOCIATION OF BROADCASTERS	Fourth Respondent
SOUTH AFRICAN BROADCASTING CORPORATION SOC LIMITED	Fifth Respondent
VODACOM (PTY) LIMITED	Sixth Respondent
MOBILE TELEPHONE NETWORKS (PTY) LTD	Seventh Respondent
CELL C (PTY) LIMITED	Eighth Respondent
TELEKOM SA SOC LIMITED	Ninth Respondent
WIRELESS BUSINESS SOLUTIONS (PTY) LTD t/a RAIN	Tenth Respondent
LIQUID TELECOMMUNICATIONS SOUTH AFRICA (PTY) LIMITED	Eleventh Respondent
SENTECH SOC LIMITED	Twelfth Respondent

JUDGMENT

MSIMANG, AJ

The Applicants and Intervening Applicants brought an application against the Respondents for the following orders:

- [1] That only to the extent necessary and pursuant to directions issued by the case management judge (the Honourable Mr Justice Fourie), the ordinary provisions regarding service and time periods are dispensed with and this matter is treated as one of urgency in terms of Uniform Rule 6(12),

- [2] It is declared that, prior to the determination by the Minister of the analogue switch-off date and the date for completion of digital migration, the Minister is required to undertake a process of consultation with affected parties, including, but not limited to e.tv and the Intervening Applicants, regarding the date of the analogue switch-off date and the date for the completion of digital migration and whether appropriate measures are in place to ensure that those in South Africa who are reliant on analogue broadcasting are not deprived of their rights of access to information by means of receiving free-to-air broadcasts as a consequence of the determination by the Minister.
- [3] It is declared that the digital migration process may not be completed and/or the analogue switch-off date may not be proclaimed by the Minister unless and until the Minister has complied with her constitutional obligations and public promises to provide those South Africans who are presently reliant on analogue broadcasting with alternative means to access these services on a free-to-air basis.
- [4] To the extent that the Minister has taken a final decision in relation to the determination of the date for digital migration's completion and analogue switch off, or takes such a decision prior to the determination of this application (*"the determination decision"*):

4.1 The determination decision is declared to be unlawful and invalid;

4.2 The determination decision is reviewed and set aside.

[5] The Minister is directed to file a Report to this Court within one (1) month of the date of this Order, or such other period as this Court should determine to be appropriate and just and equitable, setting out the steps that have been taken to ensure that:

5.1 members of the public who are currently reliant on analogue broadcasting services (including but not limited to 54% of e.tv's viewers as measured over the period September 2020 to August 2021) are provided with access to set-top-boxes and/or reception devices to enable them to continue to be a position to access free-to-air broadcasts without subscription or charge following digital migration;

5.2 adequate resourced call-centres are operational to process viewer queries sufficiently and effectively;

5.3 an effective viewer information campaign has been conducted; and

5.4 sufficient Sentech resources have been allocated to action the switch-off of transmitters.

[6] Such further and/or alternative relief as this Court considers necessary, just and equitable.

[7] The First and Second Intervenors brought an application to be granted leave to intervene as parties in the main application, which is granted.

THE HISTORY

[8] This matter raises disputed, complicated, and technical issues of fact and law, including constitutional law, and this judgement was prepared under significant time pressure due to the current deadline of 31st March 2022 for the switch-off analogue broadcasting signal, as explained below. The Court also required additional evidence from the Minister, which was only provided after hours on the first day of oral argument and responded to with further additional evidence from the applicants before the hearing commenced the next day. The Court appreciates the efforts of all parties to provide this relevant additional evidence, which confirms the complexity of the issues raised before the Court and requiring the Court's consideration in the short time available to it. Indeed, on the eve of judgment on Sunday 27th March 2022, the applicants applied to place still further evidence before the Court for its consideration. Those applications are discussed below. The matter is about the fraught process of digital migration - a process which started in 2006. During 2005 the Minister of Communications, Dr Ivy Matsepe-Casaburri (hereinafter referred to as

Minister including all successors in title) established the Digital Migration Working Group (DMWG). The Minister in consultation with the DMWG made far reaching recommendations that paved the way for the migration of the South African Broadcasting systems from analogue to digital. The DMWG group consisted of the government, broadcasting industry, organised labour and civil society.

- [9] South Africa is a member of the International Telecommunications Union (ITU). In 2006 the Regional Radiocommunication Conference (PRC-06) of the ITU resolved that all countries of Europe, Africa, Middle East as well as the Islamic Republic of Iran should migrate from analogue to digital broadcasting services by 2015. Broadcasting Digital Migration is the process of converting the broadcast of television and radio signals from analogue to digital technology. This is set to mark the beginning of the end of analogue broadcasting in these regions.
- [10] The process started in earnest in 2007 through public participation which was held regarding the proposed Digital Migration policy based on the recommendations made by the DMWG and the inputs received from the public.
- [11] The key benefit of digital broadcast technologies is that they use scarce national radio frequency spectrum far more efficiently than analogue technologies. This means that the existing broadcasting services can be

provided by using less of the radio frequency spectrum they currently occupy. The radio frequency spectrum freed up through the digital migration process, often referred to as “digital dividend”, has the potential not only to provide new and improved broadcasting but also to enable additional information and communication technology (ICT) services traditionally not provided in the broadcasting radio frequency band, such as mobile telephony and wireless broadband. The “digital dividend” can only be realised after the migration process is completed.

[12] Digital Migration begins with the “switch-on” of the broadcasting digital transmission signals and ends with the “switch-off” of analogue ones. Until the analogue switch-off occurs there is a period of “double illumination” during which both analogue and digital services are simultaneously broadcasted.

[13] The switch-on date¹ of broadcasting digital terrestrial television (DTT) signal was originally set for the 1st November 2008 and the switch-off date for the analogue terrestrial television (ATT) signals was the 1st November 2011. However, this feat was not accomplished.

¹ 2008 Digital Migration Policy Section 2 and 7(1) Government Notice No. 958 dated 8 September 2008

- [14] The Broadcasting Digital Migration Policy of 2008 was amended by the Minister on the 17th February 2012.² The 2012 policy provided that the government will endeavour to switch-on the digital terrestrial television signal in the last quarter of 2012. The date for the switch-off of analogue signal will be determined by the Minister after engaging with cabinet and the relevant broadcasting sector stakeholders. Section 3.3.1 of the amendment provided:

“Government is committed to meet the deadline for analogue switch off by 17 June 2015 in line with the relevant ITU resolution. Taking into account the different processes which need to be completed before digital switch-on, Government has decided that digital signal should be switched on by the end of the 2012/2013 financial year. A final date for the commencement of the dual illumination period will be announced by the Minister of Communications after engaging with Cabinet and all relevant stakeholders, including the broadcasting industry. The date for the final switch-off of the analogue signal with Cabinet and other relevant stakeholders and assessing the extent of take up by audiences of the necessary equipment to facilitate universal access to broadcasting services”.

- [15] In December 2012, ICASA promulgated the Digital Migration Regulations³. The purpose of the regulations was to provide for the transition from analogue broadcasting to digital broadcasting of the existing television channels and to prescribe the conditions for assignment of channel capacity for purposes of digital migration⁴.

² Government Notice No. 97 of 7 February 2012. Government Gazette 35014

³ Government Notice No.1070 Government Gazette 36000 of 14 December 2012

⁴ Regulation 2, read with the definition in Regulation 1.

- [16] The Digital Migration Regulations required progressive dual illumination of the SABC channels, e.tv channel and M-Net channels during the dual illumination period to achieve the phased digital migration of those channels in the whole of the Republic⁵.
- [17] The date for the commencement of the dual illumination period as well as the date of the final switch-off of the analogue signal would be published by the Minister in the Gazette⁶.
- [18] On the 18 March 2015 the Minister published amendments to the 2008⁷ and the 2012⁸ policies as follows:

Para 2 Executive Summary

“The switch-on and switch-off date of the digital and analogue broadcasting digital terrestrial television signals will respectively be determined by the Minister of Communications in consultation with Cabinet”

“3.3.1 the government is committed to ensure a successful migration in South Africa. Taking into account the different processes, that need to be completed before the digital switch-on. Government has decided that the signal should be switched-on, on a date to be determined by the Minister in consultation with Cabinet. The date for the final switch-off of the analogue signal will similarly be announced by the Minister in consultation with Cabinet.

⁵ Regulation 3.3

⁶ Regulation 7

⁷ Government Gazette No. 31408 of 8 September 2008 and the 2012

⁸ Government Gazette No. 35014 of 17 February 2012

- [19] On the 1st February 2016 the Minister gazetted the commencement of the dual illumination period for the digital broadcasting signal in South Africa:

“Kindly take notice that the commencement of the dual illumination period for the digital broadcasting signal in South Africa starts on 1 February 2016. However, the analogue switch-off date will be announced after consultation with Cabinet”.

- [20] On the 5th October 2021 the Minister issued a media statement stipulating that:

20.1. The digital migration commenced in 2006 when South Africa acceded to the ITU Regional Agreement in Geneva.

20.2. During January 2021 President Ramaphosa announced that South Africa must complete digital migration by the 31st March 2022.

20.3. All eligible households earning less than R3500 per month are required to register at the nearest post office in or before the 31st October 2021 to receive government assistance for STB installations.

- [21] On the 28th February 2022 the Minister determined the 31st March 2022 as the date for the final switch-off of the analogue signal and the end of dual illumination¹⁰.

FACTS

- [22] The dispute in this matter is about the 700MHz/800MHz spectrum. In terms of the ITU Convention it was agreed that the spectrum must be cleared of analogue broadcasting for IMT700/IMT800 Mobile Network Operators (MNO). The migration process would culminate with the switch-on of digital transmission and the switch-off of analogue transmission.
- [23] In South Africa the 700MHz/800MHz spectrum was allocated to the SABC, M-Net and e.tv for analogue television broadcasting. In terms of the digital migration process analogue transmission would be switched-off on the 31st March 2022 as announced by the Minister.
- [24] The broadcasters would not be able to broadcast on this spectrum. The SABC has already switched off 288 analogue transmitters and has migrated to digital transmission. M-Net (Multi-choice) has switched off 84 transmitters and has migrated to digital transmission. e.tv has switched off 4 of the 95 transmitters and is still broadcasting on analogue. It is common

¹⁰ Government Notice 1804 of 28 February 2022 Government Gazette No. 45984

cause between the parties that the IMT 700/IMT 800 spectrum that has been cleared by the SABC and M-Net will not be capable of use for digital transmission as long as e.tv analogue broadcast continues as there will be interference in the signal.

[25] On the 5th October 2021 the Minister issued a media statement on the Broadcast Digital Migration and Analogue Switch-off Plan and stated the following:

“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 the estimated 3.75 million qualifying households (as per StatsSA 2018 data).

2.2 Since the inception of the BDM programme, 556 954 beneficiary households have been migrated from the current total of 1.184 million. In addition, almost 10.5 million households out of just over 14 million TV households (2018 StatsSA estimates) self-migrated through private satellite boxes, as follows:

- DSTV = 7.8 million households*
- OpenViewHD = 2.3 million households, and*
- StarSat = 450, 000”*

“4.5 Households Qualifying for Support

4.5.1 Given the low numbers of registered beneficiary households, Cabinet approved a last call for registration with a cut-off date of 31 October 2021, this last call is also made fully aware of the impact of the Covid-19 pandemic on household income, In terms of this call:

- *The qualifying households who register on or before 31st October 2021, will be connected before the ASO; and*
- *The households that register after the 31st October 2021 will only be connected within three (3) to six (6) months after the ASO.*

4.5.2 We call upon all eligible households to register at the nearest post office on or before the 31st October 2021 to receive government assistance for your STB installation. We are also finalizing a registration App and the details will be announced in the near future”.

[26] The applicants brought these applications which seek to delay the migration process. The basis for the opposition is that the process has not been fair in that the government has breached the rights enshrined in the Constitution and the Bill of Rights particularly in that it intends to switch off approximately 3.75 million poor South African households including 54 percent of e.tv viewers who are receiving Free-To-Air Broadcasting. The government had promised the estimated 3.75 million qualifying households that they would not be left behind in the migration to digital transmission in that they would be provided with installed STB's prior to ASO if they registered to receive a STB.

[27] The argument of e.tv is that out of the 3.75 million households eligible and reliant on government to migrate them, the Minister could probably install 1 167 912 STB's by March 2022 which means that 2.58 million qualifying

indigent households (over 8 million South Africans) would not have migrated.

[28] Mr Marcus SC, Counsel for e.tv argued that the Minister's conduct threatened the fulfilment of the government's over-arching duty under section 27 of the constitution to ensure social assistance, in the form of financial support, for those who cannot support themselves. Further he argued that in this case the duty is accentuated for government when it comes to the indigent and their access to information, particularly where government has publicly promised to assist the poor with STB's to enable them to receive digital television.

[29] Similarly, Mr Ferreira, Counsel for the intervening applicants, argued that as a result of the sudden rush by the Minister to switch-off analogue broadcasting at least 2.5 million indigent households representing 8.25 million indigent people will be left entirely without Free -To -Air services at the end of March 2022 and in the immediate aftermath of the ASO.

THE KZN PRINCIPLE

[30] Mr Marcus relied on the so-called "KZN"¹¹ principle" that a state organ will be bound by its seriously and lawfully made public promises and that it

¹¹ Kwa Zulu Natal Joint Liaison Committee v MEC for Education, Kwa Zulu Natal and others 2013(4) SA 263 (cc)

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

- [31] In that case, the MEC for Education issued a Notice in September 2008 setting out the subsidy amount which had to be paid to independent schools for the budget year commencing 1st April 2009. The payment of the first term tranche was due on 1st April 2009. The Independent Schools had incorporated the allowance for those subsidies in their budgets for 2009. In May 2009, the department sought to retract and significantly reduce the available subsidy amount. The Constitutional Court through Cameron J¹² stated the following:

“[48] Even though the 2008 Notice may not have given rise to an enforceable agreement between the Applicant and the Respondents, it constituted a publicly promulgated promise to pay. And, once the close date for payment of a portion of the subsidy passed, this created a legal obligation unilaterally enforceable at the instance of those who were intended to benefit from the promise”

- [32] The 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

¹² Kwa Zulu Natal Joint Liaison Committee at 48

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.

[33] Froneman J¹³ expressed a different view as against the majority view:

“[106] The lack of an intention to contract was the only real defence that the Department offered to the contractual claim of the applicant. The promise to pay the subsidies to schools is reasonably susceptible to a construction that it was an offer to schools which was accepted by them. Nothing in private contract law or public administrative law excludes that construction as a matter of principle”

[34] The reasoning of Froneman J is more in line with the position in our law of contract and the law of property which recognises various rights and obligations. Rights are reciprocal and for every right there is an obligation. A real right (*ius in re*) is a right to a thing and is enforceable against the world at large. A personal right (*ius in persona*) is a right to performance or a prestation and is enforceable only against the person who is party to the contract.¹⁴ It is important to establish what rights the registered

¹³ KwaZulu Natal Joint Liaison Committee of para 106

¹⁴ Silberberg and Schoeman's - The Law of Property 5 ed page 23

“The following patrimonial rights or property rights with corresponding legal objects may be distinguished namely:

- (a) A real right is a right to a thing. As indicated before, a thing is an independent corporeal object (other than human beings) which is susceptible to legal control and which is valuable and useful to a person.
- (b) A personal right is a right to performance. Performance is an act in the form of delivering something, doing or not doing something (*dare, facere or non facere*) which one person can require a particular other person to perform.
- (c) An immaterial property right is a right to immaterial property. Immaterial property is the intangible expression of human skills, or inventions of the human mind, embodied in a tangible agent and which are by law allotted to their author.

applicants acquired *vis-à-vis* the unregistered households and the government.

[35] e.tv's arguments are anchored, on the promise that the Minister and government had made in respect of the provision of the STB's. It is imperative to establish the nature and the extent of the promise in order to establish any rights and obligations it created and who should be the beneficiaries of the promise. In order to do so we must interrogate all the policies where the promise was made.

-
- (d) A limited real right to other patrimonial rights (serving as legal objects) such as real rights, personal rights and immaterial property rights.
 - (e) A statutory right granted by the legislature to a party to an agreement to claim performance from the other party to the contract. Performance in this instance is also an act in the form of delivering something, doing or not doing something (*dare, facere or non facere*) which one person can require a particular other person to perform.
 - (f) A statutory right against the state to certain resources or performances. The following rights distinguished:
 - (i) Welfare claim rights against the state and not based on contract (for example pensions, medical benefits and subsidies);
 - (ii) Licences, permits and quotas issued by the state; and
 - (iii) Other rights against the state and based on legislation (especially land and water-use rights, and mineral and petroleum rights in terms of land reform and similar initiatives undertaken in terms of section 25 of the 1996 Constitution)."

Sakereg Vonnisbundel 2nd edition page 5

- "(a) Volgens die *persoonlikesteorie* is die onderskeid tussen saaklike en persoonlike regte in die werking van die regte geleë. 'n Saaklike reg het hiervolgens absolute werking, d w s dit geld teen die hele wêreld. 'n Persoonlike reg daarenteen het slegs *relatiewe* werking, d w s dit geld slegs teenoor 'n bepaalde individu...
- (b) Volgens die *klassieke* teorie is die onderskeid tussen saaklike en persoonlike regte nie in die werking van die regte geleë nie, maar in die *aard van die betrokke regsbetrekking*. 'n Saaklike reg is volgens dié siening 'n regsbetrekking tussen 'n regsobjek en 'n saak, terwyl 'n persoonlike reg met 'n verhouding tussen 'n regsobjekte onderling te make het."

[36] **The 2008 DM Policy**¹⁵

The policy estimated that there are 4.5 million households that are poor who would find it very difficult to afford STB's by November 2011 and that government has decided as a matter of policy, to consider finding means of making STB's affordable.

[37] The 2008 policy promised to find a means to make STB's affordable by 1st November 2011. It did not promise to provide STB's and in any event the 1st November 2011 switch-on and switch-off was not met.

[38] **2012 DM Policy**¹⁶

The 2012 policy estimated that there are 11.5 million TV households in South Africa and of these 5 million are poor households who would find it very difficult to afford STB's. The government had decided as a matter of policy, to consider finding some means to make STB's 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 Electronic Communication Act (ECA)¹⁷, to subsidise poor households through the Universal Service and Access Fund (USA Fund).

¹⁵ Government Gazette 31408 Government Notice 158 of 2008

¹⁶ Government Gazette 35014 Government Notice 97 of 2012

¹⁷ Electronic Communications Act No. 36 of 2005

[39] It must be noted that the policy estimates that there are 5 million poor households who would find it difficult to afford STB's. The government, in order to assist the poorest households to make the STB's affordable, mandated the use of Funds available in the USA Fund, ensuring that the benefit that they currently enjoy is maintained.

[40] It is important at this stage to consider the provisions of section 88(1)(a) of the ECA which provides:

“88 Application of money in Universal Service and Access Fund:

(1) The money in the Universal Service and Access Fund must be utilised exclusively for payment of subsidies-

(a) For assistance of needy persons towards the cost of the provision to, or the use by, them of broadcasting and electronic communication services”

[41] The mandate of Section 88(1) of the ECA is to assist needy persons towards the costs of broadcasting and electronic services. The 2012 policy enables the government to use the USA Fund to assist in the provision of STB's. The policy, makes provision to assist the poorest of the poor households. The USA Fund mandate is for the usage of the fund for the needy.

[42] **2015 DM Policy**¹⁸

The 2015 Broadcasting Digital Migration policy simply provided that the total TV-owning households in South Africa are estimated at 13 million, of which approximately 65 percent rely exclusively on free-to-air broadcasting. No commitment was made with the provision of the STB's.

[43] On 10th March 2015 the Independent Online News reported that 5 million poor television household owners would receive free STB's from government. The Fact Sheet (annexure PR 28) provided by e.tv states that government will provide free STB's to more than 5 million poor households television owners and that the following groups are eligible to receive subsidies:

- Indigent South African with a green Identity Document.
- Households who are in possession of a functioning TV set and are not subscribed to paid television services.
- Households dependent on social grants.
- Households already covered by SABC concessionary TV licence scheme.
- South Africans living around the boarder region areas of the country SKA in the Northern Cape.

¹⁸ Government Gazette 38583 Government Notice 232 of 2015

The people who will not qualify for the government subsidy will have to buy STB's. Prices will be announced once the STB's are available and further states that the South African Post Office (SAPO) is responsible for the distribution of STB's.

[44] On the 13th May 2021 the Post Office provided requirements to qualify for a free TV decoder (STB) and advised people to apply for a subsidised STB.

- Proof of family income. Families with income of R3200 per month or less qualify.
- Recipients of a SASSA social grant qualify.
- Proof of SA identity and SA citizenship.
- Proof of address (for installers).
- A police affidavit to state that you have a working TV.

[45] On the 5th October 2021 the Minister made a media statement that during Sona 2021 the President announced the 31st March 2022 as the switch-off date for analogue. That government undertook to assist beneficiaries earning less than R3500 per month with the installation of STB's to ensure universal migration. That the process of registering the beneficiary households to be supported commenced in 2015 and that to date 1.184 million qualifying households have been registered out of the 3.75 million qualifying households (as per Stats SA 2018 data).

Since the inception of the BDM programme 556 954 beneficiary households have been migrated from the current 1.184 million.

- [46] According to Stats SA there are 14 million TV owning households in South Africa 10.5 million self-migrated and 3.5 million are the qualifying households. The 10.5 million is made of: -

DSTV	7.8 million
OpenViewHD	2.3 million
Starsat	450 000.

- [47] *“We call upon all eligible households to register at the nearest post office on or before 31st October 2021 to receive government assistance for your STB installation. We are also finalising a registration application and the details will be announced in the near future.”*

STATISTICS

- [48] The Statistics that are relied on by all parties were obtained from Statistics South Africa. The Statistics during 2008 indicated that the majority of television sets in South Africa were analogue.
- [49] Television manufactures started manufacturing digital compliant television sets from 2010. New generation television sets manufactured from 2010 were digital compliant. It appears that by 2021 out of the

14 million television sets in South Africa 10.5 million were compliant and about 3.75 million were analogue.

- [50] 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.

CRITERIA FOR ELIGIBILITY

- [51] In 2015 the registration process started for the poorest households who needed assistance and the Post Office was identified as the Distributor of the decoder (STB's). The criteria was set for registration and to qualify the following requirements had to be met:

- 51.1 Income of R3200 or less;
- 51.2 Sassa Grant recipient;
- 51.3 Proof of South African Identity Document and Citizenship;
- 51.4 Proof of Address;
- 51.5 Police affidavit to state that you have a TV set in working condition.

THE PROMISE AND THE MISSING MILLIONS

- [52] It is clear from the 2018 Stats South Africa statistics that there were 3.75 million television sets in South Africa receiving signal via analogue. The households that have heeded the government's call to register were 1.184 million. These statistics are actual and tangible figures. Similarly, the 260 868 who registered after the cut-off date present real and tangible figures.
- [53] As at 31st October 2021, 1 228 879 households had registered, of which 1 180 666 qualified to receive STB's. 12 754 could not have the STB's installed at the stipulated addresses (no reasons provided), leaving 1 167 912 households requiring installation. Since the installation programme commenced, only 660 661 STB installations have been completed as of the 14th March 2022, leaving 507 251 registered households outstanding. The Minister's department (department) projected that it could install 197 214 STBs by 20th March 2022, 184 196 by 25th March 2022, 93 202 by 28th March 2022 and the balance of 32 639 by 31st March 2022 to achieve installation of all 507 251 outstanding registered and qualifying households. Of these, 34 294 were in the Free State, 39 835 in the North- West, 5 598 in the Northern Cape, 20 122 in

Mpumalanga and 17 918 in Limpopo. These are the provinces in which analogue transmission has already been switched off in terms of an agreement with the SABC and installation completion is most urgent there. The department achieved the installations completed thus far with 285 installers and noted that Sentech has engaged another approximately 8 000 installers to complete the project. No further details or evidence was placed before the Court regarding what remains to be achieved and how it can reliably occur before ASO on the 31st March 2022. Again, the department indicated on 14th March 2022 to the Court its projection that all these outstanding installations will be completed by 31st March 2022, the ASO date. This commitment, whilst seriously made by the department, must be considered by the Court in light of the common cause facts regarding the progress in installations thus far. 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, especially in the provinces that have already switched-off.

- [54] 2.58 million households have not registered. The applicants argue that they constitute about 8 million people that have been forgotten or who are missing from the migration process. The applicants have not provided the Court with any statistics that these are deserving households that require

STB's. Neither the government nor the applicants have conducted a research or study that indicates how many indigent households receive television via analogue. Households continued registering after the 31st October 2021 and continue to do so; an indication that there are still households deserving of STB's out there although the exact number is unknown. As at the hearing before the Court, a further 260 868 households had registered between 31st October 2021 and 10th March 2022. The department and Minister say no more about this group other than that:

- (i) Their STB installations are currently not budgeted for, necessitating an application to National Treasury to secure additional funds that have not yet been made available, and;
- (ii) Their STB installations are expected to take three to six months.

While this group failed to register by the 31st October 2021 cut-off date announced on the 5th October 2021, the Minister has included them in the numbers of those who are entitled to urgent STB installation.

[55] **RIGHT OF THE REGISTERED HOUSEHOLDS *vis-a-vis***

GOVERNEMENT

It is common cause that government publicly made a call in the Gazette calling on members of the public who meet certain criteria to apply for

STB's. The households that registered and met the requirements set by government qualify for STB's. By registering, the households accepted the invitation for a free STB from government¹⁹. It is analogous to the offer and acceptance as stated by Froneman J in the Kwazulu Natal principle case. The person who registered acquired a prestation which entitled that person to performance that will compel government to provide that person with a STB.

[56] **RIGHTS OF UNREGISTERED HOUSEHOLDS *vis-a-vis* THE GOVERNMENT**

The households that did not heed government's call and did not register do not qualify for STB's. In order to qualify the household had to comply with the criteria set and fulfil the requirements. The household had to register. The registration is imperative in order for the household to be counted. Without registering, the government will be unable to ascertain the number of deserving households and to make the necessary provisions for the STB's. The household that has not raised its hand and applied as required has no standing.

¹⁹ Christie's Law of Contract in SA

"In the leading English case of *Carlill v Carbolic Smoke Ball Co* [1983] 1 QB 256 (CA) 268, the company had published an advertisement offering to pay £100 to anybody who used its smoke ball as directed but nevertheless, caught influenza. Bowen LJ said:

"It was also said that the contract is made with all the world – that is, with everybody; and that you cannot contract with everybody. It is not a contract made with all the world. There is the fallacy of the argument. It is an offer made to all the world; and why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and perform the condition?"

[57] The 1.184 million households are entitled to STB's to be installed by government on or before the 31st March 2022 which is the switch-off date announced by the Minister. The 260 868 households who registered after the 31st October 2021 had been promised that their STB's will be installed in three to six months from the 31st March 2022.

[58] It remains to be seen how many households will be adversely affected by switch-off. However, it would be unreasonable to allow for a situation where this unknown variable is allowed to hold up a process that will eventually be of benefit to all citizens and where the government must meet its international obligations.

[59] 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.

FREEDOM OF EXPRESSION

[60] It was argued by the applicants that an estimated 8 million South Africans will be cut-off from analogue broadcasting and thereby would be denied their right to freedom of expression including freedom to receive information. It is correct that in today's world, freedom of expression and freedom to receive information, is best served by being able to receive information from multiple sources (an argument aptly made by Vodacom)

and sources of a person's own choice. It is the court's view, that in light of the process undertaken by government to provide for STB's to all qualifying registered households, the government has done enough within its powers to help the qualifying households realise this right. It is near impossible for the government to establish who else qualifies for a STB without the affected households registering as not all indigent households own an analogue TV and not all households that own an analogue TV are indigent.

[61] **DUTY TO CONSULT**

The duty to consult which is raised by the applicants is primarily that the Minister must consult e.tv, Media Monitoring Africa and SOS Support Public Broadcasting before announcing the switch-off date. The migration process has a long and arduous history starting with the establishment of the Digital Migration Working Group and continuing all the way to the dual illumination period and, finally, the provision of STB's. The various Digital Migration Policies indicated what consultation had taken place. e.tv mostly relies on the six letters written by it in September and October 2021 but cannot dispute its inclusion in several satisfactory consultations over many years regarding the process of digital migration. Its disagreement with the process followed and preference for a process that serves its commercial interests does not require further consultation

opportunities. Similarly, the Intervening Applicants have not shown that further consultations with them are necessary to ensure a rational, reasonable, and lawful digital migration process. The applicants' interests have been heard by government and balanced against the urgent need for digital migration to occur, many years after it ought to have been completed in terms of South Africa's international commitments. 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.

- [62] 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.

Nugent J A in *Scalabrini* concluded:

*"[72] that consultation in this case does not have as a consequence that there is a general duty on decision makers to consult organisations or individuals having an interest in their decisions. Such a duty will arise only in circumstances where it would be irrational to take the decision without such consultation, because of the special knowledge of the person or organisation to be consulted, of which the decision-maker is aware. Here the irrationality arises because the Director-General, through his representations, at the meeting of 7 May 2012, acknowledged the necessity for such consultation..."*²⁰

²⁰ "Minister of Home Affairs v Scalabrini Centre 201 (5) SA 421 para 72

[63] The Minister announced the switch-off date as 31st March 2022. There is nothing that prevents her from doing so. It is in the interest of the country the economy and for South Africans in general that the Digital Migration be finalised.

[64] **INSTALLATIONS: STATUS QUO**

The government's responsibility is to provide STB's to the 1.184 million registered households by the 31st March 2022 in terms of the agreement with the households who applied and registered for the STB's.

[65] In terms of the figures provided 1 167 912 households had registered and were entitled to STB installations. On the 5th October 2021 the Minister indicated that 556 954 of these households had been migrated which means that there were 610 958 outstanding installations. The Minister indicates that as at the 10th March 2022 there were 507 251 households which still required installations. This means that from October 2021 to 10th March 2022 only 103 707 STB's had been installed.

[66] The Minister provided the Court with projections that 507 251 outstanding installations will be conducted and concluded by the switch-off date, 31st March 2022. These projections are ambitious and very tight. The Court is sceptical that the government will be able to install the STB's as per the projections as they 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.

[67] Mr Motau SC, Counsel for the Minister, gave the Court the assurance that these projections will be met. He offered to submit a report to the Court on the progress of installations.

[68] The Court is not in the position to project manage the programme of installing STB's. It appears that the government will require more time to be able to install the STB's. The Court finds solace in the fact that some 800 000 STB's are available from the post office warehouse and that it appears that arrangements have been made for the sourcing of many thousands more technicians to undertake the installations.

[69] In order to make sure that the government does not switch-off the 507 251 households who have timeously registered and who are entitled to the installation of STB's by 31st March 2022; and who are likely to be switched-off if the government does not reach its installation target; the Court has decided that the switch-off date should be deferred for a period of three (3) months, to 30th June 2022, to give the government sufficient time to complete the installations of the outstanding STB's. The prompt installation of those qualifying households who registered after 31st October 2021 and by 10th March 2022 also is required to be completed

within the timeframe committed by the Minister to ensure the shortest disruption of their receipt of information on their analogue tv's.

RULE 6(5)(e) APPLICATIONS

[70] On Sunday 27th March 2022, the eve of judgement, e.tv and the Intervening Applicants brought two applications in terms of Rule 6(5)(e) to place further additional evidence before the Court. As with the main applications, these are strikingly similar. In both applications, the additional evidence was a media statement made by the South African Broadcasting Corporation on 25th March 2022 regarding the imminent ASO date of 31st March 2022. The SABC has played no part in these proceedings. The Minister and other respondents have not had the opportunity to deal with these applications or the contents of the SABC's media statement. Given the stage of the litigation and obvious need for all parties to have finality and certainty as to the ASO date and the installation of STB's for qualifying registered households, there is prejudice that will result from affording a party not before the Court in these proceedings the opportunity to be joined, consider its position and respond to the complex issues raised in a manner that also then enables the respondents to address the new evidence. However, in light of the Court's order, this further evidence is not required, and these applications are dismissed.

COSTS

[71] For the reasons set out above, e.tv and the Intervening Applicants were unsuccessful in obtaining the majority of the relief they sought in their main applications aimed at further consultation, interdicting the ASO in effect and requiring the Minister to report to the Court. They also were unsuccessful in their applications in terms of Rule 6(5)(e). The relief granted by the Court in its order is granted because it is just and equitable to do so in terms of section 172 of the Constitution to ensure that the qualifying registered households received their STB's before ASO or, for those who missed the registration cut-off date, within the shortest possible time period projected by the Minister. This means that the applicants ought to bear a portion of the respondents' costs in opposing the applications. However, the *Biowatch* principle applies to the Intervening Applicants which litigated in the public interest. For these reasons, e.tv is ordered to pay 50 % of the first respondents' costs and 100 % of the costs of the second, third and sixth respondents on party and party scale, including the costs of three counsel where employed.

ORDER

I therefore make the following order:

- 1) Media Monitoring Africa and SOS Support Public Broadcasting are granted leave to intervene as co-applicants in the proceedings under case number 51159/21;
- 2) The main applications and the applications in terms of Rule 6(5)(c) are dismissed;
- 3) The analogue switch-off date is deferred from 31st March 2022 to 30th June 2022;
- 4) Set-Top-Boxes for the 507 251 qualifying households registered by 31st October 2021 are to be installed by no later than 30th June 2022, with priority to be given to the installation of Set-Top-Boxes for the qualifying registered households located in the Free State, North-West, Northern Cape, Mpumalanga and Limpopo provinces;
- 5) Set-Top-Boxes for the 260 868 qualifying households registered between 31st October 2021 and 10th March 2022 are to be installed by no later than 30th September 2022; and
- 6) e.tv is ordered to pay 50% of the costs of the first respondent and 100% of the costs of the second, third and sixth respondents on party and party scale including the costs of three counsel where employed.


MSIMANG AJ
ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

I agree


LUKHAIMANE AJ
ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

I agree


LE ROUX AJ
ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on: 14 -15 March 2022
For the Applicant (e.tv): Gilbert Marcus SC
 Max du Plessis SC
 Andreas Coutsoadis
 Sarah Pudifin-Jones
 Celeste Moodley
Instructed by: Nortons Inc

For MMA and SOS: Nick Ferreira
 (the Intervening Applicant) Amanda Cachalia
Instructed by: Rosengarten & Feinberg

For the First Respondent: Terry Motau SC
Minister of Communication & Benny Makola SC
Digital Technologies Buhle Lekokotla
 Peter Smith
 Busani Dhladhla
Instructed by: State Attorney - Pretoria

For the Second & Third William Mokhare SC
Respondents: Mpho Makgato

(ICASA)
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Kunene Ramapala Inc

For the Sixth Respondent:
(Vodacom)

Frank Snyckers SC
Duncan Turner
Ayanda Msimang
Cliffe, Dekker Hofmeyer Inc

Instructed by:

Date of Judgment:

28 March 2022