



CONSTITUTIONAL COURT OF SOUTH AFRICA

*e.tv (Pty) Limited v Minister of Communications and Digital Technologies and Others
and Media Monitoring Africa and Another v e.tv (Pty) Limited and Others*

CCT 89/22 and CCT 92/22

**Date of hearing: 20 May 2022
Date of judgment: 28 June 2022**

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Tuesday, 28 June 2022 at 10h00, the Constitutional Court handed down judgment in two consolidated applications for direct appeal against a judgment and order of the High Court of South Africa, Gauteng Division, Pretoria (High Court). These applications arose from a matter that was launched in the High Court by e.tv (Pty) Limited (e.tv) against the Minister of Communications and Digital Technologies (Minister), where Media Monitoring Africa (MMA) and SOS Support Public Broadcasting (SOS) were admitted as intervening parties. The matter concerns the government’s plan to change television broadcast through analogue transmission to digital broadcasting systems and the eventual date when the analogue systems would be switched off.

South Africa is a member of the International Telecommunications Union (ITU). In 2006, the ITU resolved that all the member states in Africa, Europe and the Middle East should migrate from analogue broadcasting systems to digital broadcasting systems by the year 2015. In order to comply with the ITU resolution, on 8 September 2008, the then Minister published a Broadcasting Digital Migration Policy (BDM Policy), in which it was stated that the analogue switch-off would be on 1 November 2011. Further, there would be a period of “dual illumination” from 1 November 2008 to 1 November 2011. This meant that during this period both analogue and digital transmission would be in operation. However, the analogue switch-off was not implemented as planned.

On 7 February 2012, the then Minister amended the BDM Policy. The analogue switch-off date was moved to 17 June 2015; furthermore, the Minister also stated that the Department would consider finding means to make “set-top boxes” (STBs) available to indigent households, to enable them to continue having access to television channels on their analogue television sets after the analogue switch-off. The BDM policy was again amended on 14 December 2012. In terms of this policy, the switch-on and switch-off dates would be determined by the Minister, in consultation with Cabinet.

On 1 February 2016, the then Minister announced the date of the dual illumination period and communicated that the distribution of STBs had begun. However, the Minister did not provide the analogue switch-off date.

In February 2021, the President of the Republic of South Africa announced during his State of the Nation Address, that the phased switch-off of analogue transmitters would be completed by the end of March 2022. On 29 September 2021, Cabinet approved the analogue switch-off plan, which was prepared by the Department of Communications and Digital Technologies (Department), in consultation with the Steering Committee. In terms of this plan, the analogue switch-off date was 31 March 2022. On 5 October 2021, the Minister made a final call for those qualifying for state-sponsored STBs to register, with the deadline for registration set for 31 October 2021. One of the conditions attached to registration was that for those who registered timeously, the STBs would be installed by March 2022; whilst for those who registered after 31 October 2021, the STBs would be installed three to six months after the analogue switch-off – meaning that they would not have access to television broadcast during that period.

After this announcement, e.tv brought an urgent application in the High Court against the Minister. It sought to prevent the Minister from disconnecting millions of people who were still relying on and receiving analogue transmission as they had not yet migrated to digital transmission. The applicants sought an order in the following terms: the Minister should undertake a process of consultation in order to determine the analogue switch-off date; the analogue switch-off would only occur once all persons relying on analogue transmission had been provided with a necessary alternative; the notice that determined the 31 March 2022 analogue switch-off date be declared unlawful; and the Minister should be ordered to report on the steps taken to ensure access to STBs within one month of the date of the Court order.

On 28 March 2022, the High Court delivered its judgment. The High Court accepted that out of over 14 million television sets in South Africa, 10.5 million were compliant with digital transmission and 3.75 million were analogue. However, as there were no statistics available to indicate the financial status of the households still using analogue television sets, it was not possible for the High Court to discern how many households would qualify for the state-sponsored STBs. The High Court noted that the state had undertaken to install 507 251 STBs by the end of March 2022 to cater for the households that qualified and registered but had not yet received STBs. Regarding the households that had not yet registered, the High Court held that the applicants failed to provide the Court with any statistics to show that these households would qualify for STBs, because

neither the state nor the applicants had conducted any study to establish whether they would qualify. The Court held that households that did not register for STBs, have no standing. The High Court further held that, because there is an unknown number of households who will be affected by the switch-off, it would be unreasonable to allow a situation where an unknown variable would be allowed to delay a process that will eventually benefit all citizens. The High Court held that three months would be sufficient to allow the Minister to complete the outstanding installation of STBs. Therefore, the High Court dismissed the application, but extended the analogue switch-off date to 30 June 2022 to ensure that the government did not switch-off households who had registered for STBs timeously and were entitled to have the STBs installed by 31 March 2022, but would likely be left behind if the government did not reach its installation target.

Aggrieved by the outcome, e.tv, MMA and SOS launched two urgent applications against the Minister in the Constitutional Court. The applicants argued that the Minister's power to determine the analogue switch-off date and deadline for registration for state-sponsored STBs constitutes administrative action. They further submitted that, even if the decisions were policy decisions, the Minister still had a duty to act lawfully, take proper notice of representations made and follow a process rationally connected to the outcome sought to be achieved. e.tv argued that the Minister had a duty to consult the public, including the applicants, before imposing the STB registration cut-off date determining the analogue switch-off date. Further, the applicants submitted that since the analogue switch-off date is being reviewed for its rationality, this Court should assess whether there is a rational connection between the decision and the purpose it aims to achieve.

Only four respondents opposed the application – namely, the Minister, the Independent Communications Authority of South Africa (ICASA), the Chairperson of ICASA, Vodacom and Sentech. The Minister denied the allegation that she had violated certain constitutional rights and reneged on any of the government's public promises or acted in a procedurally unfair or irrational manner. The Minister submitted that the STB registration process was designed to determine how many people wanted and needed STBs, and were qualified to receive same. Therefore, according to the Minister, the STB registration process and the October deadline were the methods used to collect the necessary information to determine the analogue switch-off date. Vodacom, ICASA and Sentech opposed the relief sought on the basis that the relief sought, in the form of the declarators preventing the Minister from completing the analogue switch-off until certain steps are taken, is, in substance, interdictory relief brought under the guise of a declaratory order. Their contention was that the applicants have not met all the requirements of a final interdict, therefore, the interdictory relief should not be granted.

In a unanimous judgment penned by Mhlantla J, the Constitutional Court held that this matter is urgent and concerns issues of public importance, and that direct appeal should be granted. On the nature of the Minister's power to determine the analogue switch-off date and the registration deadline for STBs, the Court held that the power is located within the Minister's original constitutional policy-making function, which stems from

section 85(2)(c) of the Constitution. The Minister's exercise of power was thus executive in nature. The Court thereafter determined whether the Minister exercised this power rationally and lawfully.

Regarding the determination of the analogue switch-off date, Mhlantla J held that it was not procedurally rational for the Minister to set it without adequate notice to the industry and affected parties, like MMA and SOS, to seek their views on the matter. In the result, the Minister's decision not to give notice and take account of the representations received on the analogue switch-off with the public or affected parties was found to be unlawful. The Constitutional Court further considered the process leading up to the deadline of 31 October 2021 to register for STBs and be supplied with such before the analogue switch-off date. The Court held that there was no sense of urgency on the steps taken before October 2021, and there was insufficient evidence before the Court on the steps taken by the Minister between February 2021 and October 2021 to notify the public of the urgent need to register for STBs. As the process was defective, the Minister did not have the necessary information before her regarding the number of persons who qualified and wished to register for state-sponsored STBs before the analogue switch-off date. In the result, the Minister's decision to determine the analogue switch-off date was declared to be unlawful, and the registration of the STBs and the imposed deadline irrational.

As to the remedy, the Court held that the decisions of the Minister as well as the order of the High Court had to be set aside. The applicants sought declarators that the Minister must first take certain steps before the analogue switch-off date can be determined. The Court declined to grant the declaratory orders on the basis that this relief has the effect of this Court dictating to the Minister the process that must be followed to implement a lawful analogue switch-off process. This would be tantamount to substitution, which would not only be inappropriate under the circumstances of this matter but would also go beyond the scope of justice and equity and would violate the principle of the separation of powers.

The Court further upheld the appeal against the costs order issued by the High Court, in which e.tv was ordered to pay 50% of the Minister's costs and 100% of the costs for ICASA, the Chairperson of ICASA and Vodacom. The Constitutional Court held that the High Court failed to correctly apply the *Biowatch* principle. The Constitutional Court has confirmed that when considering whether *Biowatch* applies, the crucial consideration is not the character of the parties, but the nature of the litigation at issue. The nature of this litigation was litigation for the broader public interest.

In the result, the Constitutional Court granted leave to appeal directly to it on an urgent basis; the appeal was upheld; and the order of the High Court was set aside and replaced with an order declaring the analogue switch-off date and the imposed deadline to register for STBs unconstitutional, invalid and set aside. The Court ordered the Minister to pay the applicants' costs, including the costs of two counsel.