



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

/ES

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED	
DATE 24/6/15	SIGNATURE 

CASE NO: 26166/2015

DATE:

IN THE MATTER BETWEEN

e.tv (PTY) LTD

AND

MINISTER OF COMMUNICATIONS

MINISTER OF TELECOMMUNICATIONS
AND POSTAL SERVICESINDEPENDENT COMMUNICATIONS AUTHORITY
OF SOUTH AFRICAUNIVERSAL SERVICE AND ACCESS AGENCY
OF SOUTH AFRICASOUTH AFRICAN BROADCASTING
CORPORATION SOC LTD

ELECTRONIC MEDIA NETWORK LTD

ASSOCIATION OF COMMUNITY TELEVISION – SA

NATIONAL ASSOCIATION OF MANUFACTURERS
OF ELECTRONIC COMPONENTS (1st Grouping)

APPLICANT

1ST RESPONDENT2ND RESPONDENT3RD RESPONDENT4TH RESPONDENT5TH RESPONDENT6TH RESPONDENT7TH RESPONDENT8TH RESPONDENT

SOUTH AFRICAN COMMUNICATIONS FORUM	9 TH RESPONDENT
SENTECH SOC LTD	10 TH RESPONDENT
CELL C (PTY) LTD	11 TH RESPONDENT
TELKOM SOC LTD	12 TH RESPONDENT
TELLUMAT (PTY) LTD	13 TH RESPONDENT
S.O.S. SUPPORT PUBLIC BROADCASTING COALITION	14 TH RESPONDENT
MEDIA MONITORING SOUTH AFRICA	15 TH RESPONDENT
NATIONAL ASSOCIATION OF MANUFACTURERS OF ELECTRONIC COMPONENTS (PTY) LTD (2 nd Grouping)	16 TH RESPONDENT

JUDGMENT

PRINSLOO, J

- [1] This application came before me as one of urgency. The record runs into some 1 440 pages. There were six legal teams representing the applicant and the first, fifth, sixth, eighth, fourteenth, fifteenth and sixteenth respondents respectively. The eighth, fourteenth and fifteenth respondents made common cause and were represented by the same team. There were fifteen counsel in all. The hearing lasted two days.
- [2] A day or two before the hearing, the sixteenth respondent launched an application to intervene and be joined as the sixteenth respondent. The sixteenth respondent, bearing the same name as the eighth respondent, is represented by another grouping from the ranks of the eighth respondent. Without being disrespectful, it is fair to say that the eighth respondent has two opposing factions in its ranks. The first grouping, under the banner of the eighth respondent, made common cause with the fourteenth and fifteenth respondents and supported the application. The sixteenth respondent is represented by
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the second grouping, which is at arm's length with the first grouping, and opposes the application.

At the commencement of the proceedings, I granted the joinder on an unopposed basis. Counsel for the eighth and the sixteenth respondents agreed that they would simply make their presentations (conflicting as they are) and the right or standing of either faction to represent this particular organisation, as well as any costs flowing from the intervention or joinder application, would stand over for later adjudication, if necessary, in a different court. An appropriate order was made.

- [3] As to urgency, the first respondent ("the Minister") was the only respondent contending in her opposing affidavit that the application was not urgent. At the commencement of the proceedings, I offered counsel for the Minister the opportunity to address me on urgency *in limine* but he informed me that the Minister was no longer pressing the issue of urgency. Consequently, the application was heard as one of urgency. In the circumstances, it is incumbent upon me to attempt to deliver the judgment (which will not be as detailed as it may have been under "non-urgent" circumstances) as a matter of urgency.

Brief synopsis of the case

- [4] This is a review application arising from a decision taken by the Minister on or about 18 March 2015 to enact certain amendments to the Broadcasting Digital Migration Policy for South Africa ("the BDM policy").

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For the sake of detail, I add that, following the 2014 national elections, the Communications portfolio was split into two: a new Department of Communications under the present Minister of Communications (the first respondent or "the Minister") and the Department of Telecommunications and Postal Services ("the DTSPS") under the Telecommunications Minister.

In terms of a proclamation published in the *Government Gazette* of 15 July 2014, the administration of and the powers and functions entrusted by the Electronic Communications Act, no 36 of 2005 ("the ECA") were transferred to the Telecommunications Minister.

However, subsequently, in terms of a proclamation appearing in the *Government Gazette* of 2 December 2014, the power to make broadcasting policy in terms of section 3 of the ECA was transferred from the Telecommunications Minister to the Communications Minister ("the Minister"). "Minister" is defined in the ECA as meaning the Minister responsible for Communications.

- [5] The BDM policy deals with a matter of considerable significance for all South Africans – the digital migration process. Simply put, this process involves a technological shift from the present analogue television broadcasting system to a digital television broadcasting system.
- [6] I briefly turn to some particulars on this subject, as they emerged from detailed and well crafted papers presented by the parties.

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(i) Terrestrial versus Satellite

[7] At present in South Africa there are two ways in which television may be broadcast:

- (1) First, television is broadcast on the terrestrial spectrum. This involves viewers receiving the television signal via their aerials. Terrestrial television is directly relevant to the present application.
- (2) Second, television is broadcast via satellite. This involves viewers receiving the television signal via a satellite dish, as is the case with MultiChoice's DSTv. Satellite television is not directly relevant to this application, although it is referred to, mainly for comparative purposes, from time to time in the papers.

[8] This case concerns terrestrial television. This is how the vast majority of people in South Africa receive television broadcasts at present and how they are likely to receive television broadcasts for the foreseeable future. (The emphasis added through underlining, is that of the drafter of the papers, in this case the founding affidavit. These technical details are, by and large, common cause between the parties.)

[9] At present there are a limited number of terrestrial channels being broadcast in South Africa:

- I. There are four primary free terrestrial television channels – SABC1, SABC2, SABC3 and e.tv. (e.tv is, obviously, the applicant and will be referred to as "e.tv" or "the applicant" at times.)

Accordingly, SABC and e.tv are, together with certain community broadcasters, referred to collectively as the free-to-air or FTA broadcasters.

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2. The other channel that is currently broadcast via terrestrial television is M-Net. However, it is not free. Rather, it is a subscription-based service. It is also the sixth respondent which opposes this application.

[10] For the sake of detail, I add that all five of these channels – the SABC channels, e.tv and M-Net – can also be received via satellite, for example via DSTv, for those who can afford access to satellite broadcasts.

(ii) Analogue v digital

[11] At present, terrestrial television broadcasting uses analogue technology. This entails the transmission of the television picture and sound information to the viewer in its entirety – there is no conversion of the picture and sound, and none of the picture and sound information is removed.

[12] This is now set to change. Terrestrial television broadcasts will shortly be broadcast using digital technology instead.

1. Digital technology entails the conversion of the television picture and sound into discrete digital information which is then compressed by removing unnecessary information and it is then transmitted to the end-user as a digital signal.
2. Because of the nature of the process, each television set will require a set-top box ("STB") in order to properly receive and display the broadcast. At the receiving end, the digital signal from the aerial is first passed into the STB which converts the digital information back into the TV picture and sound

(obviously, for those millions of TV viewers still using "old" television sets equipped with "analogue" technology).

(iii) **The digital migration process**

[13] The process in terms of which this shift from analogue to digital is taking place is often referred to as the "*digital migration process*", because it means that all terrestrial television viewers in South Africa will have to "*migrate*" from receiving such broadcasts in analogue form to receiving them in digital form.

[14] In short, the main purpose of the global migration from analogue to digital is to release limited radio frequency spectrum, which is used for the purposes of both broadcasting and telecommunications. Digital broadcasts only require a fraction of the spectrum required by analogue broadcasts. Therefore a shift from analogue to digital means a more efficient use of available spectrum (in the ECA, "radio frequency spectrum" is defined as meaning the portion of the electromagnetic spectrum used as a transmission medium for electronic communications and broadcasting).

[15] South Africa co-ordinates its use of spectrum with other countries to ensure that there is no interference between their broadcasting signals.

Analogue broadcasting is currently protected from interference. In light of certain decisions of the International Telecommunications Union ("the ITU"), South Africa is required to migrate from analogue to digital terrestrial television.

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South Africa was expected to have completed the digital migration process by 17 June 2015. After this date, it is not able to continue relying on the ITU to protect its broadcasts from interference by other countries' broadcasting signals. South Africa has not yet started with the digital migration process, but may do so shortly, and it is alleged, on behalf of the applicant, that no "calamitous" effects will result from South Africa missing this deadline. Indeed, there are many countries who will not meet the deadline. Moreover, because of South Africa's geography and the limited interference likely to come from its neighbours, the impact on members of the public of missing the deadline of 17 June 2015 is not severe. Sentech SOC Ltd (the tenth respondent), which is responsible for the transmission of e.tv's broadcasts, estimates that only 3 600 people receiving e.tv on terrestrial television will be likely to suffer some form of interference.

- [16] Because the conversion from analogue to digital terrestrial television cannot occur overnight, otherwise millions of viewers would be left without any ability to watch television, it is envisaged that there will be the migration process, referred to, whereby digital terrestrial television will begin in conjunction with analogue terrestrial television, with the latter being "turned off" on a specified date.

I add that in theory, it is possible to avoid the use of an STB by purchasing an "integrated digital television" or "iDTV" – this is a television set with a built-in receiver which carries out the functions of an STB. However, iDTVs are not a practical option for the vast majority of ordinary South Africans given that they are not freely on sale in South Africa and are very expensive.

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[17] The process of digital migration has been a complicated and lengthy one. The BDM policy was first published in 2008.

[18] The Independent Communications Authority Of South Africa ("ICASA", which is also the third respondent), acting in terms of its regulation-making powers under section 4 of the ECA, enacted various sets of draft and final regulations to regulate the digital migration process. That process was completed on 14 December 2012 with the publication of the Digital Migration Regulations, 2012.

[19] The government has made available substantial funds for the digital migration process. It is estimated that over the period 2012 to 2018, these expenses or funds will come to some R4 billion.

(iv) **The need for Set-Top Boxes ("STB's") and the government subsidy**

[20] On the current (analogue) system, terrestrial television viewers do not need an STB to receive the four FTA channels. They simply connect their television set to the aerial and can then receive and watch the three SABC channels and e.tv for free.

[21] This will change with the migration from analogue to digital. Because of the nature of digital technology, viewers will require STB's to watch television. Every television will have to be connected to both the aerial and the STB. Without this, the viewer will be unable to watch terrestrial TV. Each terrestrial television-viewing household or workplace will therefore have to possess an STB.



- [22] More than 8 million South African households rely solely on airdials, and therefore terrestrial television to receive the four FTA channels. It is therefore envisaged that approximately 8 million STB's will have to be manufactured in total in order to allow for an effective digital migration.
- [23] The average price of an STB is likely to be in the region of R600,00. This is recognised to be out of reach of many ordinary South Africans who receive their television broadcasts via terrestrial means. The government, quite appropriately, decided early on that it would commit to at least a partial subsidy to provide 5 million STB's to the poorest TV-owning households. This was recognised in the BDM policy from the outset. Ultimately, it was decided that these 5 million STB's would be fully subsidised and therefore provided for free to the poorest TV-owning households. These STB's will be referred to as the "subsidised STB's" or the "free STB's".
- [24] A tender to provide these 5 million STB's was issued in November 2014.
- [25] The government will be investing billions of rand in supplying the subsidised STB's. To ensure that this investment is protected they must be fitted with a control system ("the STB control system"). A lack of control could result in the subsidised STB's being stolen and sold to South African households which do not qualify for the subsidy or sold to people living in neighbouring countries. This theft could occur in high volumes during the distribution process or on an individual basis.
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(v) **STB control**

[26] The BDM policy has, from its enactment in 2008 to the present, always recognised the need for an STB control mechanism.

[27] For example, in the first version of the policy it was stipulated that STB's would "have a control system to prevent STB's from being used outside the borders of South Africa and to disable the usage of stolen STB's". Later it was stipulated that STB's would have "capabilities to unscramble the encrypted broadcast signal so that only fully compliant STB's made or authorised for use in South Africa can work on a network". There was a 2012 stipulation that STB's will "have a robust STB control system that will also benefit the consumers by ensuring that they do not have to own multiple boxes for both current and future free-to-air broadcasting services". Later reference was made to a "national standard" which would "include a robust free-to-air STB control system to ensure that only conformant STB's can work in the electronic communications network in South Africa".

[28] The national standard was later issued by the SABS as SANS 862:2012. It prescribes that the "main functional elements specified for security" are:

- (1) "a secure over-the-air software and bootstrap loader;
- (2) a mechanism to prevent STB decoders from functioning in non-RSA DTT networks; and
- (3) STB control system that will enable mass messaging."

(Note: DTT stands for Digital Terrestrial Television.)



The standard specifies that FTA broadcasters are responsible for determining security requirements and manufacturers of STB's can obtain these security requirements from the FTA individual broadcasting service licensees.

(vi) Encryption

- [29] This subject embodies the crux of the case: e.tv wants the subsidised STB's to be fitted with a so-called "encryption facility" because e.tv wants to broadcast so-called "encrypted" signals as an FTA broadcaster to the terrestrial TV users.

The Minister, on the other hand, in her March 2015 policy amendment, stipulated that subsidised STB's will not have "capabilities to encrypt broadcast signals". The decision of the Minister to prescribe, when making her policy, subsidised STB's without the encryption capability, is what is attacked on review in this application. Relying, essentially, on the principle of legality, e.tv contends that the Minister's decision was unlawful (she exceeded her powers), irrational and that the procedure adopted to enact the amended policy was also unfair.

The application is strenuously opposed by the Minister (the first respondent or "no 1"), no 5 (the SABC), no 6 (M-Net) and the newly joined no 16. No 8, and with it, no 14 and no 15, support the application. None of the other respondents have entered the fray, although no 7 filed an affidavit supporting the opposition to the application.

- [30] So much for a brief synopsis of the case.
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The Minister's amendments to the BDM policy which are under attack in this review application ("the impugned amendments")

- [31] The amendments were published in terms of the Electronic Communications Act, Act 36 of 2005 ("the ECA") in *Government Gazette* no 38583 of 18 March 2015.
- [32] In an introductory paragraph to the amendments, Minister Muthambi states that she amends the BDM policy issued initially by *Government Gazette* on 8 September 2008 and as amended by amendments published in a later *Government Gazette* of 17 February 2012, "to the extent indicated below taking into consideration submissions made by stakeholders on the amendments proposed by the Department of Communications on 6 December 2013".
- [33] There are ten paragraphs containing amendments, but e.tv is only challenging those contained in paragraph 8. These are new paragraphs inserted into the (already amended) policy. It is convenient to quote paragraph 8:
- "8. Paragraphs 5.1.2(A), (B) and (C) are inserted in the Policy:
- 5.1.2(A) In keeping with the objectives of ensuring universal access to broadcasting services in South Africa and protecting government investment in subsidised STB market, STB control system in the free-to-air DTT will be non-mandatory.
- 5.1.2(B) The STB control system for the free-to-air DTT STB's shall -
- (a) not have capabilities to encrypt broadcast signals for the subsidised STB's; and

(b) be used to protect government investment in subsidised STB market thus supporting the local electronic manufacturing sector.

5.1.2(C) Depending on the kind of broadcasting services broadcasters may want to provide to their customers, individual broadcasters may at their own cost make decisions regarding encryption of content."

[34] 5.1.2(C) is not attacked on review.

[35] Apart from the "urgency clause", and the clause praying for costs against those respondents opposing the relief sought, the relevant paragraphs in the notice of motion provide:

"2. The decision of the First Respondent on 18 March 2015 to enact clauses 5.1.2(A) and 5.1.2(B)(a) of the Broadcasting Digital Migration Policy ('BDM policy') is reviewed and set aside.

3. It is declared that clause 5.1.2(A) of the BDM policy is unlawful and invalid and, to remedy the defect, clause 5.1.2(A) is deemed to read as though it provides as follows:

'In keeping with the objectives of ensuring universal access to broadcasting services in South Africa and protecting government investment in subsidised STB market, the use of the STB control system in the free-to-air DTT will be non-mandatory.'

4. It is declared that clause 5.1.2(B)(a) of the BDM policy is unlawful and invalid."

- [36] As far as the attack on 5.1.2(A) is concerned, e.tv initially argued, in the founding papers, that it was the result of a "drafting error" and that the phrase "the use of" should have been inserted.

I debated this issue with Mr Budlender, for e.tv, and he conceded, quite properly, that e.tv's attack on 5.1.2(A) is misplaced. He accepted that the proper meaning of 5.1.2(A), is that advanced on behalf of the Minister and some of the other respondents. It is this: the amendment enacted by the Minister, also described by e.tv as "the non-mandatory control amendment" relates to the manner in which control over STB's may be exercised. As far as the provision of subsidised STB's is concerned (for purposes of digital migration), all STB's are going to be provided by the government. 5.1.2(A) provides that "STB control system in the free-to-air DTT will be non-mandatory", which, in simple terms, means that the "STB control system" will not be mandatory. On the other hand, in terms of 5.1.2(B)(b) the STB control system shall "be used to protect government investment in subsidised STB market" and not any other STB's, ie non-government STB's. The provision does not apply to STB's provided by broadcasters themselves or which are not subsidised by the government. It applies to subsidised STB's because those which may be provided by broadcasters, such as e.tv, to their customers (which they are free to do) do not need the government's protection through the Policy. The policy is not the appropriate instrument to provide whatever protection broadcasters may need for their own issued STB's. The policy only prescribes an STB control system for the government subsidised STB's. This is necessary to protect the government's investment, as



indicated. I add that the inclusion of an encryption facility or capability in the STB control system is not prescribed by the SABS national standard, *supra*.

- [37] As a result of Mr Budlender's concession, the attack on 5.1.2(A) has, therefore, been abandoned for all practical purposes. In fairness, I add that Mr Budlender did mention that, as far as the attack on 5.1.2(A) was concerned, he was still "left with the procedural challenge". This is a reference to the so-called "third leg" of a review in terms of the principle of legality. The others involve lawfulness and rationality. It is difficult to understand why it would be necessary, or appropriate, to launch a "procedural challenge", against an enactment which, on the challenger's own concession, is in order.

More about encryption: the pros and cons

- [38] A slightly more detailed discussion on this subject appears to be appropriate because the only amendment to the policy still under attack, in this review application, is the so-called "encryption amendment" which is to be found in 5.1.2(B)(a). It deals with the policy stipulation that subsidised STB's shall not have capabilities to encrypt broadcast signals.
- [39] "Encryption" refers to the process in terms of which a tv-signal is deliberately encrypted at the source before being broadcast. In the *Shorter Oxford English Dictionary*, volume 1 on p822, "encrypt" is described as follows: "convert into code, especially to prevent unauthorised access; conceal in something by this means".

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- [40] The encrypted television signal is then transmitted to television households where it can only be decrypted by an STB that has been loaded with the right software, hardware and decryption keys. The STB therefore "unlocks" the encrypted signal for viewing.
- [41] It is common cause between the parties that encryption technology is used by all pay-TV operators – for example, DStv, M-Net and Top TV. In the context of pay-TV, it ensures that only subscribers who have paid their fees are ordinarily able to watch the encrypted broadcast. This seems to fit into the dictionary definition.
- [42] Encryption technology is not used by the FTA broadcasters, including e.tv. e.tv is the only FTA broadcaster contending for encryption capability to be included in the control system for subsidised STB's.
- [43] In the founding affidavit, e.tv, quite properly, concedes that it was initially of the view that STB control was not necessary for DTT. In fact, it made lengthy submissions to the Minister, during the earlier policy making process, to the effect that encryption is undesirable for purposes of FTA broadcasting. When I confronted Mr Budlender with this, he reminded me, quite correctly, that everyone is entitled to change his or her or its mind.
- [44] In the founding affidavit, it is contended on behalf of e.tv that the latter considers it essential that it be able to encrypt its broadcast signal. It considers this to be "critical to its business" and the interest of the public for at least two reasons. Before I turn to these reasons, I point out that e.tv, repeatedly, and properly, alleges that it would be in

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the interests of its own business plan if subsidised STB's were to be provided with encryption capability. Indeed, the main thrust of e.tv's case is that it laments the fact that, if there were to be no encryption facility for subsidised STB's, and if it were to insist on broadcasting encrypted signals, e.tv would have to supply its own commercial STB's to the 5 million odd subsidised terrestrial viewers referred to. This will be an expensive exercise. What e.tv fails to explain, or adequately explain, is why it needs to encrypt its signals for FTA DTT purposes. It is the only FTA broadcaster that supports the idea and it has not been doing so up to now. Encryption is not necessary for FTA broadcasting purposes (DTT) and, as I will illustrate, it appears to have more negative features than positive ones. Some of these negative features directly impact on the interests of the impoverished 5 million soon to be subsidised FTA viewers. This issue does not appear to be high on the priority list of e.tv.

[45] In its founding affidavit, e.tv makes the following introductory statement:

"In particular, e.tv considers it essential that it be able to encrypt its broadcast signal. It considers this to be critical to its business and the interest of the public for at least two reasons." (Emphasis added.)

[46] For the sake of brevity, I quote only portions of the submissions made by e.tv with regard to these two reasons:

"1. It would ensure compliance with a minimum set of specifications for STB's within the country, preventing non-compliant STB's from receiving digital broadcast signals. Such STB's would allow for FTA

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broadcasts to be received in the correct format and with the correct features, ensuring a uniform and reliable viewer experience.

A failure to comply with the minimum set of specifications would likely result in a weak experience for the viewer ... This would reflect negatively on FTA broadcasters, as viewers would assume that the poor quality of the user experience was the broadcasters' fault ... This weak FTA offering would be particularly damaging in a context where FTA broadcasters must compete with a strong incumbent pay-TV brand such as DStv.

2. Broadcasters such as e.tv would in the future likely be unable to provide broadcasts in high definition ('HD') without a fully conformant platform enabled through STB control with encryption. ... Preventing free-to-air broadcasters from broadcasting in the latest forms of technology will seriously and irreparably damage their business as viewers will be forced to switch to pay-TV in increasing numbers to achieve the desired viewing experience." (Emphasis added.)

[47] e.tv acknowledges that its views on this score are strenuously contested by "certain interested parties".

[48] Remarkably, e.tv then contends that its case does not rest on the court making a determination as to which of the contested positions is correct. It states that its case does not rest on the court determining whether encryption of FTA broadcasts is good or bad for broadcasters or the country as a whole. This statement is perhaps not



surprising given the vigorous opposition to the submissions made by e.tv when singing the praises of encryption. I also do not agree that information about the advantages and disadvantages of encryption is to be disregarded: in my view, this is a factor which could be taken into account when deciding whether or not the Minister's decision was rational.

[49] An example of the strong opposition to e.tv's assertions about the benefits of encryption for FTA broadcasting is to be found in the opposing affidavit of M-Net, the sixth respondent:

"17. e.tv wishes to encrypt its free-to-air television broadcast signals in the DTT environment. It is the only free-to-air television broadcaster in South Africa which wishes to do so, and its intention is at odds with the global trend. The overwhelming majority of free-to-air terrestrial television broadcasters world-wide do not encrypt their broadcast signals.

18. The reasons which e.tv puts forward for wishing to encrypt its free-to-air broadcast signals are based on flawed and incorrect assumptions which are contradicted by e.tv's own previous statements.

19. Contrary to the misconceptions promulgated by e.tv in its founding affidavit, and by recent commentators in the media, encryption of free-to-air broadcasting signals –

19.1 is not required to prevent piracy of television broadcasting content. As I explain below, this objective is met by the incorporation in the STB of High-bandwidth Digital Content Protection (HDCP), a form of digital copy protection which

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prevents unauthorised copying of content. The standard developed by the South African Bureau of Standards (SABS) for STB's, SANS 862:2013 Edition 2.1 (the National Standard) explicitly requires the inclusion of HDCP in STB's;

- 19.2 it is not required to enable free-to-air broadcasters to obtain high definition content. As I explain below, the majority of free-to-air terrestrial broadcasters world-wide broadcast their signals unencrypted and obtain and broadcast high definition content. These broadcasters include, in the United Kingdom, the public broadcaster, the BBC, the public commercial broadcasters ITV and Channel 5; in the United States, the public broadcaster PBS, and commercial broadcasters ABC, NBC and CBS; and in Australia, the public broadcaster ABC and commercial broadcasters Seven Network, Nine Network, Network Ten and SBS. Leading international program suppliers do not require encryption of their programs on free-to-air terrestrial networks; and
- 19.3 is not required to prevent the importation and sale of cheap, poor quality STB's to the public. As I explain below, this objective will be addressed by a range of conformance measures to protect consumers against poor quality products, including the adoption of the National Standard, the certification of compliant products, and consumer education on the risks of purchasing STB's which are not certified.
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20. At the heart of e.tv's challenge is the claim that the encryption amendment will directly preclude free-to-air terrestrial broadcasters from encrypting their broadcast signals in respect of the 5 million households which will have government-subsidised STB's, and indirectly preclude them from deciding to encrypt their signals at all. Both parts of this claim are unfounded and untrue.
21. What e.tv does not acknowledge or even disclose is that it can itself fund the manufacture and provision of its own customised STB's with encryption capability for the households which it wishes to reach. As a commercial broadcaster which, we are told, has identified the encryption of its signals as '*critical to its business*', e.tv does not explain why it expects the cost of this decision to be borne by government.
22. Also absent from e.tv's account is a recognition of the transitory role which the STB is expected to play in the terrestrial television broadcasting landscape. It has always been accepted that the STB will be a temporary feature of television broadcasting. It is attractive in the early stages of digital migration as a low cost means of enabling an existing analogue television set to receive digital transmissions. Viewers already using iDTVs when digital migration is concluded will not need to use STB's at all. When, as happened globally, iDTVs become more widely available and affordable, the STB will become redundant.
23. If the government subsidised STB's were to incorporate encryption capability to meet e.tv's needs, viewers would be reliant in perpetuity



on STB's and STB's would have to be manufactured, purchased and maintained indefinitely for e.tv's commercial benefit. Since digital tuners can and will be built into a wide range of consumer products, including portable tv's, viewers using all these products would require STB's as well.

24. e.tv also does not deal with the other significant implications of including encryption capability in STB's, which include not only the cost but also the technical complexity which it will add to each STB, thus increasing the risk of STB malfunction and giving rise to higher maintenance and repair costs for the consumer, and a higher risk of replacement. As explained below, the inclusion of encryption capability also has important implications for emerging manufacturers of STB's in South Africa.
25. Evidently e.tv does not wish to make the investment necessitated by its decision to encrypt its free-to-air broadcast signals. Instead, it wants encryption capability to be incorporated in the control system in all the government-subsidised STB's. Having failed to persuade government of the merits of its views for purposes of the formulation of government policy, it now seeks to achieve this objective by way of judicial review. It seeks, in essence, to usurp government policy for its own commercial advantage.
26. e.tv acknowledges that its views on the merits of encrypting free-to-air broadcast signals are '*strenuously contested*' by '*certain interested parties*', but asserts that its case does not depend on the court

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determining whether encryption of free-to-air broadcast signals is good or bad for broadcasters or the country as a whole.

27. In fact, e.tv's views on encryption are unsupported by the facts, have no support among South African free-to-air television broadcasters, and are aberrant globally. In these circumstances, e.tv's contention that it brings this application in the public interest is unsustainable. The application has self-evidently been brought only in e.tv's commercial interest. Since the reasons afforded by e.tv for wishing to encrypt its free-to-air broadcast signals are groundless, it can only be assumed that e.tv has a different, undisclosed objective."

[50] So much for M-Net's views on encryption in respect of FTA television broadcasting.

[51] M-Net is in good company. The SABC (fifth respondent) is equally scathing in its condemnation of encryption in the free-to-air space. The SABC highlights certain aspects of research and analysis it has conducted over the past two to three years as part of preparing the various submissions that it has made during the DTT migration process. For the sake of brevity, I will attempt a brief summary of the aspects listed by the SABC:

1. One of the critical success factors identified by the European Union in its migration process was "low cost and widely available set-top boxes". It is important, as already mentioned, to distinguish between the role played by set-top boxes in the pay-Television environment and in the free-to-air environment. In the former, encryption is essential because it is the only way for a broadcaster to ensure that only people who subscribe to, and pay for, its

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service will gain access to it. In this environment, the additional costs of facilitating encryption are built into the broadcasters' costing, and are justified because they are an essential component of the business model.

2. On the other hand, in the free-to-air environment, consumers are used to receiving their signal for free. They do not want to pay extra to receive a channel that they have historically received for free. The European experience therefore shows that the cheaper the free-to-air STB, the greater numbers of consumers are likely to migrate to DTT. In the FTA environment, the STB's must therefore be as affordable as possible.
3. The SABC points out that e.tv, in its founding affidavit, did not address the cost of enabling encryption in set-top boxes. There would be a significant cost implication of a decision by government to procure STB's with encryption capabilities:
 - (i) There would be an immediate once off cost of \$2 per STB to equip each with encryption capability. This would increase the cost of subsidising 5 million STB's by about \$10 million. SABC submits, correctly in my view, that where the use of encryption in the FTA environment is questionable, to put it mildly, it is difficult to see why government should be expected to pay well over R100 million for such a capability.
 - (ii) SABC estimates that the implementation of encryption of the free STB's would involve annual costs of approximately R561,9 million to be borne by the broadcasters. These costs would involve the annual royalties for the encryption software, the additional business systems needed to manage and control STB's and consumer databases, the cost

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of operating call centres and the regular maintenance costs of the complicated software.

- (iii) Because the necessary software in STB's that facilitate encryption is more complicated, it is inevitable that there are accessibility difficulties from time to time, when encryption is used. This means, as is already the case in the pay-TV environment, call centres will be needed to assist consumers with accessibility problems. A number of call centres will be required to service the needs of approximately 12 million FTA consumers (this is the SABC estimate). Consumers will have to pay to communicate with these call centres. All this means that consumers, who previously could simply switch on and access FTA channels, will face the extra step of having to navigate, at their cost, accessibility difficulties. This is the opposite of what is required in the digital migration process, which, to work properly, needs to introduce as few barriers to access as possible.
- (iv) STB's with encryption capabilities will require the use of software that increases the cost of STB's because of royalties that must be paid.

- 4. The SABC emphasises the fact that, throughout the world, the norm for FTA broadcasts is not to be encrypted. For the government to decide to pay extra to enable STB's to encrypt signals in the FTA environment, would constitute a highly unusual step.
- 5. If STB's are to be supplied with encryption facilities, software available only overseas will have to be used. There are various situations which could cause an overseas contractor to terminate access to the software. The SABC, in

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discharging its public mandate, uses its signal to convey a variety of important information to the public. A simple example is information about electricity supply and the implication of its use for possible load-shedding. If public access to the SABC was shut down, even on a temporary basis, this could have disastrous consequences for the country.

- [52] Later, I will briefly revert to the question as to whether or not the Minister's decision (which is under attack) to enact the "encryption amendment" (5.1.2(B)(a)), was rational, but the SABC, correctly in my view, submits that in the light of the aforesaid discussion about the use of encryption in the FTA environment, a choice by government not to subsidise an encryption capability in STB's is entirely rational and reasonable. Equally, so the SABC submits, a policy that allows individual broadcasters to make their own decisions about encryption, but requiring those broadcasters to carry the costs of encryption themselves if they opt for encryption (amendment 5.1.2(C)) is entirely rational and reasonable.

In these circumstances, as already pointed out earlier, I disagree with e.tv's submission that its case does not rest on this court determining whether encryption of FTA broadcasts is "good or bad for broadcasters or the country as a whole". As I mentioned, this issue is, in my view, an important one that should go into the scale when judging the decision of the Minister objectively.

- [53] Towards the end of its discussion on the use of encryption in the FTA environment, the SABC also makes the following submission, which I find convenient to emphasise

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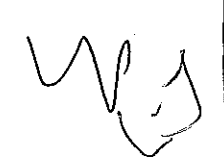
at this point, lest it escapes me, as I consider it to be of particular relevance in the present case:

"It is well-established that the deference that is required in the context of all reviews of executive conduct is particularly important when the allocation of state resources is involved."

The Minister, in her heads of argument, deals with the same subject by referring to *National Treasury v Opposition to Urban Tolling Alliance* 2012 6 SA 223 (CC). It is useful to quote what was said in that judgment at 241E-H:

"[67] The harm and inconvenience to motorists, which the High Court relies on, result from a national executive decision about the ordering of public resources, over which the executive government disposes and for which it, and it alone, has the public responsibility. Thus, the duty of determining how public resources are to be drawn upon and recorded lies in the heartland of executive-government function and domain. What is more, absent any proof of unlawfulness or fraud or corruption, the power and the prerogative to formulate and implement policy on how to finance public projects reside in the exclusive domain of the national executive subject to budgetary appropriations by parliament.

[68] Another consideration is that the collection and ordering of public resources inevitably call for policy-laden and polycentric decision-making. Courts are not always well suited to make decisions of that order. It bears repetition that a court considering the grant of an interim interdict against the exercise of power within the camp of



government must have the separation-of-powers consideration at the very forefront."

[54] Still on the subject of opposition to introducing an encryption facility for subsidised STB's, it is fair to refer briefly to the submissions made on behalf of the sixteenth respondent in opposing the application.

[55] The deponent of the opposing affidavit, speaking for emerging black manufacturers of electronic components (in this case, no doubt, STB's, bearing in mind that there are indications on the papers that all twenty tenderers, responding to the government tender to manufacture STB's, received a share of the tender) advances some arguments militating against the notion of allowing encryption facilities. I will attempt a brief summary, for the sake of brevity:

1. Black manufacturers will need to be accredited by the foreign Conditional Access vendor companies ("CA vendor"), who hold the software licences necessary to produce encrypted STB's. This accreditation would come at an unnecessary significant cost to the manufacturer.
2. The manufacturing process will then be subject to a decision by a CA foreign vendor which will serve as a gate-keeper to manufacturers as this software is only available overseas.
3. A CA vendor will essentially have the unilateral powers to decide who eventually manufactures STB's in South Africa.
4. The manufacturers will be hampered in their development costs because any applications that need to be incorporated will be subjected to integration costs that the CA vendor charges.

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5. The incumbent manufacturers would be the beneficiaries because they have already been accredited by CA vendors.
6. The costs that this system introduces will have to be borne by the taxpayer.
7. It is an undesirable system "that has never been implemented as a government policy anywhere in the world".

[56] The deponent on behalf of the sixteenth respondent then records that a multi-stakeholder workshop was held on 16 April 2013 to discuss whether or not encrypted STB's were the best option for South Africa. At the workshop, a resolution was passed to the effect that the requirement for STB control/encryption should be scrapped from government policy in its entirety.

The resolution was jointly signed by the sixteenth respondent, the MK Military Veterans' Association, the Progressive Woman's Movement of South Africa, the Congress of Traditional Leaders, the SA National Civic Organisation, the Black Business Council and many other organisations.

[57] I turn, briefly, to the contribution of the seventh respondent, the Association of Community Television – SA (also referring to itself as "ACT – SA").

[58] This association filed an "explanatory affidavit" indicating that it would abide the decision of the court, but clearly recording in this affidavit that it opposes the application.

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[59] ACT – SA is a voluntary association representing the interests of community television in South Africa. It was established in 2013 when all of the existing community television licensees in South Africa at the time, namely Soweto TV, Cape Town TV (CTV), Bay TV, One KZN (1 KZN), Tshwane TV, North West TV and Bara TV, signed a joint memorandum of understanding creating ACT – SA and confirming their membership of ACT – SA.

[60] Community television broadcasters provide free-to-air broadcasting services to their viewers. Their programming has a particular focus on local community content.

[61] The deponent on behalf of ACT – SA states that for some time, community broadcasters have been anxious about indications that STB's would be required to have a "control system" with encryption technology. The concern is that encryption technology will unnecessarily and unduly increase the cost of STB's, thus adversely impacting on the accessibility of STB's for the people who need these devices the most, namely lower income South African households which rely exclusively on free-to-air broadcasting services and only have analogue television sets.

[62] The deponent states that a requirement that all broadcasters, including free-to-air broadcasters, would be expected to encrypt their services, would be inimical to the very concept of free-to-air broadcasting. "Free-to-air broadcasting is underpinned by the spirit of enhancing accessibility. Encryption is, by its very nature, aimed at restricting accessibility."



[63] ACT – SA was therefore relieved that, as presently formulated, the BDM policy does not require STB's to have encryption capability, and specifically provides that government subsidised STB's shall not have encryption capability. "We notice specifically that the BDM policy does not prohibit broadcasters from encrypting content at their own cost."

[64] I has consistently been ACT – SA's position that an encryption capability requirement for government subsidised STB's would be adverse to the public interest and would serve to marginalise access to information for the poorest members of society.

[65] Government should not have to bear the cost of facilitating the private, commercially-motivated objectives of individual broadcasters, particularly where those objectives run counter to the public interest.

[66] Encryption technology is a costly extra for STB's. It is noteworthy that the deponent then adds that "indeed, e.tv had itself effectively highlighted this concern in previous representations to the Department of Communications". I have referred to this before, indicating that e.tv, for a reason which I still do not quite understand, then changed its mind. The deponent submits that the inclusion of this technology (encryption) will significantly increase the cost of STB's through software and subscriber management costs. In addition, the technical complexity added by the inclusion of encryption technology in STB's will result in higher maintenance and repair costs and a higher risk of needing to replace STB's.



[67] It is clear that ACT – SA opposes the application. I consider it unnecessary to dwell any further on the contents of the "explanatory affidavit".

[68] It is proper to record that the application is supported by the eighth respondent, in turn supported by the fourteenth and fifteenth respondents. These three respondents also filed a joint answering affidavit.

[69] I mentioned at the outset, that the eighth respondent, the National Association of Manufacturers of Electronic Components or "NAMEC", is the same organisation as the sixteenth respondent, which opposes the application and with whose submissions I have dealt. I mentioned at the outset that the eighth and the sixteenth respondents are respectively represented by what can be described as opposing factions or groupings of NAMEC. The eighth respondent grouping supports the application, and the sixteenth respondent grouping opposes the application. The one grouping maintains that the other grouping does not have the necessary standing or authority to represent NAMEC. This leads to the somewhat unusual result that it can be said that NAMEC both supports and opposes the application.

[70] The fourteenth respondent, SOS Support Public Broadcasting Coalition ("SOS") is a civil society coalition that comprises a broad range of non-governmental organisations and individuals, including the fifteenth respondent, Media Monitoring Africa ("MMA"). SOS and MMA campaign for open, competitive and high quality public broadcasting that is in the public interest. They are clearly not broadcasters themselves. It is useful to note that all three these organisations have previously



expressed their views regarding the various iterations of the BDM policy and have previously made submissions to the Minister's predecessors in this regard.

[71] The main thrust of the argument of these organisations, represented by Mr Chaskalson SC and Mr Kelly, if I understand it correctly, was that the Minister's enactment of the BDM policy was unlawful by virtue of her failure to comply with the provisions of section 3(5) of the ECA that obliged her to publish the BDM policy in a draft form for comment by the Independent Communications Authority of South Africa ("ICASA"), the third respondent and Universal Service and Access Agency of South Africa ("USAASA"), the fourth respondent, and interested parties such as these three organisations. Counsel argued that the Minister's suggestion that the prior notice and comment procedure of one of her predecessors, Minister Carrim, discharged this obligation, is incorrect.

[72] As I have mentioned, a version of the BDM policy was first enacted in 2008 by the then Minister. The last amendments to it were enacted by Minister Pule in 2012. On 6 December 2013, Minister Carrim published proposed amendments to the BDM policy for public comment. One of these was that subsidised and non-subsidised STB's would have to include an "STB control system" that would have the capability to "decrypt" encrypted broadcast signals. See my later remarks on this point. It was also proposed that broadcasters could elect whether or not to utilise the STB control system, as its use would be non-mandatory. The costs associated with STB control technology would be covered by government, and would be recovered from broadcasters that elected to utilise the STB control system.



SOS made submissions in support of the amendments proposed by Minister Carrim. It also issued a press statement after the proposed amendments were published, noting, *inter alia*, that "STB's would have the capacity to have a control mechanism through encrypted television signals, but this potential would only be implemented if broadcasters wish to do so". Of course, we know that the only broadcaster interested in broadcasting encrypted signals in the FTA DTT environment, is e.tv, which approach is at odds with the attitude of the remaining broadcasters and, for that matter, the world-wide trend in this regard.

[73] It is also useful to note that Minister Carrim did not enact any of the proposed amendments. He was replaced by the current Minister Muthambi after the 2014 general elections.

[74] Counsel for these three respondents indicated that their heads of argument were confined "to the lawfulness of the process followed by the Minister in enacting the BDM policy, and the significant public interest issues that arise from the clauses that are the focus of e.tv's challenge". I have pointed out that the one leg of the e.tv challenge has all but fallen away, namely the challenge aimed at 5.1.2(A). The reasons I have dealt with.

[75] As to the first leg of the argument of counsel, it involves the subject of procedural fairness. Indeed, it is argued that the process followed by the Minister in enacting this amended BDM policy was procedurally unauthorised and procedurally unfair.



[76] The argument that it was "procedurally unauthorised" is based on submissions that the Minister, in enacting these provisions, failed to comply with the requirements of section 3 of the ECA. It was argued that, in terms of this section, the Minister was obliged, not only to consult with ICASA and USAASA, but also to obtain the views of "interested persons" through the publication of the BDM policy in the *Government Gazette*. It was argued that the Minister did not publish the BDM policy for public comment with the result that parties such as e.tv and these three respondents did not have the opportunity to comment on the BDM policy. It was also pointed out that there is no evidence before the court that the Minister consulted with ICASA and USAASA.

[77] It was also argued that there is no evidence as to the identity of the stakeholders the Minister claims to have consulted regarding the BDM policy.

[78] At this point in the judgment, it seems to me to be appropriate and convenient to turn to the subject of procedural fairness, which is one of the central issues when it comes to a review attack of this nature. I will do so under a few subheadings.

(i) Are the impugned amendments (or the remaining one) reviewable under PAJA, or the principle of legality or not at all?

[79] Mr Budlender, who appeared for the applicant with Mr Berger and Mr Tshetlo, argued that the amendments are reviewable both under PAJA and in terms of the principle of legality. These counsel, however, did not focus their submissions on a "PAJA review" but only on a "legality review".



Mr Maenetje SC who, with Mr Tsatsawane, appeared for the Minister, conceded that the amendments were reviewable under the principle of legality. The same goes for Mr Unterhalter SC, who, with Ms Norton, appeared for M-Net, Mr Chaskalson SC, who, as I have said, appeared with Mr Marriott and Mr Kelly for the eighth, fourteenth and fifteenth respondents and Mr Solomon SC, who appeared, with Mr Gumbi, for the sixteenth respondent.

Mr Bhana SC who, with Mr Ramaepadi and Mr Friedman, appeared for the SABC, argued that the amendments are not reviewable at all at this time.

[80] As far as a PAJA review is concerned, I find myself in respectful agreement with Mr Unterhalter's submission that the Minister has decided that, as a matter of national policy, the government-subsidised STB's will have a control system which does not include encryption capability. This decision falls within the Minister's powers under section 3(1) of the ECA and section 85(2)(b) of the Constitution. So much for the submission.

The relevant portion of section 85 of the Constitution reads as follows:

"85. Executive authority of the Republic. –

- (1) The executive authority of the Republic is vested in the President.
- (2) The President exercises the executive authority, together with the other members of the Cabinet, by –
 - (a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;



- (b) developing and implementing national policy;
- (c) ...
- (d) preparing and initiating legislation;
- (e) performing any other executive function provided for in the Constitution or in National legislation." (Emphasis added.)

The relevant portions of section 3(1) of the ECA read as follows:

"3. Ministerial policies and policy directions.

- (1) The Minister may make policies on matters of national policy applicable to the ICT 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 treatise 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) ...
 - (f) the promotion of universal service and electronic communications services in under-serviced areas;

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- (g) ...
- (h) ...
- (i) any other policy which may be necessary for the application of this Act or the related legislation.
(Emphasis added.)

The relevant portion of the definition of "administrative action" in terms of section 1 of PAJA, reads as follows:

"Administrative action' means any decision taken, or any failure to take a decision, by –

- (a) an organ of state, when –
 - (i) exercising a power in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) a natural or juristic person ...

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include –

- (aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e), ... of the Constitution. (Emphasis added.)

From the aforementioned, it is clear that the Minister was exercising her powers in her official capacity as a member of the executive authority of the Republic when making

policy within the ambit of the provisions of section 3(I) of the ECA and, as such, her actions fall outside the ambit of "administrative action" as defined in PAJA.

For these reasons, I have come to the conclusion that this is not a PAJA review, neither was it argued that it was, except that Mr Budlender submitted that the review could resort under PAJA, but he did not press the point before me. For present purposes, and given the urgency of the matter, I accept that the review does not resort under PAJA.

- [81] Mr Bhana and his team, in their argument that the amendments are not reviewable at all, recognised the constitutional exclusion, in section 85(2)(b), of executive powers or functions of the National Executive from "administrative action" as defined in PAJA. Nevertheless, they argue that "for present purposes, the relevant aspect of the definition is 'which adversely affects the rights of any person and which has a direct, external legal effect'".

Counsel then proceed to deal, by referring to case-law, with the proper meaning of the term "direct, external, legal effect".

For example, counsel referred to *Grey's Marine Hout Bay (Pty) Ltd and others v Minister of Public Works and others* 2005 6 SA 313 (SCA). This, as I understand it, was a PAJA review. It involved a decision by the Minister to lease a portion of a property to the third respondent. It was held that the Minister's decision was made in the exercise of a public power confirmed by legislation in the ordinary course of administering the property of the state with immediate and direct legal consequences

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(at least for the third respondent), and that it constituted administrative action – at 325C-E. This does not appear to be the type of executive function foreshadowed in section 85 of the Constitution, such as "developing and implementing national policy" which, as I have pointed out, is excluded from the definition of administrative action.

This conclusion, it appears to me, is fortified by what the learned Judge of Appeal said in *Grey's Marine* at 323F-324B:

"[24] Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so. Features of administrative action (conduct of 'an administrative nature') that have emerged from the construction that has been placed on section 33 of the Constitution are that it does not extend to the exercise of legislative powers by deliberative elected legislative bodies, nor to the ordinary exercise of judicial powers, nor to the formulation of policy or the initiation of legislation by the executive, nor to the exercise of original powers conferred upon the President as head of State. Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals."

(Emphasis added.)



- [82] Counsel for the SABC nevertheless persist, for purposes of their argument, to enquire into whether the Minister's conduct in enacting the amendments has a direct, external, legal effect, an approach which, in my view, is more appropriate in the case of a PAJA review, where one has to determine whether or not certain conduct amounts to administrative action as intended by the PAJA section 1 definition.

In the course of their enquiry as to whether or not the BDM policy has a direct, external legal effect, counsel submitted that it was necessary "to consider what the courts have said about the making of policy". They referred me to *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 4 SA 501 (SCA). This case involves an application to review the decision by the Western Cape Gambling and Racing Board to refuse an application for a gambling licence. There is no reference to PAJA which only came into effect a few months before this case was decided. There is also no reference to a so-called legality review. The case involves the constitutional imperative of the separation of powers between the Executive and the Legislature, in this case at provincial level. It was held that the executive (or provincial cabinet) had issued a so-called policy determination which amended, diluted or led to the undoing of a legislative act by the Board. It was held, therefore, that by an executive act, a legislative act had been amended, diluted or undone. This had been beyond the power of the cabinet – at 510F-H.

- [83] Counsel for the SABC point out that in explaining this approach, the learned Judge of Appeal said the following in *Akani* at 509B-F:

"The word 'policy' is inherently vague and may bear different meanings.

It appears to me to serve little purpose to quote dictionaries defining the word.

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To draw the distinction between what is policy and what is not with reference to specificity is, in my view, not always very helpful or necessarily correct. For example, a decision that children below the age of 6 are ineligible for admission to a school can fairly be called a 'policy' and merely because the age is fixed does not make it less of a policy than a decision that young children are ineligible, even though the word 'young' has a measure of elasticity in it. Any course or program of action adopted by a government may consist of general or specific provisions. Because of this I do not consider it prudent to define the word either in general or in the context of the Act. I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between Legislature and Executive will disappear."

- [84] In developing their rather complicated argument (namely that the impugned amendments are not reviewable) counsel for the SABC also referred me to the case of *The Minister of Education v Harris* 2001 4 SA 1297 (CC). As far as I can make out, this has nothing to do with a PAJA review or the question of administrative action as intended by the PAJA definition. The case was decided a few months after *Akani*. It also has to do with the separation of powers between the executive and the legislature. Broadly speaking, the Minister of Education is empowered by section 3(4)(i) of the National Education Policy Act 27 of 1996 to determine national policy for "the determination of the age of admission to schools". It was held that the

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Minister was not empowered by the Act to require provinces to adopt national policy to amend provincial legislation in conformity with national policy.

Counsel urged me to bear in mind that the Constitutional Court, at 1304B-E, emphasised the distinction between the determination of guiding policy, on the one hand, and its translation into legally binding enactments, on the other.

[85] It is with all this in mind, that counsel argue that the impugned amendments are not reviewable under PAJA. I have already come to the same conclusion by simply referring to the exclusion of the Minister's executive action in making the policy in terms of section 3(1) of the ECA, from the PAJA definition of administrative action.

Nevertheless, the main thrust of counsel's argument appears to be this: in terms of section 3(4) of the ECA, ICASA, in exercising its powers and performing its duties in terms of the ECA and the related legislation, must consider policies made by the Minister in terms of section 3(1) and policy directions issued by the Minister in terms of section 3(2).

Counsel submit that the making of policies in terms of section 3(1) of the ECA does not adversely affect the rights of the public and does not have a direct external, legal effect. They argue –

"A policy does not take the form of a legislative instrument. ICASA may choose to follow some of what is in the policy, but not other parts. At the time when a policy is made, therefore, it cannot be said that it impacts directly and immediately on members of the public. Only if ICASA decides to make

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regulations in respect of the subject-matter of the policy will there be any direct impact on the public or any party."

Counsel for the SABC argue that in this case, e.tv has presented no facts to suggest that the policy has a direct external legal effect.

[86] It is on this basis, essentially, as I have formulated the argument on behalf of the SABC, that only if ICASA decides to make regulations in respect of the subject-matter of the policy will there be any direct impact on the public or any party. Consequently, at least at this stage where no regulations have been promulgated, the conduct of the Minister falls outside the ambit of the PAJA definition of administrative action, so that the impugned amendments do not fall to be reviewed in terms of PAJA.

[87] Where I have already found that this is not a PAJA review because of the exclusion, in terms of section 85(2)(b) of the Constitution in particular, from the PAJA definition of administrative action, the impugned amendments are not reviewable under PAJA, it is not necessary, at this point, to decide the argument advanced on behalf of the SABC. I will revert to this argument when dealing with the question whether or not the amendments are reviewable in terms of the principle of legality. I now turn to that subject, but before doing so, and in conclusion on this particular point, it is useful to take notice of what the learned author Cora Hoexter, *Administrative Law in South Africa*, 2nd edition, has to say about executive powers and functions at pp235-237, and her remark that the section 85(2) powers (with the exception of those listed in section 85(2)(a)) resort under executive powers and functions.



[88] When considering whether the exercise of executive powers is reviewable on the principle of legality, it is useful, in my view, to record at the outset that there is no requirement that the action under attack must "adversely affect the rights of any person" and "have a direct, external legal effect", which requirement forms the basis of counsel's argument that a PAJA review is not applicable.

[89] It is also useful to quote the words of *Hoexter, op cit* at p122:

"But legality also has a wider meaning that goes *beyond* administrative action, and this is probably the more common usage of the term today. Here it refers to a broad *constitutional* principle of legality that governs the use of *all* public power rather than the narrower realm of administrative action. This principle of legality (or 'legality and rationality') is an aspect of the rule of law, a concept implicit in the interim Constitution and a founding value of our constitutional order in terms of section 1(c) of the 1996 Constitution. The fundamental idea it expresses is that 'the exercise of public power is only legitimate where lawful'. Its detailed content has to be worked out from the Constitution as a whole, and this is a continuing process that the Constitutional Court embarked on in a series of cases involving non-administrative action."

For the sake of brevity I refrain from quoting the authorities listed by the learned author in the footnotes.

[90] It seems that the legality principle has been extended by the courts to include the requirement of procedural fairness, the subject which I am now attempting to decide.

[91] It appears that procedural fairness can be considered as part of the rationality element of the legality enquiry, or even as part of the lawfulness requirement or, even as a requirement on its own. *Hoexter*, p123, puts it as follows:

"More recently, in *Albutt v Centre for the Study of Violence and Reconciliation* (my note: the reference is 2010 3 SA 293 (CC)), the Constitutional Court further expanded the principle of legality by treating procedural fairness as a requirement of *rationality*. In this important case, which concerned a special dispensation for pardoning politically motivated offenders, the court held that it would be irrational for the President to exercise his pardoning power without first hearing the victims of the offences. It is worth pointing out that it is also possible for aspects of procedural fairness to be brought in via the requirement of lawfulness, as was done for instance in *Competition Commission of SA v Telkom SA Ltd*, (my note: the reference is [2010] 2 All SA 433 (SCA)) or indeed for procedural fairness to be acknowledged as a requirement in its own right. Natural justice is, after all, an accepted part of the rule of law."

[92] In arguing that the impugned amendments are also not reviewable in terms of the principle of legality, and while recognising that the notion of "direct, external legal effect" is not encompassed in the doctrine of legality, counsel for the SABC submit that "our courts have long accepted that the issue of ripeness is applicable to judicial reviews of all varieties".

Counsel point out that the SCA (in *Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd* 2012 2 SA 16 (SCA) at paragraph [17]) has approved the following characterisation of the test given by the author *Baxter*:

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"The appropriate criterion by which the ripeness of the action in question is to be measured is whether prejudice has **already resulted** or is **inevitable**, irrespective of whether the action is complete or not." (The emphasis is that of counsel.)

They emphasise that the constitutional court has also recognised the importance of ripeness when it comes to the appropriateness of the court hearing a constitutional matter (*National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others* 2000 2 SA 1 (CC) at paragraph [21]). Any review in terms of the doctrine of legality, counsel correctly point out, is a constitutional matter.

[93] Counsel then submit that, for the same reasons as advanced in respect of PAJA, a review in terms of the doctrine of legality is not now ripe for determination. "The considerations leading to the conclusion that the impugned amendments have no direct, external, legal effect, also demonstrate that the impugned amendments are not ripe for review under the doctrine of legality", so they argue.

Counsel point out that it appears from the papers that the Minister indicated in her answering affidavit that she intends to issue an instruction not to use encryption to the manufacturers of STB's, taking part in the tender which has been set in motion. Counsel also repeat the earlier argument that ICASA has not yet made regulations and that there is "no reasonable expectation" that it will do so before the STB manufacturing process commences.

The closing argument of counsel on this point is then crafted as follows:

"If the Minister issues any instruction to Set-top box manufacturers in due course, then it will be necessary to decide, at that stage, whether her instruction amounts to administrative action. If it does not, then it will no doubt be reviewable under the doctrine of legality because, at that stage (and not now), prejudice to e.tv's interests will have arisen or be inevitable. Since it is unclear now what the instruction, if any, will be, that stage cannot yet be said to have arisen."

[94] I have the following difficulties with this argument:

- (1) As pointed out, the requirement of "direct, external, legal effect", is not a pre-requisite for a legality review. This much is conceded by counsel. Yet, counsel appear to persist with its reliance on the alleged importance of this notion when they seem to marry it to the issue of ripeness in this particular case. I repeat what they said in their heads of argument:

"The considerations leading to the conclusion that the impugned amendments have no direct, external, legal effect, also demonstrate that the impugned amendments are not ripe for review under the doctrine of legality."

- (2) In any event, on *Baxter's* criterion by which the ripeness of the action in question is to be measured, I am of the view that at least on e.tv's version which still has to be tested, prejudice has already resulted or is inevitable: the Minister has, in mandatory terms, published an amendment to the policy to the effect that government subsidised STB's shall not have an encryption facility, and it is common cause that a tender process is under way. Cabinet has

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approved this policy. The BDM process must also get under way as a matter of urgency, and is something that affects the whole country, for the reasons mentioned. Against this background, I consider the argument by counsel that e.tv must wait until the Minister issues an instruction to STB manufacturers before e.tv can launch a review application, to be artificial and unconvincing in these particular circumstances.

- (3) As far as the ICASA regulations are concerned, this is governed by the provisions of section 4 of the ECA. As I read this section, it provides that ICASA may make regulations "with regard to any matter which in terms of this Act or the related legislation must or may be prescribed, governed or determined by regulation". I find no provision that ICASA must make regulations (emphasis added). This is also in line with submissions made by counsel for the SABC and, in later supplementary heads of argument, by counsel for M-Net. It must follow that ICASA may elect never to make regulations on this subject of government subsidised STB's. On counsel's argument, which I am revisiting, that "only if ICASA decides to make regulations in respect of the subject-matter of the policy will there be any direct impact on the public or any party", it means that there may never be the required "direct, external, legal effect" opening the door for a review challenge. This approach appears to me to be unsustainable: I cannot see how it can be understood that the Minister and cabinet can be held to ransom as it were by an indecisive communications authority when a matter of national importance, such as the production of government subsidised STB's, has to be attended to urgently.

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I understood all counsel before me to subscribe to the view that the Minister was acting in terms of section 3(1) of the ECA which empowers her to "make policies on matters of national policy applicable to the ICT sector ..." The ICT sector stands for Information, Communications and Technology sector. I add immediately that this does not mean that she was "issuing" a policy because she was, in real terms, only "amending" the existing policy. I will revert to this point at a later stage. Nevertheless, it appears to be common cause between all the parties that she was acting in terms of section 3(1) and that she was empowered to do so. See my later remarks about "make", "issue" and "amend".

Moreover, section 3(4) of the ECA only provides that ICASA and USAASA, as the case may be, in exercising their powers and performing their duties in terms of the Act and the related legislation (of course, in terms of the Act, ICASA has the power to, if it so chooses, issue regulations) must consider policies made by the Minister in terms of section 3(1) and policy directions issued by her in terms of section 3(2). I do not read this to mean that either ICASA or USAASA are empowered to shoot down in flames a policy made (or amended) by the Minister, with the approval of cabinet, with regard to the make up of government subsidised STB's.

I add that in terms of the Independent Communications Authority of South Africa Act no 13 of 2000 ("the ICASA Act"), and more particularly section 4 thereof it is also provided that ICASA may make regulations on any matter consistent with the objects of this Act and the underlying statutes or that are

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incidental or necessary for the performance of the functions of the Authority (emphasis added) – see section 4(3)(j).

- (4) I also have difficulty in determining the relevance of counsel's apparent reliance on the issue of the Separation of Powers (as in *Akani* and *Harris*). I do not see this as a case of an executive act amending, diluting or undoing a legislative act. The executive member, herself, initiated the legislation. It appears to be common cause that the Minister acted in terms of section 3 of the ECA. Both the Minister and ICASA exercise their powers in terms of the same legislation (with the latter also operating in terms of the ICASA Act, as I have mentioned).

Moreover, I have difficulty with the argument that the enacted amendments are not binding. I revisit the words of the learned Judge of Appeal in *Akani*:

"I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments."

It seems to me, where this policy was made (or amended) in terms of section 3(1) of the ECA, a step falling within the powers of the Minister, and duly promulgated and published, the amendments have become "legislative instruments", and are not mere "policy determinations". As such, they seem to me to "bind the public".



(This, of course, is subject to the question as to whether or not the requirement of procedural fairness has been met.)

Unfortunately, the terms "policy determination" or "policy direction" or "policy" are not defined in the ECA.

- (5) e.tv Based its case on the three pillars on which a legality review is to be conducted: lawfulness, rationality and procedural fairness, as previously pointed out. In my view this opens the door, for all the reasons mentioned, for a legality review to be launched under these particular circumstances. Put differently, the impugned amendments (or the remaining one) is reviewable in terms of the principle of legality.

[95] I now revert to the main issue of procedural fairness before turning to the subjects of lawfulness and rationality.

(ii) Was e.tv consulted before the amendments were enacted?

[96] In the founding affidavit, the fourth (and last) review ground offered by e.tv is that "the impugned amendments were made pursuant to a process that was not procedurally fair".

[97] It is submitted by e.tv that the proposed amendments to the BDM policy, in respect of which comments were invited by former Minister Carrim in December 2013, were not adopted. Instead, so it is argued, and without embarking on any further public consultation process, the present Minister published the BDM policy with

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amendments that are "so different from what was proposed over fifteen months ago (ie in December 2013) that a further public consultation process was required". It is argued that the making of such a policy must take place in a manner that is procedurally fair and allows for public comments to be made and taken into account. In this regard, e.tv relies on the provisions of section 4 of PAJA (which I have found not to apply) and section 3(5)(b) of the ECA and "the principle of procedural rationality that applies to the exercise of all public power".

[98] I will return hereunder to a more detailed discussion of the provisions of section 3 of the ECA.

[99] The main thrust of e.tv's complaint appears to be that what the present Minister published, was so "markedly different" from that which Minister Carrim published for public comments, that a further process of public consultation ought to have been launched before the Minister enacted the impugned amendments.

[100] I turn to "the process under Minister Carrim" as it is referred to by e.tv.

In the first place, of course, Minister Carrim's proposals were never enacted because he was replaced by the present Minister, as I have pointed out. The process under Minister Carrim is therefore different from what happened in the 2008 published policy providing that STB's would have "capabilities to unscramble the encrypted broadcast signal so that only fully compliant STB's made or authorised for use in South Africa can work on a network", and the published amendments of 2012 in terms of which encryption capabilities were expressly excluded and it was only provided

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that STB's will "have a robust STB control system that will also benefit the consumers by ensuring that they do not have to own multiple boxes for both current and future free-to-air broadcasting services". It is therefore not clear what the status of the "Carrim proposals" are, given the fact that they were never enacted.

The proposed amendments of Minister Carrim, which is hailed by e.tv as "internally consistent and co-herent policy" represented, according to e.tv, "the compromise sought by requiring STB's to be able to allow for the encryption of broadcast signals, but leaving broadcasters free to decide whether to encrypt their signals and make use of the STB control system contemplated by the unamended BDM policy". Of course, the Minister's proposed amendment 5.1.2(C), which is not under attack in the review application, contains a similar provision namely "depending on the kind of broadcasting services broadcasters may want to provide to their customers, individual broadcasters may at their own cost make decisions regarding encryption of content".

In the record, I cannot find a basis for e.tv suggesting that Minister Carrim's proposed amendments "was the compromise sought by requiring STB's to be able to allow for the encryption of broadcast signals, but leaving broadcasters free ..." (emphasis added): the actual proposed amendments of Minister Carrim, of 6 December 2013, appearing in *Government Notice* no 37120, contain the following statements (I do not quote the actual paragraph numbers for the sake of brevity):

- "To avoid challenges in implementing the Digital Migration program, caused mainly by differences between broadcasters and also between some manufacturers, the use of a control system is not mandatory. However, the STB's will have a control system to protect government's investment in the

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subsidised STB market and the local electronics industry and, with rapid technological changes, for future use by broadcasters who might not want to use it on implementation."

(This appears to me to be very much in line with what the present Minister enacted.)

- "In order for households to continue to receive television services on their current analogue TV sets after the analogue signal is switched off, Set-Top-Boxes (STB's) which convert the digital signals into analogue signals, are required." (Nothing to do with encryption.)
- "To avoid subscription broadcasters unfairly benefiting from the STB control system, government's investment in the STB control system will be recovered from those subscription broadcasters that choose to make use of the STB control system."

(This appears to be aimed at the subscription broadcasters and not at FTA broadcasters.)
- "Have a robust STB control system that –
 - (a) is not mandatory for use by broadcasters in the transmission and management of their broadcasting services;
 - (b) can be used to ensure that consumers do not have to own multiple boxes for both current and future broadcasting services; and
 - (c) can provide long term benefits to the broadcasting industry as a whole."

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- "Enable access to a secure bootloader mechanism to ensure access to the STB control system by broadcasters on the DTT platform that choose to make use of the STB control system."

(As I understand the position, the "bootstrap loader" is part of the STB control system proposed by the SABS, already mentioned, for subsidised STB's and has nothing to do with encryption.)

The Minister's amendment proposals, as published, appear to be based on submissions by the South African and Communications Forum, ostensibly attached to the Department of Communications, dated December 2013. Similarly, I could find nothing in those proposals, neither was I referred to anything specifically, that suggest that STB's should contain encryption capabilities. I add that, in its submission, this Forum ("SACF") points out that it represents six STB manufacturers in its Industrial Development Working Group, all of which have significant black ownership and are certified at level 2 or 3 for BEE rating. SACF points out that it has engaged vigorously to ensure that emerging manufacturers who would like to participate are not shut out of the government order for subsidised STB's as well as any commercial opportunities. I mention this, because it is clear from, for example, the argument advanced by the sixteenth respondent, representing a number of influential black organisations, that the black manufacturers are united in their opposition to the idea of introducing an encryption facility to the STB's. Against this background, it is unlikely that the SACF would have supported the introduction of such encryption capabilities for the subsidised STB's.

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In the founding affidavit, e.tv relies on a statement issued by Minister Carrim on 20 December 2013 in which, according to e.tv, the Minister "set out the basis upon which the STB control requirement was to be retained and its use made non-mandatory". The statement is attached to the founding papers. The statement, dated 20 December 2013, goes under the heading "Digital Television: on Set Top Box Issues". Much of what is stated in this document is a repetition of what is contained in the published proposed amendments from which I have quoted. These are two extracts from the statement which I consider to be of some significance for present purposes:

- "We have not made a decision about the *management* of a control system. Nor do we refer at all to conditional access or encryption as methods of implementing STB control. We are saying that broadcasters are *free* to decide whether they want to use control or not. There is no compulsion. So we cannot see how we are going against the court order (my note: this is a reference to the so-called 'e.tv judgment' to which I will later refer). Furthermore, we have proposed generic control, which refers to any system which can be used to control the functions of a STB. We are not proposing a particular or specific system." (Emphasis added.)
- Under a subheading "SABC-MultiChoice agreement", the following is said:

"The SABC does not want to use a control system. So the agreement with MultiChoice will not be affected. Our advice is that the commercial agreement only deals with the encryption of SABC channels and not with whether the STB's that are used for viewing SABC services have a control system or not. So the SABC is free not to use

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the control system in the transmission and management of its channels, and its agreement with MultiChoice will not be affected." (Emphasis added.)

It is clear from my earlier discussion on the SABC's submissions, that the latter is directly opposed to the introduction of an encryption facility for the STB's subsidised by the government.

Against this background, I see nothing in Minister Carrim's 20 December 2013 statement (ostensibly relied upon by e.tv) which could have brought e.tv or any of the other role players under the impression that government subsidised STB's were to be provided with an encryption capability.

Finally, and what may have been Minister Carrim's last throw of the dice on this particular subject, one finds, attached to the founding papers, a presentation by the Communications Department, dated 18 February 2014, on the "Broadcast Digital Migration Amendments Gazetted on 6 December 2014". This is quite a lengthy document, but I find nothing in this presentation which would suggest the provision of encryption capabilities for government subsidised STB's. The presentation is one to the Portfolio Committee on Communications. The following statements in this presentation appear to me to be significant for present purposes:

- The Portfolio Committee was reminded that the 2008 BDM policy stated that the STB's would have a control system to:
 - "(i) protect government's investment in subsidised STB's;
 - (ii) protect consumers from low quality non-conformant STB's;
 - (iii) unscramble encrypted signals;

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- (iv) stimulate local electronic manufacturing industry;
 - (v) prevent the STB's from being used outside South Africa and to disable stolen STB's;
 - (vi) allow for mass and unique messaging, inter-activity with government."
- (Emphasis added.)

The presentation then goes on to state:

"In 2012, an amendment to the BDM policy was gazetted to soften the use of the STB control system. For example, encryption was dropped but STB control maintained to ensure that STB's conform to SABS (South African Bureau of Standards) standards." (Emphasis added.)

- Nowhere in this presentation (which was launched under the watch of Minister Carrim) do I find any indication to the effect that "encryption was re-introduced" or something similar. The last mention of encryption, as far as I can see, was the announcement that "encryption was dropped". This is also in line with what Minister Carrim said in his 20 December 2013 statement that

"We have not made a decision about the *management* of a control system. Nor do we refer at all to conditional access or encryption as methods of implementing STB control ..."

[101] Against this background, I have difficulty in finding such a "marked difference" between Minister Carrim's proposals and what is contained in the impugned amendments that it necessitated a further public participation process before the impugned amendments could be enacted. This conclusion is perhaps fortified by the

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fact that a number of role players made submissions to the Minister, mainly in January 2014, following the proposals of Minister Carrim. For example, in their lengthy submission dated 5 January 2014, e.tv, *inter alia*, makes the following statement:

"The SABC went on to say that 'the SABC, e.tv and other free-to-air broadcasters may independently and individually decide how they wish to manage their STB's'. This could perhaps have been better put by substituting the words 'manage their STB's' with the words 'manage their signal'. That is in fact the position that the department has now arrived at -- free-to-air broadcasters can now decide how they wish to manage their signal and whether that signal will be encrypted. e.tv Can see no reason why those broadcasters opposing encryption, having been given the right to choose whether or not to encrypt their signals, should continue to object to STB control."

At the risk of repetition, I repeat what was said in the impugned amendment 5.1.2(C), which is not subject to the review attack, that individual broadcasters may at their own cost make decisions regarding encryption of content.

In their submission, e.tv also says the following:

"For the record, e.tv states that it will be making use of the STB Control system to encrypt its DTT channels irrespective of whether other free-to-air channels choose to do so."

This is fighting talk. The only difficulty I have with this statement is that e.tv, for the reasons mentioned earlier, now appears to insist on the government funding the

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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



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

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

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

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

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



- 37.3 the inclusion of CA in the basic STB would add '*complexity and expense*' to the entire digital migration process;
- 37.4 '*the use of CA in a free-to-air environment is highly unusual and untested in comparable jurisdictions*';
- 37.5 '*it would ... cause unnecessary complications down the line, especially when integrated digital TV-sets are introduced into the market*'.

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

"Amendment of paragraph 5.1.2.7 of the Policy

Paragraph 5.1.2.7 of the Policy is amended –

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

'5.1.2.7 have a robust STB control system that –

- a) is not mandatory for use by broadcasters in the transmission and management of their broadcasting services;
- b) can be used to ensure that consumers do not have to own multiple boxes for both current and future broadcasting services; and
- c) can provide long term benefits to the broadcasting industry as a whole;"

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



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

"(b) by the insertion after paragraph 5.1.2.7 of the following paragraph:

5.1.2.7(A) To avoid subscription broadcasters unfairly benefiting from the STB Control System, government's investment in the STB Control System will be recovered from those subscription broadcasters that choose to make use of the STB Control System."

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

"We have not made a decision about the *management* of a control system. Nor do we refer at all to conditional access or encryption as methods of implementing STB control. We are saying that broadcasters are *free* to decide whether they want to use control or not. There is no compulsion ..."



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

- (i) the "STB control amendment" (the one that has been abandoned) provides for the manufacture and use of STB's *without* any STB control system. This is clearly incorrect. It is obvious, from a reading of 5.1.2(A), with 5.1.2(B)(b) that the subsidised STB's will be fitted with an STB control system to protect the government investment in the subsidised STB's; and
- (ii) the BDM policy (presumably including the impugned amendments) "does not provide for STB's to have technology to enable them (to) provide a government messaging service to users via (*sic*)". It is suggested that the 2012 policy provided for individual STB's to be "addressable", ie to facilitate government messaging services. This is also, with respect, clearly wrong: the SABS national standard, to which I have referred, and which, it is common cause, will be applicable to the subsidised STB decoders, will have the following main functional elements specified for security:

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



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

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

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

need to ensure the ability of the Executive to act efficiently and promptly."

(The emphasis is that of counsel.)

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

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

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

[114] Section 3(5) provides:

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



- (a) must consult the Authority (read ICASA) or the Agency (read USAASA), as the case may be; and
- (b) must, in order to obtain the views of interested persons, publish the text of such policy or policy direction by notice in the *Gazette* –
 - (i) declaring his or her intention to issue the policy or policy direction;
 - (ii) inviting interested persons to submit written submissions in relation to the policy or policy direction in the manner specified in such notice in not less than thirty days from the date of the notice;
- (c) must publish a final version of the policy or policy direction in the *Gazette*." (Emphasis added.)

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

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

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CJ

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

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



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

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

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

1. The subsection prescribes what the Minister must do when issuing a policy under subsection (1) or a policy direction under subsection (2). (Emphasis added.)
2. I first deal with the issuing of a policy direction under subsection (2), because, in my view, it is not applicable for present purposes.

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

- (a) the undertaking of an enquiry in terms of section 4(B) of the ICASA Act ...;
- (b) the determination of priorities for the development of electronic communications networks and electronic communications services or



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

- (c) the consideration of any matter within the Authority's or the Agency's jurisdiction reasonably placed before it by the Minister for urgent consideration;
- (d) guidelines for the determination by the Authority of spectrum fees; and
- (e) any other matter which may be necessary for the application of this Act or the related legislation." (Emphasis added.)

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

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

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



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

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

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

- (i) Of course, the reference to subsection (1) is important. It stipulates that the Minister may make policies on matters of national policy applicable to the ICT sector (emphasis added).
- (ii) In my view, the Minister already took the step to make the policy in 2008.



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

On page 3, the introductory paragraph is short and sweet:

"I, Dr Ivy Matsepe-Casaburri, Minister of Communications, hereby in terms of section 3(1) of the Electronic Communications Act, 2005 (Act no 36 of 2005), make the Broadcasting Digital Migration Policy in the schedule."

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

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

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

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

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

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

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

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



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

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

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



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

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

"8. Statutory interpretation

8.1 The approach of the Courts

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



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

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

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

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



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

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

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

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



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

"The agency (read USAASA) further informed the Committee that in the interest of time it thought it was prudent to initiate the tender process calling for quotation for both encryption and non-encryption Set-top-boxes system.

USAASA was mindful of the fact that a Policy decision had not been concluded, but was concerned about its ability to meet the deadline of 17 June 2015 as set by the International Telecommunications Union.

In consultation with the Executive Authority, USAASA issued an invitation to tender that sought quotations for both control and non-control set-top-boxes. This was done to ensure that by the time a Policy Directive is finalised by Cabinet, time consuming administrative processes would also been concluded (*sic*)."

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

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

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

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

Lawfulness

[121] I earlier dealt with the author *Cora Hoexter's* overview of the subject when she said "the fundamental idea it expresses is that 'the exercise of public power is only legitimate where lawful'". She submitted that "its detailed content has to be worked out from the Constitution as a whole and this is a continuing process that the Constitutional Court embarked on in a series of cases involving non-administrative action" (the author refers to the principle of legality). She then point out that "in the first of these, *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* (the reference is 1999 1 SA 374 (CC)) the court identified the principle of legality and described it as an aspect of the rule of law".



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

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

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

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

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

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C-J

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

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

"116. e.tv's First ground of review relates to the lawfulness of the Minister's decision. e.tv contends that the impugned amendment (this is the encryption amendment) is *ultra vires* the Minister's powers.

117. This is made clear by the e.tv judgment. In the case, the South Gauteng High Court held at paragraph [37] that '*the Minister does not have the power to prescribe to FTA broadcasters how they should manage STB's*'. It held at paragraph [50] that neither does she have the power '*to make or prescribe binding decisions relating to STB control*' ...

120. I am advised to submit that:

120.1 it is an elementary principle of the rule of law and principle of legality that members of the executive may exercise no power and perform no function beyond that conferred upon them; and

120.2 a decision can be unlawful because either its purpose or effect is unlawful.

121. In the present case, whatever the intent of the Minister, the effect of her amendment is plainly *ultra vires* her powers.

122. On this basis alone, the Minister's decision to enact clause 5.1.2(B)(a) is unlawful. This is so both under sections 6(2)(a)(i) and 6(2)(f)(i) of PAJA and under the principle of legality."

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I have held that this is not a PAJA review.

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

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

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

E.TV (PTY) LTD

APPLICANT

AND

MINISTER OF COMMUNICATIONS

1ST RESPONDENT

SENTECH LTD

2ND RESPONDENT

*INDEPENDENT COMMUNICATIONS AUTHORITY
OF SOUTH AFRICA ("ICASA")*

3RD RESPONDENT

*SOUTH AFRICAN BROADCASTING CORPORATION
LTD ("SABC")*

4TH RESPONDENT

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

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

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- "2. The decision of the Minister of Communications of 10 May 2012 to instruct Sentech Ltd to assume responsibility for the set-top-box control system for free-to-air digital terrestrial television is declared to be unlawful and of no force and effect and is reviewed and set aside;
3. it is declared that e.tv (Pty) Ltd and the South African Broadcasting Corporation Ltd and other free-to-air broadcasters are responsible for the set-top-box control system for free-to-air digital terrestrial television."

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

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

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

And –

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



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

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

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

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

"Thus, the duty of determining how public resources are to be drawn upon and recorded lies in the heartland of executive-government function and domain. What is more, absent any proof of unlawfulness or fraud or corruption, the power and the prerogative to formulate and implement policy on how to finance public projects reside in the exclusive domain of the national executive subject to budgetary appropriations by parliament."



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

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

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

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

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

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

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

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

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

Is the encryption amendment irrational and unreasonable?

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

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

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

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C-J

encryption, but requiring those broadcasters to carry the costs of encryption themselves if they opt for encryption (amendment 5.1.2(C)) is entirely rational and reasonable.

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

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

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

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

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

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

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

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

VP
GT

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

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

Conclusion

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

Costs

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

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

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

"In *Affordable Medicines* (the full reference is *Affordable Medicines Trust and others v Minister of Health and others* 2006 3 SA 247 (CC) at paragraph [139]) this Court held that as a general rule in constitutional litigation, an unsuccessful litigant in proceedings against the State ought not to be ordered to pay costs. In that matter a body representing medical practitioners challenged certain aspects of a licensing scheme introduced by the government to control the dispensing of medicines. Ngcobo J said the following:

'The award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations. One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. The *rationale* for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule. There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that



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

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

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



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

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

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

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

Motsepe at 911E-G.

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

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

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

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

Wm C-J

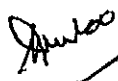
[153] Nevertheless, after due reflection, I have come to the conclusion that this is an appropriate case to deviate from the "general rule", inasmuch as it may be applicable to the present circumstances, and to order that the costs should follow the result so that the unsuccessful litigant has to pay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

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

The order

[154] I make the following order:

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



W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA



HEARD ON: 26 & 27 MAY 2015

FOR THE APPLICANT: S BUDLENDER,
ASSISTED BY J BERGER AND R TSHETLO
INSTRUCTED BY: NORTON ROSE FULLBRIGHT

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

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

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

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

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

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