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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number: 2025-008928

(1) REPORTABLE: NO

(2) OF INTEREST TO THE JUDGES: NO

(3) REVISED.

DATE: 27/03/2025

SIGNATURE:

In the matter between:

E.TV (PTY) LIMITED

1ST APPLICANT

MEDIA MONITORING AFRICA

2ND APPLICANT

**SOS SUPPORT PUBLIC BROADCASTING
COALITION**

3RD APPLICANT

AND

**MINISTER OF COMMUNICATIONS AND
DIGITAL TECHNOLOGIES**

1ST RESPONDENT

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	2 ND	RESPONDENT
SENTECH SOC LIMITED	3 RD	RESPONDENT
INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA	4 TH	RESPONDENT
SOUTH FRICAN BROADCASTING CORPORATION SOC LIMITED	5 TH	RESPONDENT
CAPE TOWN COMMUNITY TELEVISION	6 TH	RESPONDENT
TSHWANE COMMUNITY TELEVISION	7 TH	RESPONDENT
SOWETO COMMUNITY TELEVISION	8 TH	RESPONDENT
1KZN TV	9 TH	RESPONDENT
TRINITY BROADCASTING NETWORK	10 TH	RESPONDENT
MEDIA DEVELOPMENT AND DIVERSITY AGENCY	11 TH	RESPONDENT
CHAIRPERSON: NATIONAL ASSEMBLY PORTFOLIO COMMITTEE ON COMMUNICATIONS AND DIGITAL TECHNOLOGIES	12 TH	RESPONDENT

JUDGMENT

BAQWA, J:

INTRODUCTION

1.

This is an application which is brought in two parts, Part A being an urgent

application for an interdict pending the final determination of Part B review of the impugned decision to set 31 March 2025 as the analogue switch off (ASO) date.

The applicants seek the granting of an interim order to maintain the *status quo* by suspending the ASO date and interdicting the Minister (the first respondent) and/or Sentech (the third respondent, which abides) from giving effect to the ASO date.

THE PARTIES

2.

The first applicant is E.TV, with its place of business at 4 Albany Road, Dunkeld West, Johannesburg. It is South Africa's biggest independent and free-to-air television channel and the only meaningful non-state broadcaster of free-to-air television news in South Africa. Established in 1998, its E.TV channel is the most viewed English television channel in South Africa.

3.

E.TV operates in terms of an Individual Broadcasting Service Licence issued by ICASA, which entitles it to provide a commercial television broadcasting service. In terms of clause 2 of schedule 1 of the licence E.TV is obliged to provide national coverage of its broadcasting services provided that at any given time the minimum population coverage is 77%.

4.

The second applicant is Media Monitoring Africa (MMA), a non-profit organisation with its principal place of business at Fourth Avenue, (corner Fourth Avenue and Sixth Street) Parkhurst, Johannesburg.

5.

The third applicant is SOS Support Public Broadcasting Coalition (SOS), a non-profit organisation with its principal place of business at Suite 3, Art Centre, 22 Fourth Avenue, (corner Fourth Avenue and Sixth Street), Parkhurst, Johannesburg.

6.

The first respondent is the Minister of Communications and Digital Technologies who

is cited as the responsible Minister under the Electronic Communications Act (ECA) and the custodian of the digital migration process which is the subject of this application. He takes the decisions regarding the digital migration process and he is required to gazette the date of ASO. The Minister's offices are at IParioli Office Park, 1166 Park Street, Hatfield, Pretoria.

7.

The second respondent is the President of the Republic of South Africa who is cited as head of the National Executive and Cabinet. The Minister set the analogue switch off date for 31 March 2025 either in or after consultation with Cabinet.

8.

The third respondent is Sentech Soc Limited (Sentech), a state-owned company offering digital content delivery services to public and commercial entities with its main place of business situated at Sender Technology Park, Octave Road, Honeydew, Gauteng. Sentech is cited on account of the interest it has in the relief, as the entity which provides the services used by E.TV for the purpose of analogue transmission, and as the entity that will be responsible for "flicking the switch" to turn off analogue broadcasting in South Africa on the date determined by the Minister.

9.

The fourth respondent is the Independent Communications Authority of South Africa, ICASA is a juristic person established in terms of section 3(1) of the Independent Communications Authority of South Africa Act 13 of 2000 (ICASA Act). Its registered offices are at 350 Witch-Hazel Avenue, Eco-Park Estate, Centurion. ICASA exercises the powers and performs the duties conferred and imposed on it by the ICASA Act and the underlying statutes, including the Electronic Communications Act 36 of 2005 ("**ECA**")

10.

The fifth respondent is The South African Broadcasting Corporation Limited. The SABC is a public company with limited liability incorporated in terms of the Company Laws of South Africa, and the Broadcasting Act 4 of 1999. The SABC's main place of business is at Broadcasting Centre, Henley Road, Auckland Park, Johannesburg.

The SABC is a free-to-air terrestrial television broadcaster.

11.

The sixth to tenth respondents are the following five community television broadcasting service licenses:

11.1. Cape Town TV, with physical address 18 Lower Scott Road, Observatory, Cape town and email address: m[...];

11.2. Tshwane TV, with physical address 75 Twickenham Avenue, Auckland Park, Johannesburg, email address: k[...];

11.3. Soweto TV, with physical address 8270 Vilakazi Street, Orlando West, Soweto, and email address: T[...];

11.4. TKZN TV, with physical address 71 Dollar Drive, Richards Bay Cental, Richards Bay, and email address: b[...];

11.5. FAITH TV, with physical address 74 Studio Office Park, Cresta, Johannesburg, and email address: b[...] and i[...], no relief is sought against these licensees, but they are cited for any interest they may have in the matter.

12.

The eleventh respondent is Media Development and Diversity Agency (MDDA).

MDDA is a statutory development agency for promoting and ensuring media development and diversity. It is a partnership between the South African Government and major print and broadcasting companies to assist in, amongst others, developing community and small commercial media in South Africa. It was established in 2003, in terms of the Media Development and Diversity Agency Act 14 of 2002 and started providing grant funding on 20 January 2004. It is cited as the statutory body responsible for the promotion of development and diversity in the South African media throughout the country and for any interest it may have in this application. Its offices are at 26 Canany Road, SABC Auckland Park Campus,

Auckland Park.

13.

The twelfth respondent is the Chairperson, National Assembly Portfolio Committee on Communications and Digital Technologies who heads the Portfolio Committee responsible for overseeing the Minister and ASO. She is cited in her official capacity for any interest she may have in this matter. She is served care of the State Attorney and her email address is: k[...]

ABBREVIATIONS

14.

I have considered it necessary to list the abbreviations used in this judgment upfront to facilitate an easier understanding of what follows below:

ABBREVIATION	DEFINITIONS
ASO	Analogue Switch off
BDM POLICY	Broadcasting digital Migrations Policy published under GN 97 in GG 35014 of 07/02/2012 and GG 38583 of 18/03/015
BDMC	Broadcast Digital Migration Committee
BRC	Broadcast Research Council
DEPARTMENT	Department of Communications and Digital Technologies
DTH	Direct-to-home (Satellite)
DTT	Digital Terrestrial Television
e.tv	e.tv (Pty) Limited vs Minister of Communications and digital Technologies 2023(3)SA 1(cc)
ECA	Electronic Communications Act 36 of 2005
ICASA	Independent Communications Authority of South Africa
ITU	International Telecommunications Union
MINISTER	Minister of Communications and Digital Technologies

NAB	National Association of Broadcasters
REGULATIONS	Digital Migration Regulations, 2012 published under GN 1070 in GG 36000 of 14 December 2012
SABC	South African Broadcasting Corporation
SITA	State Information Technology Agency
STB	Set-top Box
USAASA	Universal Service and Access Agency of South Africa

BACKGROUND

15.

This application arises as a consequence of the implementation of the Digital Migration Policy which is led by the Minister.

16.

Television is broadcast through the use of frequency signals which are different signals on the spectrum with analogue television being the original television technology which utilised analogue signals to transmit video and audio. The broadcasting signal in an analogue television set is received directly from an aerial or antenna and transmits through a terrestrial analogue signal. Currently all analogue broadcasting in South Africa happens in the frequency band below 694 MHz.

17.

Digital television is the transmission of television signals using digital encoding. It makes more economical use of scarce radio spectrum space hence the decision to go the digital migration route. It allows multiple channels to be transmitted with the same bandwidth capacity previously used by a single analogue channel, and provides additional features that analogue television cannot.

18.

Digital television signals are transmitted in two ways. Firstly, DTT involves transmission of television signals through transmission signals built on land and viewers need a set that is capable of receiving digital signals. Secondly DTH

involves transmission of television signals via satellite and viewers need a satellite dish and a set top box capable of receiving digital signals. Analogue television sets are not able to display information received from digital frequencies without a set-top box to convert digital transmissions to analogue transmissions.

DIGITAL MIGRATION

19.

The process through which the broadcast of television is migrated from the original analogue technology to digital technologies and frequency signals is called “digital migration” or “broadcast digital migration” (BDM).

20.

The process end of digital migration is ASO which signifies the time when South Africa ceases analogue television broadcasting. When this happens, E.TV's, SABC's and numerous community broadcasters allocation of the requisite analogue frequency for analogue broadcasting will come to an end.

21.

The result of BDM is the freeing up of spectrum. The primary aim being to free up “space” on the electromagnetic spectrum in the 700 MHz and 800 MHz frequency “band” which has been re-allocated for use by the telecommunication companies such as MTN, Vodacom, Telkom, Cell C etc. The outcome is the effective data usage which bolsters the economy.

22.

This goal has already been achieved with all broadcasting (including analogue broadcasting) previously in the 700 MHz to 800 MHz band having vacated this band into the lower bands which continue to be dedicated to broadcasting. South African telecommunication companies have already been assigned their respective frequencies in the 700 MHz to 800 MHz band pursuant to the “spectrum auction” which was held in 2022.

23.

All analogue television signals that were previously broadcasting above 694 MHz have with ICASA's approval migrated their analogue broadcasts to the below 694 band, thus making available the undisturbed use for services to telecommunications operators.

ISSUE TO BE DECIDED

24.

A decision was taken in line with the above developments to switch off-permanently-analogue television broadcasting on 31 March 2025 and the applicants have applied to review that decision.

25.

This Court is seized with Part A of that decision. The issue for determination is whether to cut off millions of people from access to television or whether they should retain that access pending the outcome of the applicant's review. Their constitutional right to freedom of expression, so the applicants submit, which includes freedom to receive information will be irreparably harmed. They submit further that with interim relief government will maintain the *status quo* for a while longer until an expedited determination of the applicants' review. The harm that would be caused by not granting interim relief would be more catastrophic than any potential harm to the respondents.

26.

The applicants contend further that without the relief, what would ensue is the perpetuation of what the Chair of the Parliament's Portfolio Committee on Communications called as "unmitigated disaster". For, as she lamented, while government speaks about "leaving no one behind" it adopted a haphazard ("spray and pray") approach to digital migration and the identification and engagement with indigent households that government needs to ensure are not left behind.

THE GROUNDS FOR REVIEW

27.

The applicants seek to challenge the decision to set the ASO at 31 March 2025 on a number of fronts namely, irrationality, unlawfulness, absence of consultation, and non-compliance with the KZN principle. The KZN principle is explained at paragraph 62 below.

CABINET HAD NO POWER TO DECIDE ASO

28.

It is common cause that the decision to set the ASO at 31 March 2025 was taken by Cabinet and not by the Minister. There is no ambivalence in the law in this regard. In the e.tv judgment the Constitutional Court held that the Minister is empowered to set the ASO date and that he is empowered by section 85(2(c) of the Constitution to take the decision¹. His decision is the implementation of the BDM policy². Clause 3.3.1 of the BDM Policy provides also that ASO should occur “on a date to be determined by the Minister in consultation with Cabinet”.

29.

As the Constitutional Court held in e.tv “(t)he Regulations and the BDM Policy, therefore presuppose that the Minister has the necessary power to determine the analogue switch off date.” This finding was central to the determination whether the decision on the ASO date constituted an administrative or executive action, which in turn determined the ambit of the judicial review.

30.

The submission by the first respondent that because the BDM is a national policy of the government, there is nothing unlawful when the President and other members of the Cabinet take it upon themselves to implement national policy such as the BDM Policy by proclaiming the analogue switch-off date clearly overshoots the runway. It is unlawful. The attempt to justify the decision on the basis of Esau and others v Minister of Co-operative Governance And Tradition Affairs And Others³ is misplaced.

¹ E.tv judgment paragraph 35.

² e.tv judgment paragraphs 35-6.

³ [2021] ZASCA 9 at paragraph [56].

30.

The legal consequences of the wrong person taking the decision are apparent. The decision is unlawful because “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” Fedsure Life Assurance Ltd v Greater Johannesburg Traditional Metropolitan Council⁴ Minister of Water and Sanitation vs Sembcorp Siza Water (Pty) Ltd⁵

31.

It is established law that “a functionary in whom a discretionary power is vested must himself exercise that power in the absence of a right to delegate”. Minister of Environment and Tourism and Ano vs Scenematic Fourteen (Pty) Ltd⁶ ,Walele vs City of Cape Town and others⁷

32.

The submission that the President and the Cabinet derived their power from Section 85(1) of the Constitution is incorrect. Where the wrong person exercises a power, it is reviewable on a number of grounds, including material error of law, a failure to take an action in terms of an empowering provision which placed a duty on a particular individual or abdicating a discretion.

Stutterheim High School v Member of the Executive Council, Department of Education, Eastern Cape⁸; Mlokoti v Amathole District Municipality and Ano⁹.

33.

To make matters worse, the absence of reasons by the Cabinet regarding the decision on ASO (assuming it had the power) renders the decision arbitrary. Minister of Justice and Ano vs SA Restructuring and Insolvency Practitioners Association and Others¹⁰

⁴ 1999 (1) 374(CC) at paragraph 58.

⁵ 2023(1) SA 1(cc) at paragraph 83.

⁶ 2005(6) SA 182 (SCA) at paragraph 20;

⁷ 2008⁷(6) SA 129 (cc) at paragraph 113.

⁸ [2009] 4 All SA 364(E) at paragraphs 28 and 59

⁹ 2009(6) SA 354(E) at 380.

¹⁰ 2018(5) SA349(cc) at paragraphs 49 and 55.

Significantly the affidavit promised to be filed by the President in the Minister's answering affidavit was also not filed.

Absence of consultation regarding ASO of 31 March 2025.

34.

The applicants contend that they were not consulted when the Cabinet decided to set 31 March 2005 as the analogue switch-off date. This is contested by the Minister.

35.

The stance taken by the Minister is as follows:

The purpose of consultation is to solicit the views of stakeholders on the subject matter of consultation. The subject matter of the consultation in this case was the analogue switch-off date and matters incidental to it. The decision-maker only has to give interested parties an opportunity to make representations and consider the representations before making the decision.

36.

In support of his stance the Minister states that on 9 December 2022 he invited interested parties to submit comments on the proposed analogue switch-off date of 31 March 2023 and that the applicants responded to the invitation and submitted written comments. He considered that submissions and responded to each of them.

37.

After engaging with the stakeholders, the Minister was persuaded not to proclaim 31 March 2023 as the analogue switch-off date, which is what the applicants wanted.

38.

During consultations with the broadcasters, a two phase migration approach was agreed upon. In the Minister's letter to broadcasters dated 13 June 2013, the Minister recorded that after having "noted your feedback and considered your inputs from various meetings and workshops regarding the analogue switch-off approach,

the Department has resolved to adopt a two-phase approach towards analogue switch-off.”

39.

Subsequent to this feedback by the Minister, he decided to convene a steering committee to assess progress and to determine the way forward. It is this committee which adopted a hybrid approach of the two phases referred to in the letter to broadcasters dated 13 June 2023.

40.

After the Committee had considered the various views of the stakeholders, it was recommended to the Minister to approve *“That 31 December 2024 is the ultimate date for analogue switch-off, even if the registration and subscriptions do not reach the 2.5 million cumulative household migration level notwithstanding all efforts by all stakeholders”*. The SABC attended the first workshop whereas the community broadcasters attended the second workshop. According to an explanation in the list of attendees MMA and SOS had not attended the first workshop as they are not broadcasters.

41.

A letter dated 14 June 2023 from e.tv summarises the fact that it has not always been a discordant environment along the digital migration journey. E.TV referred *“to the recent constructive and collaborative approach that has recently been adopted by the Department in engaging with broadcasters in order to find a potential solution to the challenges that are posed by the switching off of analogue transmitters, given the fact that millions of South Africans remain dependent on analogue signal to access television.”*

42.

MMA and SOS have also engaged the Department through copious correspondence in which they made written representations to the Minister and the President requesting the Minister to postpone the analogue switch-off date of 31 December 2024. According to the Minister, there is no suggestion that the Minister did not consider their views to the extent that the Minister advised them that *“the earliest*

opportunity that Cabinet will possibly deliberate on the matter again is at its next meeting on Wednesday 04 December 2024”

43.

Consonant with the stance referred to above taken by the Minister, he concludes as follows:

“When Cabinet met on 04 December 2024, it knew that the applicants wanted the 31 December 2024 analogue switch-off date to be postponed and the reasons for the postponement. The fact that the Cabinet postponed that date to a date with which the applicants do not agree with does not mean that their views were not considered”.

44.

There was an obligation on the Minister to consult stakeholders regarding the actual proposed date of the ASO.¹¹

45.

The requirements of consultation laid down by the e.tv judgment are:

45.1. The consultations must be in respect of the actual date;

45.2. the consultations must include critical questions such as the number of persons who qualify to receive STB's who would like to register before the ASO and how long it would take, at the current rate of installations, for the households who wish to register to receive STB's to be supplied with them.

46

Upon enquiry by the Court, Counsel for the Minister conceded that the above consultation requirements were not complied with by the Minister. The country and the stakeholders (including the applicants) were presented with a *fait accompli*.

47.

¹¹ . E.tv judgment paragraphs 488; 51-52.

Further, the stakeholders were never informed that the Minister or the Cabinet were considering setting the ASO at 31 March 2025 nor were they invited to comment on whether 31 March 2025 was viable in light of the factors identified by the Constitutional Court as being crucial to such consultation.

48.

The Minister is not assisted in his attempt to escape his obligation to consult the stakeholders by contending that e.tv had “made a long list of submissions to the Government to postpone the date” and that government did postpone the date.

49.

Further, the Minister’s submission is factually and legally incorrect as the letter of 01 December was in response to the ASO set at 31 December 2024. It was not and could not have been, a response to the newly and unilaterally imposed date of 31 March 2025 in respect of which nobody had prior notice or an opportunity to respond.

50.

The Minister’s stance is bad in law in that in terms of the e.tv judgment which requires consultation regarding the actual date of the ASO.

51.

Besides the specific requirements of consultation laid down by the Constitutional Court, the general requirements are also well established. This, in Telkom SA Soc Limited v Independent Communications Authority of South Africa¹²” this court made two points which are presently relevant:

51.1. *First when an organ of state adopts a change of stance or changes horses midstream it “had a duty to apply the fundamental principles of hearing the other side (audi alteram partem) and ensure that all interested parties were informed of the proposed change”*¹³

¹² [2021] ZAGPPHC 120 (8 March 2021).

¹³ at paragraph 35;

- 51.2. *second ICASA was under a duty to “play open cards with the stakeholders”¹⁴*
- 51.3. *These considerations apply with equal force to the present application.*
- 51.4. *Besides the Minister’s clear obligations, The Minister failed to appreciate that providing a fair hearing is simply not for the benefit of those potentially affected by a proposed decision. It is also “likely to improve the quality and rationality of administrative decision making and to enhance its legitimacy”. (See Joseph and others v City of Johannesburg¹⁵)*

THE SETTING OF THE ASO AT 31 MARCH 2025 IS IRRATIONAL

52.

The objectives regarding the achievement of Digital Migration are set out succinctly in the e.tv judgment namely:

- 52.1. *“The transition to digital television without causing millions of persons to lose access to television on the analogue switch-off date” e.tv.¹⁶*
- 52.2. *Steps must be taken to notify persons eligible for receipt of STB’s that there would be “the imminent loss of access to television on a set date and not a theoretical date in the future¹⁷;*
- 52.3. *A statement to the public of a need to register but without a deadline by which to register is insufficient.¹⁸*

53.

One of the critical questions to address to determine the ASO is how many people will be left without access to television broadcasts if the ASO is allowed to proceed on 31 March 2025.

¹⁴ at paragraph 42;

¹⁵ 2010 (3) BCLR 212 (CC), 2010 (4) SA 55 (CC).

¹⁶ at paragraph 63;

¹⁷ at paragraph 67.

¹⁸ at paragraph 69.

54.

According to the most conservative estimates provided by the Minister:

54.1. As of 21 February 2025, 391 513 households were registered for STB's but had not yet received them at the StatsSA ratio of 3.2 persons per household, this translates to 1,252,841 people;

54.2. According to Sentech's presentation to Parliament on 27 February 2025, the numbers are higher than the Minister's and they stand at 421,000 households which translates in 1,347 200 persons.

54.3. At another part of The Minister's affidavit he states:

"Currently 447,000 households remain to be supplied with Government sponsored STB's which translates into 1,430 400 people."

55.

From the numbers reported by the Minister it is quite apparent that it is not his case that these registered households will have STB's installed by March 31, 2025. He unequivocally states that such persons will receive STB's by 31 December 2025, yet he persists in opposing this application.

56.

In his answering affidavit he states that he finalised his plan sometime around 27 February 2025, but he has not tendered any evidence to this court nor to the applicants in that regard.

57.

The Constitutional Court in e.tv paragraph 44 stated that:

"The STB registration process and the deadline for registration form part of the process leading up to the analogue switch-off" and that the duty of consultation would need to address critical questions such as addressing "the number of persons who qualify to receive STB's who would like to register for STB's before the analogue switch-off date and how long it would take at the

current rate of installation for all households that wish to register to receive STB's to be supplied with such.”¹⁹

58.

Instead of complying with that mandate the Minister's attitude is that the process cannot be held to “ransom” by latecomers.

59.

The Minister chooses to turn a blind eye to the following facts; which expose the State's inactivity during the period 2023-2024 (contained in his answering affidavit).

59.1. Only 45 450 STB's were installed between August 2023 to October 2024;

59.2. Between August and December 2024, The Department only installed 15 740 STB's (about 300 per month);

59.3. Even though The State knew that in August 2023 well over 400 000 households required STB's (1280 000 people) before 31 December 2024, it installed only 61 000 STB's in a period of 18 months.

JUSTIFICATION OF LIMITATION OF RIGHTS

60.

The respondents bear the onus to establish that any limitation of rights is reasonable and justifiable. Moise vs Greater Germiston Transitional Council: Minister of Justice and Constitutional Development Intervening (Woman's Legal Centre as Amicus Curiae)²⁰. Yet on the Minister's own version he has deliberately embarked on an irrational process which will not achieve the objective identified by the Constitutional Court to “transition to digital television without causing millions of persons to lose access to television on the analogue switch-off date. As SOS and MMA explain in their Heads, that can only be described as impermissible and retrogressive conduct which could never be reasonable or justifiable in the circumstances.

¹⁹at paragraph 48.

²⁰ 2001 (4) SA 491 (CC) at paragraph 31

61.

The Minister makes bold to say (contrary to the BDM Policy) that these people are not his concern because he has obligations only to those who have registered. But even on that approach there has been a demonstrable dereliction of duty as alluded to in paragraph 59 above.

THE Kwa- Zulu Natal (KZN) PRINCIPLE

62.

The applicants also rely on the KZN principle in asserting the unlawfulness of the decision to proceed with ASO on 31 March 2025. The KZN principle flows from *KwaZulu-Natal Joint Liaison Committee v Mec Department of Education*²¹. In that matter the Constitutional Court held that the decision-makers are bound to honour undertakings lawfully and seriously made with an expectation of reliance at paragraphs 37, 45. Reliance, accountability and rationality require government officials to adhere to such undertakings.

63.

The Minister has over a decade repeatedly promised indigent households that ASO will not sever their access to television access. The promise was made seriously and lawfully. The KZN principle therefore obliges government officials not to renege on such promises and to fulfil the legitimate expectations raised as a result thereof regarding the constitutional rights to freedom of expression which includes the right to receive information and the right to equality²²

REQUIREMENTS FOR INTERIM RELIEF

64.

The requirements for interim relief are settled:

²¹ 2013(4) 262 CC.

²² 55.9 and 16 of the Constitution.

- (a) A prima facie right;
- (b) A reasonable apprehension of irreparable harm;
- (c) Balance of convenience;
- (d) Absence of an alternative relief. National Treasury vs Opposition to Urban tolling Alliance²³

65.

The test for interim relief is not formalistic. The constitutional court described the requirements for interim relief as “a handy and ready guide”. Outa at para 45. A court granting interim relief ultimately exercises a discretion resting on substantive considerations of justice, Eskom Holdings Soc Ltd vs Vaal River Development Association (Pty) Ltd²⁴ and in a way that promotes the objects, spirit and purport of the Constitution.²⁵ At its heart the test for interim relief seeks to balance the injury occasioned by granting or denying the interim relief, the merits of the final application and the public interest. Ohio vs Environmental Protection Agency²⁶

PRIMA FACIE RIGHT

66.

i. The applicants rely on four prima facie rights the first one being the right to freedom of expression. The Minister does not deny that the applicants bear this fundamental constitutional right in his answering affidavit. It cannot be disputed that this right is implicated in this matter. Without interim relief the ASO date violates millions of South African’s freedom of information²⁷. The Constitutional Court affirmed in OUTA that: “If the right asserted in a claim for an interim interdict is sourced from the Constitution it would be redundant to enquire whether that right exists²⁸.”

²³ 2012 (6) SA 223 (cc) (OUTA) at paragraph 41.

²⁴ 2023 (4) SA 325 (cc) (Vaal River) at para 281.

²⁵ Outa at para 45.

²⁶ 603 U.S. 279 2024 at 10.

²⁷ Section 16(1)(b) of the Constitution.

²⁸ OUTA para 46.

- ii. Secondly, the Minister does not deny that the right to equality is implicated in his answering affidavit. When government decides to differentiate between people it must do so in a rational manner as the right to equality is guaranteed in terms of Section 9(1) of The Constitution. Prinsloo v Van der Linde.²⁹ In this case, the Minister's plan of December 2025 as presented by Sentech differentiates between households in five provinces where the Minister mistakenly believes ASO has occurred and households in the remaining four provinces. Such differentiation is irrational as it is based on a material error of fact.
- iii. Thirdly, the applicants rely on their prospects of success in Part B of this application. The Constitutional Court has said that "[a] prima facie right may be established by demonstrating prospects of success in the review" South African Informal Traders Forum v City of Johannesburg³⁰. This Court can only take a peek at the grounds of review to be considered in Part B in order to determine a prima facie view regarding the prospect of success. Having done so, I hold the prima facie view that the applicants have exceeded the threshold required for interim relief. I have concluded that "no serious doubt" can be thrown on the grounds of review" Simon NO v Aiv Operations of Europe AB³¹, citing Webster v Mitchell³² and Gool v Minister of Justice.³³
- iv. Fourthly the right to an effective remedy is protected in the Constitution³⁴. (see also W J Building & Civil Engineering Contractors CC v Umhlathuze Municipality³⁵. The fact of the matter is, by the time the reviewing court hears Part B, even if it is heard on an expedited basis, there would be little it can do to provide effective relief of the violations that would have been visited on the affected households' right to freedom of expression.

²⁹ 1997 (3) SA 1012 (cc) at para 25

³⁰ 2014(4) SA 371(cc) at para 25.

³¹ 1999(1) SA217(SCA) at 228 G-H

³² 1948(1) SA 1186

³³ [1955] 3 All SA 115 (c) at 121

³⁴ Sections 34, 38 and 172(1)(b) of the Constitution

³⁵ 2013 (5) SA 461 (KZD).

IRREPARABLE HARM

67.

It is not a matter for speculation that the public will suffer severe consequences and even the Minister admits in his answering affidavit that if the analogue transmitters cease operating, the “whole republic” will suffer prejudice. Despite this acceptance he suggests that all currently registered households will receive an STB by 31 December 2025 some nine months after the ASO date.

68.

This assumes that Sentech would maintain the present rate of installation which is an unlikely eventuality considering the numerous factors causing delays in the STB rollout including the shortage of STB’s themselves.

The harm is not just a temporary inconvenience. Each day without access to news, public service announcements and educational programming results in irreversible loss of knowledge, awareness and democratic participation.

69.

E.tv will suffer severe financial harm due to the fact that a third of e.tv viewers rely on analogue broadcasting. I do not for that reason accept that e.tv has brought this application merely in pursuant of its commercial interests.

70.

Between 25% and 32% of the SABC’s viewers rely on analogue television. The chair of the Parliamentary Portfolio Committee explained that ASO as things stand will be the “demise” of the SABC. She was referring to 31 December 2024. She is the twelfth respondent who has filed a Notice to abide.

71.

The SABC is the fifth respondent, and it has also filed a notice to abide but at the hearing of this application the SABC made an application to file an explanatory affidavit which was opposed only by the Minister. In the interests of justice, I granted the application.

72.

The affidavit is deposed to by the Group Chief Executive Officer (GCEO) and I have taken excerpts from paragraphs 17, 20, 21, 22, 28 and 29 to illustrate the precarious position SABC is already experiencing and the potential catastrophe that would befall it should the ASO of 31 March 2025 be allowed to proceed. The GCEO has the backing of the SABC Board:

“17. The SABC has been, and remains, committed to the successful implementation of BDM programme. This commitment has been demonstrated by the hasty vacating of the spectrum above 694 MHz in the four provinces (i.e. KwaZulu-Natl, Eastern Cape, Western Cape and Gauteng) as was gazetted the Minister.

20. The Premature analogue switch-off in the above-mentioned five provinces resulted in a major loss of audiences and revenue to the SABC. I refer the above Honourable Court to annexure “NC3” annexe hereto, which reveals the SABC’s loss of audiences and revenue. These losses have been detrimental to the SABC. Likewise, the analogue switch-off gazetted to be affected on 31 March 2025 will further jeopardise the SABC’s sustainability.

21. In light of the above facts and circumstances, the SABC Management escalated their concerns to the Minister, requesting consideration to postpone the gazetted ASO date.

22. Regrettably, the SABC did not receive any positive response from the Minister.

28. During the process of requesting to switch-off five provinces, some of the figures provided to determine whether to authorise analogue switch-off in a particular area were not accurate. This led to premature analogue switch off of transmitters in areas where the communities were not yet ready to be switched off. Unfortunately, this fact was only realised after the analogue switch off had happened, resulting in audiences being left without SABC Television Services, and the SABC losing audiences and revenue.

29. Had accurate information been provided, the SABC would not have switched off some of the areas, and thus the SABC would not have consequently lost audiences and revenue”

73.

From the above excerpts the potential devastating effect of a premature ASO are graphically illustrated. Needless to say, 31 March ASO would deliver a “killer punch” to SABC and more importantly the harm caused would be irreversible or put differently irreparable.

74.

As MMA and SOS make clear, community television stations will be dealt a severe blow by an ASO date of 31 March 2025.

BALANCE OF CONVENIENCE

75.

Two factors are relevant to consideration of the balance of convenience.

Firstly, it is the harm to be endured by an applicant if the interim relief is not granted and the applicant succeeds in obtaining final relief compared to the harm borne by the respondent if the interim relief is granted and the applicant fails to obtain the final relief.

76.

In this case if the applicants are not granted interim relief, but succeed on review, millions of South Africans would have been plunged into a television blackout and free-to-air broadcasters would have suffered not only audience losses but also severe financial harm which are not capable of repair by the reviewing court.

If the applicants are granted interim relief but lose on review, no irreparable harm befalls the respondents. The Minister has failed to substantiate the allegation that dual illumination has cost the State R1.3 billion despite being requested to do so. The applicants do not comprehend the cost allegation as Broadcasters cover the costs of analogue transmission. At best, The Minister appears to rely on a figure spent by the State over the last decade.

77.

The Minister suggests that government has taken a decision not to fund dual illumination any longer. There is no challenge by the applicants in this regard therefore this Court cannot grant any relief.

NO ALTERNATIVE REMEDY

78.

It is common cause that the applicants have engaged with the Minister on several occasions even though those engagements cannot be said to offer an alternative remedy in any shape or form, The Minister is the only person who bears the duty to set an ASO date and the applicants cannot obtain appropriate relief except by launching the present application against the Minister and related parties in light of their having made it public that they are going forward with the ASO of 31 March 2025.

URGENCY

79.

There can be no dispute that this matter is urgent considering fast-approaching ASO date of 31 March 2025 and its potential effect and consequences for millions of South Africans. The Minister also does not contest the urgency of the matter.

CONCLUSION

80.

Having considered the conspectus of facts and submissions by Counsel, I make the following order.

ORDER

1. The application is heard urgently and the applicant's departure from the Rules is condoned.

2. Pending the final determination of the relief sought in Part B of this application:

2.1. The operation of the final analogue switch-off date of 31 March 2025, as announced by the Minister of Communications and Digital Technologies on 5 December 2024, is suspended; and

2.2. The Minister of Communications and Digital Technologies is interdicted from taking any steps to implement the switch-off of analogue signals and ending dual illumination; and

2.3. Sentech SOC Limited is interdicted from taking any steps to implement the switch-off of analogue signals and ending dual illumination.

3. The Minister of Communications and Digital Technologies shall bear the costs of Part A of this application, as follows:

3.1. The costs of the first applicant on the party-and-party scale, including the costs of three counsel, each on Scale C; and

3.2. The costs of the second and third applicants on the party-and-party scale, including the costs of two counsel, each on Scale C.

SELBY BAQWA
JUDGE OF THE GAUTENG DIVISION
HIGH COURT, PRETORIA

Date of hearing: 18-19 March 2025

Date of judgment: 27 March 2025

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