



SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

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STATUS Immediate

***e.tv (Pty) Ltd v Minister of Communications* [2016] ZASCA 85**

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

In a judgment handed down today, the SCA found that, in amending the Broadcasting Digital Migration Policy in 2015, the Minister of Communications, Ms Faith Muthambi, had acted irrationally both procedurally and substantively. It thus reviewed and set aside the amendment, and upheld the appeal against the decision of the Gauteng Division of the High Court.

The policy was first published in 2008. It was designed to facilitate South Africa's shift from analogue terrestrial television to digital terrestrial television which is necessary to free up signal space. Viewers who presently receive analogue broadcast signals (via aerials) will require set top boxes (STBs) to watch television in the digital terrestrial environment. The majority of viewers in the country will need STBs to convert the digital signal on their televisions. The poorest television viewers will not be able to afford STBs, which will cost some R600 each.

The government proposes to subsidize the procurement of STBs required by five million households. It is estimated that there are eight million viewers who still rely on terrestrial television. (Other viewers use a satellite dish and decoder which can decrypt encrypted signals.) The amendment to the policy precluded free-to-air broadcasters from encrypting their television signals as it stated that the subsidized STBs would not have encryption capability. An STB that is equipped with encryption technology can decrypt signals that are encrypted. This is the technology used by pay television broadcasters such as M-Net and DSTv.

There is a debate as to whether encryption is desirable for free-to-air broadcasts. The appeal did not concern the merits of that debate, but the process that preceded the amendment and its rationality were at issue. The amendment constituted a fundamental departure from previous iterations of the policy. The policy first published in 2008 was that the subsidized set top boxes would have encryption technology. It was amended in 2012 but there was no change in this regard. In 2013 the then Minister, Mr Yunus Carrim, published various amendments for comment. He proposed that free-to-air broadcasters such as the first appellant, e.tv (Pty) Ltd, pay for encryption technology on the subsidized STBs. e.tv welcomed the 2013 amendments. The SABC, M-Net and DSTv opposed them. Encryption capability would enable free-to-air broadcasters such as e.tv to offer paid subscription services in competition with M-Net and DSTv. Encryption was supported by two public interest organizations, SOS Support Public Broadcasting Coalition and Media Monitoring Africa, as well as some members of the National Association of Manufacturers of Electronic Components. The proposed amendments were not effected.

In early 2015 Minister Muthambi published the encryption amendment which precludes the subsidized STBs from having encryption technology. She did this without consulting interested persons and the two bodies established to regulate and distribute television, the Independent Communications Authority of South Africa (ICASA) and the Universal Service and Access Agency of South Africa (USAASA).

e.tv brought an urgent application for an order reviewing and setting aside the encryption amendment on the basis that there had been no consultation and that the amendment was inherently irrational. It stated that the subsidized STBs 'shall not have capabilities to encrypt broadcast signals' and that 'individual broadcasters may at their own cost make decisions regarding encryption of content'.

The Gauteng Division refused the application on the basis that the Minister had consulted about the 2013 proposed amendments, and that the amendment was not irrational. e.tv, supported by a group of NAMEC, SOS and MMA, appealed against this decision. The Minister, the SABC, M-Net and a second group of NAMEC opposed the appeal.

The SCA found that the amendment was a fundamental departure from previous policy; that the Minister was required by the Electronic Communications Act 36 of 2005 to consult ICASA, USAASA, and broadcasters before changing policy, and that she had not done so. The amendment was thus made unlawfully. It was also irrational as it sought to achieve two purposes: avoid government paying for the encryption of the subsidized STBs and allow free-to-air broadcasters to pay for encryption. By precluding encryption of the subsidized STBs she did not achieve that result. The SCA also held that the Minister had exceeded her powers