THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1039/2015

In the matter between:

e.tv (PTY) LTD	**FIRST APPELLANT**
NATIONAL ASSOCIATION OF MANUFACTURERS OF ELECTRONIC COMPONENTS (First Group)	**SECOND APPELLANT**
SOS SUPPORT PUBLIC BROADCASTING COALITION	**THIRD APPELLANT**
MEDIA MONITORING AFRICA	**FOURTH APPELLANT**
and	
MINISTER OF COMMUNICATIONS	**FIRST RESPONDENT**
MINISTER OF TELECOMMUNICATIONS AND POSTAL SERVICES	**SECOND RESPONDENT**
INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA	**THIRD RESPONDENT**
UNIVERSAL SERVICE AND ACCESS AGENCY OF SOUTH AFRICA	**FOURTH RESPONDENT**
SOUTH AFRICAN BROADCASTING CORPORATION SOC LIMITED	**FIFTH RESPONDENT**

ELECTRONIC MEDIA NETWORK LTD **SIXTH RESPONDENT**

ASSOCIATION OF COMMUNITY TELEVISION – SA **SEVENTH RESPONDENT**

SOUTH AFRICAN COMMUNICATIONS FORUM **EIGHTH RESPONDENT**

SENTECH SOC LTD **NINTH RESPONDENT**

CELL C (PTY) LTD **TENTH RESPONDENT**

TELKOM SOC LTD **ELEVENTH RESPONDENT**

TELLUMAT (PTY) LTD **TWELFTH RESPONDENT**

NATIONAL ASSOCIATION OF MANUFACTURERS OF ELECTRONIC COMPONENTS (Second Group) **THIRTEENTH RESPONDENT**

Neutral Citation: *e.tv (Pty) Ltd v Minister of Communications* (1039/2015) [2016] ZASCA 85 (31 May 2016)

Coram: Lewis, Saldulker, Swain and Mbha JJA and Baartman AJA

Heard: 9 May 2016

Delivered: 31 May 2016

Summary: Legality: an amendment by the Minister of Communications of the Digital Broadcasting Migration Policy in 2015 that did not follow a process of consultation was irrational and in breach of the principle of legality: amendment did not achieve its purpose and was thus irrational and invalid on that basis too: the Minister purported to bind regulatory authorities and broadcasters and thus acted ultra vires: amendment reviewed and set aside.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Prinsloo J sitting as court of first instance).

1 The appeal is upheld with the costs of two counsel.

2 The respondents are ordered to pay the costs of the appeal jointly and severally.

3 The order of the court a quo is set aside and replaced with the following:

‘ (a) The application is granted with the costs of two counsel where so employed.

(b) Clause 5.1.2(B)(a) of the Digital Migration Policy is declared unlawful and invalid and is accordingly set aside.’

JUDGMENT

Lewis JA (Saldulker, Swain and Mbha JJA and Baartman AJA concurring)

[1] This appeal concerns the legality of an amendment to the Broadcasting Digital Migration Policy (the policy), made by the Minister of Communications, Ms Faith Muthambi, in March 2015. The policy has had a long gestation. It was first published in 2008 by the then Minister, Ms Ivy Matsepe-Casaburri. It was amended in 2012 by her successor, Ms Dina Pule, and again in 2013 by her successor, Mr Yunus Carrim. The amendment in early 2015 by the present Minister is alleged to have been effected unlawfully for a number of reasons, both substantive and procedural.

[2] The first appellant, e.tv (Pty) Ltd, a national television broadcaster, supported by several other parties, has challenged the amendment, but the application to

review it and set it aside was opposed not only by the Minister, who is the first respondent, but also by other broadcasters, including the South African Broadcasting Corporation SOC Ltd (SABC), the fifth respondent, and Electronic Media Network Ltd (M-Net), the sixth respondent, as well as a group of representatives of the National Association of Manufacturers of Electronic Components (NAMEC), the thirteenth respondent (the NAMEC second group). The first group in NAMEC, the second appellant, supports e.tv's application to set aside the amendment, as does SOS Support Public Broadcasting Coalition (SOS), the third appellant, and Media Monitoring Africa (MMA), the fourth appellant. The latter bodies are associations formed in the public interest and have no financial interest in the outcome of the dispute. None of the parties question the standing of the different groups representing NAMEC which take different positions.

[3] The policy was published in terms of s 3(1) of the Electronic Communications Act 36 of 2005 (ECA). Both the Constitution and the ECA empower the Minister of Communications to make policy regarding broadcasting. The policy in question deals with digital migration of broadcasting signals. The process of dealing with migration to digital broadcasting of a television signal began in 2005, following a global trend. At present, signals sent to television aerials (terrestrial television) are in analogue form. This is the process through which the majority of the population in the country receives their television broadcast. There are only two free-to-air commercial terrestrial broadcasters at present, the SABC and e.tv. There are also a number of community broadcasters who use analogue signals, as does M-Net, but it charges a fee to subscribers who use it. Other licensed broadcasters who charge a fee for broadcasting use digital signals which are received through a satellite dish and a decoder.

Digital Migration

[4] Terrestrial television, which is free-to-air, is presently available on four channels, three run by the SABC, and one by e.tv. Analogue technology entails the transmission of the television picture and the sound in their entirety. The policy was

designed to change this to require that all signals be broadcast digitally. Digital broadcasting entails converting the picture and the sound into compressed digital information and transmitting it so compressed. When the signal is received it is converted by a device back into a full picture and sound on the viewer's television set. The reason for changing to digital technology is to free up signal space for other purposes, and is universally acknowledged to be a necessary process. Indeed, South Africa co-ordinates its use of the signal spectrum with other countries to ensure that there is no interference between broadcasting signals. The International Telecommunications Union, to which South Africa is a party, has agreed that there should be a switch from analogue to digital broadcasting, the due date for which was June 2015. That did not happen for a variety of reasons, not least of which is the current litigation. The process in terms of which the shift from analogue signals to digital signals will take place is referred to as the 'digital migration process' as all terrestrial viewers will have to migrate from receiving analogue broadcasts to receiving them in digital form. Digital migration has thus not yet occurred.

[5] The migration process is unfortunately costly, because most people in South Africa do not possess television sets that have an in-built device to convert signals broadcast digitally: these are becoming increasingly common, but are unaffordable at present by the majority of television viewers who are poor. Television sets that do not have built-in devices to convert the digital signal will require set-top boxes (ST boxes or STBs, as they are referred to in the policy) to receive and convert the digital signal. Such boxes will not be required indefinitely, but at least for the foreseeable future while the majority of people in the country still possess television sets that can receive only analogue signals.

[6] It is estimated that more than eight million households currently rely on terrestrial television. Thus at least eight million ST boxes will have to be manufactured and supplied at a cost of some R600 each. This amount is beyond the reach of at least five million households. The government has resolved to subsidize the cost of five million ST boxes and provide them at no cost to those who need them.

Encryption/decryption or conditional access

[7] The contested issue is whether the subsidized ST boxes should be manufactured so as to enable them to decrypt signals that are encrypted. e.tv wishes to encrypt the signals that it transmits for a variety of reasons, and so considers that the subsidized ST boxes should have decryption capability (referred to, generally as 'encryption capability'). The first group of NAMEC, which will manufacture the ST boxes, also argues that encryption is desirable, as do SOS and MMA. e.tv initially took a different stance in 2008, but subsequently changed its approach. The SABC, M-Net and the second group of NAMEC oppose the introduction of decryption capability. It is not necessary to determine which approach is better, although the debate has some bearing on the legality of the 2015 policy as amended, and I shall turn to it in due course. Encryption is also referred to as conditional access.

[8] It is agreed by all concerned, however, that the ST boxes should have some form of technological control. This would determine the extent to which ST boxes can be managed from and interact with the point from which a broadcast emanates. The first policy, published in 2008, stated that the ST boxes would 'have a control system to prevent STBs from being used outside the borders of South Africa and to disable the usage of stolen STBs' (clause 5.1.2.2). It also provided that ST boxes would have 'capabilities to unscramble the encrypted broadcast signal so that only fully compliant STBs made or authorized for use in South Africa can work on the network' (clause 5.1.2.7). In order for ST boxes to have decryption capability they must be loaded with particular software, hardware and decryption keys.

[9] But there appears to be some confusion about the control requirement in subsequent iterations of the digital migration policy. In February 2012, Minister Pule published amendments to the policy, and clause 5.1.2.7 was changed. It provided that ST boxes should:

'include a STB control system that will protect the investment by government in its STB subsidy scheme, as well as the electronic manufacturing industry. A robust STB control will also benefit consumers by ensuring that they do not have to own multiple boxes.

Government believes that the needs of consumers should be at the forefront of the DTT [digital terrestrial television] process; the STB control system provided will be interoperable with other systems'.

There is no express reference to encryption. But the national standard for ST boxes, formulated by the South African Bureau of Standards and published by Ms Pule in June 2012, makes it clear that conditional access was intended.

[10] The standard states that:

'The main functional elements specified for security are: 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.

Detailed security requirements are not specified in this document. *The STB decoder manufacturer is responsible for the implementation of the security requirements specified by the free-to-air individual broadcasting service licensees in South Africa* and for the proper configuration of the chipsets.

Manufacturers can obtain the security requirements from the free-to-air individual broadcasting service licensees in South Africa . . . .' (My emphasis.)

[11] Implicit in this is the requirement that ST boxes should have encryption capability. It was thus understood by all parties that encryption, or conditional access, was required in terms of the 2012 policy. That this was the position adopted by Minister Pule is underscored by the answering affidavit in an application brought by e.tv against the Minister in 2012 (*e.tv v Minister of Communications & others* [2012] ZAGPJHC 268 per GC Pretorius AJ) in which e.tv challenged the validity of a decision by Minister Pule that the ST boxes be manufactured and supplied by Sentech Ltd. The deponent on behalf of the Minister stated, in relation to the appointment of Sentech as the ST box manufacturer, that Sentech had over the years operated a full conditional access system for encrypting content and gained experience in operating such a system. It continued:

'However, for the existing Conditional Access to meet the requirements of the STB control as defined in the policy and subsequently in terms of the SABS (*SANS 862*) standard, there was a need for Sentech's system to be upgraded.'

I shall refer to the judgment of the high court as *e.tv 2012* and discuss it more fully later.

[12] It is to be noted that all pay television operators, like M-Net and Multichoice (DSTv) (both owned by Naspers Ltd) broadcast using encryption technology to ensure that only fee-paying subscribers can watch their broadcasts. e.tv argues that it is necessary also for free-to-air broadcasters to prevent the importation or sale of poor quality products. SOS and MMA argue in addition that, to ensure high quality broadcasting (in high definition format), and to prevent piracy, encryption is necessary for terrestrial television as broadcasters will not be able to acquire high-quality programmes from studios unless they can assure them of the security of broadcasts. This is necessary to meet the objectives for which they campaign – open, competitive and high-quality broadcasting. The Minister, the SABC and M-Net argue otherwise. Whether e.tv and the other appellants are correct is not, as I have said, in issue. What is at issue is whether the policy was radically changed after 2012.

[13] In December 2013 a different Minister of Communications, Mr Yunus Carrim, gave notice that he intended to change the policy. In his statement published for comment, he said that the proposed amendments would ensure that the 'extent of monopolisation' would be reduced and competition encouraged 'by creating space for new players in the pay television market'. This cannot be done without encrypting broadcast signals. Cognisant of the decision in *e.tv 2012*, that held that an attempt by Minister Pule to determine who would manufacture the ST boxes was invalid, Minister Carrim said that while government has the right to make policy on ST Box control, it could not prescribe the supplier, the operator of the control system, or the type of control to be used. He said that 'broadcasters are free to decide whether they want to use control or not'. That was said in the context of denying that a decision had been made about the management of a control system, and stating that

government was not prescribing encryption or conditional access. He also stated that the cost per ST box for control would be about R20, and that broadcasters wanting to use a control system would have to pay government for that cost. Minister Carrim presented these proposals to cabinet on 18 February 2014.

[14] e.tv and other broadcasters made submissions to the department in early 2014. e.tv and SOS welcomed the compromise proposed – that broadcasters who wished to encrypt their signals could do so at their own cost. SOS issued a press statement noting that the Carrim proposals were a 'valiant compromise', the result of which was that 'STBs would have the capacity to have a control mechanism through encrypted television signals, but that this potential would only be implemented if broadcasters wish to do so'.

[15] The SABC and M-Net, on the other hand, opposed the proposed amendment. The SABC said in its submission that, in the public interest, there should not be conditional access for free-to-air broadcasting. It would detrimentally affect consumers, driving up the cost of ST boxes, and the global trend was against it. M-Net claimed that the Minister did not have the power to prescribe conditional access, citing the decision in *e.tv 2012* as authority in this regard. It is thus clear that the 2013 proposed amendments were understood by all concerned to permit encryption capability on the subsidized ST boxes, albeit at the broadcaster's expense.

[16] However, the proposed amendments were not made. After the general elections in May 2014 the department of communication was divided into two departments and Ms Faith Muthambi became Minister of Communications. (The other department was that of Telecommunications and Postal Services).

[17] No progress was made in so far as digital migration was concerned throughout 2014. But on 18 March 2015 the Minister published amendments to the policy. In effect, encryption capability was dropped from the subsidized ST boxes.

The SABC and M-Net have argued that the amended clauses are no different in substance from those in the 2012 policy and in the proposed 2013 amendments. The provisions referred to earlier, and the responses to the Carrim proposals, show that not to be correct.

[18] Clause 5 of the policy was amended by the insertion of new provisions. These are:

'5.1.2(A) In keeping with the objectives of ensuring universal access to broadcasting services in South Africa and protecting government investment in subsidized 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 STBs *shall*-

(a) *not have capabilities to encrypt broadcast signals for the subsidized STBs*; and

(b) be used to protect government investment in subsidized 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.*' (My emphasis.)

[19] The result of this is that the subsidized ST boxes will not have encryption capability. If e.tv or any other broadcaster wishes to broadcast encrypted signals it shall have to bear the costs of supplying five million ST boxes at its cost, which is prohibitive and defeats the object Minister Carrim sought to achieve. This new approach has drawn different responses and interpretations, and the Minister herself claims that it does not preclude e.tv from supplying the necessary software for decryption after the ST boxes have been manufactured. I shall turn to that argument shortly.

[20] The core of the appellants' complaint is that, despite Minister Muthambi's statement, on publication of the amended policy, that she had taken into

consideration submissions made by stakeholders on the amendments proposed in December 2013, she did not consult them, nor the statutory bodies charged with the implementation of the ECA, ICASA (the Independent Communications Authority of South Africa established by s 3 of the Independent Communications Authority Act 13 of 2000 and referred to in the ECA as 'the Authority') or USAASA (the Universal Service and Access Agency of South Africa established by s 80 of the ECA, and referred to in the ECA as the 'Agency'). Both ICASA and USAASA were cited as respondents by e.tv, but neither has opposed the relief sought and we do not know what their respective positions are. They have been entirely silent in the litigation.

[21] The grounds of review raised by e.tv in its application before the court a quo were that the amendment, not being preceded by a consultation process, was unlawful and should be set aside; that although it was an amendment of a policy, it nonetheless amounted to administrative action (the implementation of policy) and should be set aside under the Promotion of Administrative Justice Act 3 of 2000 (PAJA); that it was irrational and thus breached the principle of legality, and that it was ultra vires. Prinsloo J in the Gauteng Division of the High Court (Pretoria) rejected all of e.tv's arguments and refused the application. He based much of his reasoning on the assumption that the 2015 amendment was not different in substance from that adopted in 2012, and the proposed amendments advanced in 2013. The learned judge did, however, grant leave to appeal not only to e.tv but also to SOS, the first NAMEC group, and MMA, which were cited as respondents by e.tv, but which supported its application.

Was consultation necessary?

[22] Section 3 of the ECA is headed 'Ministerial Policies and Policy Directions'. Section 3(1) provides that:

'[T]he Minister may make policies on matters of national policy applicable to the ICT [information, communications and technology] sector, consistent with the objects of this Act and of the related legislation in relation to-

. . .

(d) the application of new technologies pertaining to electronic communications services, broadcasting services and electronic communication network services; . . .

Section 3(1A), inserted in the ECA in 2007, provides that:

'The Minister may, after having obtained Cabinet approval, issue a policy direction in order to-

(a) initiate and facilitate intervention by Government to ensure strategic ICT infrastructure investment; and
(b) provide for a framework for the licensing of a public entity by the Authority [ICASA] . . . .'

Section 3(2) deals with the issuing of policy directions to either ICASA or USAASA in relation to certain matters.

[23] Section 3(5) is at the centre of the dispute. It reads:

'When issuing a policy under subsection (1) or a policy direction under subsection (2) the Minister-

(a) must consult the Authority or the Agency, 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 30 days from the date of the notice;
(c) must publish a final version of the policy or the policy direction in the *Gazette*.'

[24] Section 3(6) deals with amendments to policy directions. It reads:

'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). (My emphasis.)

[25] Interestingly, the requirement of publication and consultation in respect of policies was introduced only in 2014. Yet previous policy amendments were in fact published and there was consultation and submissions were made, as evidenced by Minister Carrim's proposed amendments published for comment in December 2013.

[26] The question thus arises as to whether Minister Muthambi was obliged by the ECA to publish the amendment she introduced and to consult about it before it was 'enacted'. She does not deny that consultation was necessary. Rather, in the Department's answering affidavit, the Acting Director-General of the Department of Communications asserted that the submissions of e.tv and other stakeholders made in response to Minister Carrim's proposed amendments were taken into account by the current Minister and that she had 'met with various stakeholders on aspects of the BDM policy to attempt to reach agreement'. Those stakeholders were not identified, however, and e.tv states, without any contradiction, that it was not consulted about the difference in approach taken by Minister Muthambi.

[27] The Minister also maintains that it is still open to e.tv to provide technology for decryption in the subsidized ST boxes, at its expense, despite the wording of clause 5.1.2(B)(a) which states that the ST boxes 'shall not have capabilities to encrypt broadcast signals'. The answering affidavit also states that it is open to free-to-air broadcasters to 'invest in whatever technology they want in their own STBs and the relevant manufacturers will manufacture such STBs to meet their requirements'. This would require the television viewer to use at least two ST boxes which is what the previous versions of the policy wished to avoid. The appellants point out that it is not possible to 'retrofit' the subsidized STBs with decryption capability, and that the Minister had adopted contradictory positions in this regard. Which option is the Minister saying is possible? Providing an additional ST box for each viewer, or, despite the express wording of the amended policy, fitting the subsidized ST boxes with encryption capability?

[28] The contradictory positions adopted show, as e.tv points out, considerable confusion, first as to the effect of her amendment, and second as to the meaning of the previous policy and proposed amendments to that, which I discussed earlier, the last of which was that free-to-air broadcasters could provide encryption capability on the government subsidized STBs at their expense. Had the Minister consulted interested parties such as the appellants she might have understood the position better and dispelled the confusion. I shall discuss the varied responses of Minister Muthambi, and her apparent confusion, in relation to the review ground of irrationality.

[29] Accepting, as I do, that the amendment does introduce a completely different provision in relation to conditional access in the policy, what required the Minister to consult interested parties and, especially, ICASA and USAASA? The court a quo found that even if s 3(5) of the ECA obliged the Minister to have consulted on an amendment to the policy, she had done so by considering the submissions made pursuant to the proposed amendments in 2013. But that conclusion was premised on the assumption that the encryption amendment in 2015 was not markedly different from the proposed amendment in 2013, which in my view is not correct.

The interpretation of s 3(5) of the ECA

[30] e.tv argues that one must interpret the word 'issue' in s 3(5) so as to include 'amend'. The word should not be confined to the original 'enactment' of the policy. This would achieve the purpose of s 3(5), which is to promote openness and proper consultation in the process of shaping policy that affects the public. All the more so, it would not undermine the roles to be played by ICASA and USAASA. Such an interpretation would also, it is argued, give effect to the fundamental values of the Constitution – openness, transparency and accountability (*Doctors for Life International v Speaker of the National Assembly & others* [2006] ZACC 11; 2006 (6) SA 416 (CC) paras 110-116).

[31] Although a fundamental tenet of statutory interpretation is that words should be given their ordinary linguistic meaning, this is subject to certain 'riders': statutory provisions should be interpreted to give effect to the purpose of the statute; they must be properly contextualized; and they must be construed consistently with the Constitution: *Cool Ideas 1186 CC v Hubbard & another* [2014] ZACC 16; 2014 (SA) 474 (CC) para 28.

[32] Requiring consultation prior to effecting an amendment would also, argue the appellants, facilitate the involvement of ICASA and USAASA: s 3(4) of the ECA provides that both bodies, in exercising their powers and duties under the Act and related legislation, must consider both policies and policy directions made by the Minister. And s 3(9) provides that ICASA may make recommendations to the Minister on policy matters in accordance with the Act. Section 4 of the ECA empowers ICASA to make regulations on a variety of matters including technical matters necessary or expedient for the regulation of certain services. It makes no sense for significant policy amendments to be made by the Minister with no obligation to consult ICASA, USAASA or other interested parties.

[33] The legislature expressly provided in s 3(6) that amendments to policy *directions* need not be published or be subject to a consultation process if they were the result of submissions made after publication or consultation. It is silent as to policy amendments. The court a quo held that the inference to be drawn from the distinction is that amendments to a policy, as opposed to a policy direction (which would usually be a direction to one of the statutory bodies), need not be published or made subject to a consultation process in terms of the ECA. The finding is puzzling, for it seems to me to be quintessentially a situation where a member of the Executive should be consulting on important matters of public concern.

[34] In my view, s 3(6) simply excludes the need to publish amendments to policy directions. That means that amendments to policies must be published. The default position is that policy amendments must be published for comment and there must

be consultation about them. There is no need to strain at the construction of the word 'issue'. Section 3(6) makes it quite clear that only amendments of policy directions, made as a result of representations received, need not be published again for comment. Policy amendments, on the other hand, must be published for comment and a process of consultation followed. This construction gives effect to the constitutional values of openness, participation and accountability and thus achieves the purpose of s 3 of the ECA. In any event, the principle of legality itself imposes the obligation.

The principle of legality

[35] In *Kouga Municipality v Bellingan & others* [2011] ZASCA 222; 2012 (2) SA 95 (SCA) this court held that a bylaw determining liquor trading hours passed in 2006 was invalid because it had not been published as required by s 160(4)(b) of the Constitution and s 12(3)(b) of the Local Government: Municipal Systems Act 32 of 2000. The argument of the Municipality was that it had published the bylaw in 2004 for comment. This court rejected the argument since the version published for comment in 2004 was markedly different from that enacted in 2006. Cloete JA said (para 9) that the significant differences between the two versions:

'lead to the inevitable conclusion that the Municipality did not comply with the provisions of the Constitution or the Systems Act . . . . The Municipality contended that the 2004 and 2006 publications were part of one continuous process. But the changes to the bylaws made available pursuant to the first publication in 2004 were far-reaching. . . . [N]ot every change has to be advertised otherwise the legislative process would become difficult to implement; but here the two sets of proposed bylaws were so markedly different that republication of the revised draft was necessary to meet the legislative requirements of the Constitution and the Systems Act. That did not happen. The second publication in 2006 could not have served to alert the public that the Municipality intended to adopt an amended bylaw to regulate liquor trading hours.'

[36] The same view was taken in relation to publication and consultation in *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism & another* 2005 (3) SA 156 (C) paras 62 and 63. There Griesel J

held that where a decision-maker is apprised of new information before making the decision, an interested party ought to be afforded a hearing in respect of that new fact.

[37] There are of course differences between bylaws, administrative decisions and policies. But the same principle underlies the requirement of publication of a policy for comment: openness and accountability, the foundations of a democratic State, require the participation of those affected. The court a quo recognized this principle but considered that the 2015 encryption amendment was not markedly different from the 2013 proposals published for comment. As I have indicated, that was simply incorrect. The SABC and M-Net also do not contend that the principle in *Kouga* is not applicable when dealing with policy amendments. They argue that the court a quo correctly found that there was no marked difference between the 2015 amendments and previous versions of the policy. That argument cannot be sustained.

[38] Where a policy or policy amendment impacts on rights (and in this case on powers and duties in the case of ICASA and USAASA) it is only fair that those affected be consulted. Fairness in procedure, and rationality, are at the heart of the principle of legality. In *Albutt v Centre for the Study of Violence and Reconciliation & others* [2010] ZACC 4; 2010 (3) SA 293 (CC) the Constitutional Court dealt with the President's power to pardon offenders in terms of s 84(2)*(j)* of the Constitution. The President had announced a special pardoning dispensation for offenders convicted of politically motivated crimes, but who had not participated in the Truth and Reconciliation Commission process. One of the questions raised was whether, before exercising the power to pardon, the President was required to afford a hearing to the victims of the offences. Ngcobo CJ said that the question to be asked was whether such a hearing was rationally related to the achievement of the objects of the process. He said (paras 50-51):

'All this flows from the supremacy of the Constitution. The President derives the power to grant pardon from the Constitution and that instrument proclaims its own supremacy and defines the limits of the powers it grants. To pass constitutional muster therefore, the President's decision to undertake the special dispensation process, without

affording victims the opportunity to be heard, must be rationally related to the achievement of the objectives of the process. If it is not, it falls short of the standard demanded by the Constitution.

The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. 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.'

[39] In *Minister of Home Affairs & others v Scalabrini Centre & others* [2013] ZASCA 134; 2013 (6) 421 (SCA) Nugent JA (para 69) said that the process by which a decision is taken, in contradistinction to the merits of the decision, might be 'impeached for want of rationality'. That was the view too of the Constitutional Court in *Democratic Alliance v President of the Republic of South Africa & others* [2012] ZACC; 2013 (1) SA 248 (CC), where Yacoob ADCJ said (para 34):

'It follows that both the process by which a decision is made and the decision itself must be rational. *Albutt* is authority for the same proposition.'

And (para 36):

'The means for achieving the purpose for which the power was conferred must include everything that is done to achieve that purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred.'

[40] In *Scalabrini*, the Director-General of Home Affairs had taken a decision to close down a refugee reception office in Cape Town. He had done so without consulting the Standing Committee for Refugee Affairs, as he was obliged to do. He

had in fact simply informed the Standing Committee of the decision which he had already taken. Moreover, his representative in Cape Town, although charged specifically with consulting various stakeholders, including the respondent, an organization that assists refugees, did not do so properly.

[41] This court concluded that the failure to consult was not rational. Not all decisions taken without consulting interested parties would be irrational, said Nugent JA (para 72). But in this case the duty had arisen because of the particular circumstances.

'Such a duty will arise only in circumstances where it would be irrational to take the decision without such consultation, because of the special knowledge of the person or organization to be consulted, of which the decision-maker is aware. Here the irrationality arises because the Director-General, through his representatives, at the meeting . . . acknowledged the necessity for such consultation. That he did so is not surprising, bearing in mind that the organisations represented at that meeting included not only the Scalabrini Centre, with its close links to the refugee community, but also the United Nations High Commissioner for Refugees, and organisations close to the challenges relating to alleged refugees.'

[42] The duty to consult arises from the value of fairness underlying the principle of legality. It is recognized in English law too. In *R (on the application of Moseley) v Haringey London Borough Council* [2014] UKSC 56 the court held that a public authority's duty to consult before making a decision could arise in several ways including the common law duty to act fairly. The court (para 25) repeated the requirements of fairness in the consultation process set out in the earlier decision of *R v Brent London Borough Council, ex p Gunning* (1985) 84 LGR 168:

'First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third, . . . that adequate time must be given for consideration and response, and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalizing any statutory proposals.'

[43] Failure to consult where a marked change in policy is made, and the Minister's failure to consult ICASA and USAASA is, e.tv argues, especially serious because the encryption amendment has implications for the statutory and regulatory mandates of the two bodies. As the independent authority created to regulate broadcasting, ICASA's independence is enshrined in the Constitution (s 192). It licenses broadcasters and determines the terms of their licences. If a broadcasting licensee, such as e.tv, encrypts its signal, and the five million ST boxes subsidized by government do not have encryption capability, then e.tv might breach the conditions of its licence, and the digital migration regulations passed in 2012 (GN R1070, *GG 36000*, 14 December 2012).

[44] USAASA also has a role to play in implementing the policy. The ST boxes will be subsidized out of its budget, in turn allocated by the Department of Telecommunications and Postal Services. It would be the body procuring the ST boxes and it is most curious that the Minister did not consult that body where the costs were of great importance. The Minister did not claim to have consulted either ICASA or USAASA. And as I have indicated earlier, they did not play any role in this dispute and we do not know what their stance is.

[45] In my view, the failure by Minister Muthambi to consult ICASA and USAASA is even more egregious given their statutory duties. (The court a quo considered that they must in fact have been consulted. But it based this conclusion on flimsy evidence and the Minister says nothing in response to the e.tv allegations about failure to consult these bodies.) So too the failure to consult the appellants, all of whom had an interest in the policy, was quite simply irrational. Thus the ECA's silence on the requirement of consultation in respect of the amendment of the policy is of no moment. The Minister was required by the principle of legality, which encompasses the obligation to act rationally, to consult the statutory bodies and all broadcasters with an interest in the digital migration process. Minister Muthambi's failure to consult, based upon her misunderstanding of what the 2015 amendment signified, was taken in a procedurally unfair manner, and was irrational.

Irrationality in the amendment itself

[46] Minister Muthambi sought to achieve two goals that were not consonant with the amended policy itself. She intended to indicate that government would not subsidize encryption, but that free-to-air broadcasters would have the right to encrypt their broadcasts. This would have been no different from the proposals made by Minister Carrim in 2013. But that is not what the amendment states nor what it achieves. Her response to the appellants' objections is that the only issue that e.tv did not want to accept was that it pay for encryption facilities itself. But in fact the amended clause 5.1.2(B)(a) expressly prohibits encryption for the subsidized ST boxes, despite the further clause inserted (5.1.2(C)) which states that 'individual broadcasters may at their own cost make decisions regarding encryption of content'. Government had made a 'political decision', she said, that it would not bear the costs of encryption, and thus would not permit encryption capability of the subsidized ST boxes.

[47] Yet, the policy permitted broadcasters to broadcast their signals in encrypted form. So the poorest members of society would not have access to television of high quality, including high definition display. (The SABC and M-Net deny that this assertion is correct, but as I have said, this appeal is not concerned with whether the one view or the other is right.) The result is that if e.tv or any other broadcaster wishes to encrypt its signal it will have to provide additional ST boxes to the five million households that are given ST boxes by government. That does not achieve the purpose of the policy. Rationality review is 'about testing whether there is a sufficient connection between the means chosen and the objective sought to be achieved': *Minister of Defence and Military Veterans v Motau & others* [2014] ZACC 18; 2014 (5) SA 69 (CC) para 69 fn 101.

[48] The rationality of the 2015 amendment must be determined at the time when it was made. The court a quo's view that the advantages or disadvantages of encryption in some way impacted the rationality enquiry was thus at odds with the requirement of objective rationality underlying the decision itself. Minister Muthambi

did not object to e.tv's wish to encrypt its signals. She wished to ensure that broadcasters were free to decide whether or not they wanted to encrypt signals, but not at government's expense. But the policy does not achieve this.

[49] By precluding the subsidized ST boxes from having encryption capability the Minister has made it impossible for e.tv and other broadcasters to broadcast encrypted signals to television viewers who have subsidized ST boxes. This may place e.tv in breach of its licence conditions. It is not possible for e.tv – or anybody else – to fit these ST boxes with encryption capability after manufacture. It would be required to manufacture additional ST boxes for the five million households that cannot afford them and distribute them at no charge. It cannot do that. The cost would exceed two years of its revenue, some R3 billion.

[50] The effect of this, as pointed out by the first group of NAMEC, is that once the analogue signal is switched off, free-to-air broadcasters will not be able to encrypt their signals and all those with television sets that do not have ST boxes with encryption capability will not be able to access high-definition content that can compete with the pay-television broadcasts. This is the view also of the Competition Commission, which advocates conditional access, as well as that of SOS and MMA. All the appellants advocate encryption in order, inter alia, to facilitate competition amongst broadcasters. The effect of the amendment is that high-quality television will not be available to the poorest in our society, and competition will be stifled. The ability of free-to-air broadcasters to encrypt their signals, as allowed for in in clause 5.1.2(C), is thus illusory. The Minister has thus not achieved her purpose and the amendment is irrational for that reason alone.

[51] That irrationality is exacerbated by the Minister's own misunderstanding of the effect of the amendment. The appellants, the SABC and M-Net agree that the five million subsidized ST boxes will not have encryption capability. The result is that if e.tv encrypts its signal, its broadcasts will not be seen by those who have only the subsidized ST boxes. If e.tv wishes to avoid that result it will have to spend some R3

billion in providing additional ST boxes with encryption capability to five million households at no cost to them.

[52] The Minister recognized this in responding to e.tv's founding affidavit. The Acting Director-General stated that e.tv misunderstood the effect of the amendment. He said:

'Paragraph 5.1.2(B)(a) is a policy statement that in respect of the free STBs government shall not incur the costs of providing encryption capabilities. In 5.1.2(C), it is made clear that the FTA broadcaster is free to provide encryption broadcasts at its own cost. This means that the FTA broadcasters would bear the cost of providing encryption capabilities. It is up to the FTA broadcaster to elect the means for providing such encryption capabilities, and the manufacturer to supply them, to ensure that its broadcasts are received.'

The Acting Director-General stated later:

'It is correct that the 5 million subsidized STBs shall not be able to decrypt encrypted signals. This is due to the fact that the government will not spend money to install encryption capabilities in such STBs. The reason for this is simply that encryption capability is not required for purposes of broadcasting digital migration policy for which the government is providing subsidized STBs.'

[53] On the other hand he stated elsewhere:

'As I understand it, there is nothing preventing the applicant from developing its own software that would enable its viewers to receive and view encrypted broadcast signals. The applicant may even investigate the possibility of doing so through the government subsidized STBs as long as it pays for it.

It is correct that the encryption amendment was intended to clarify government's position that government subsidized STBs will not have encryption capability. The need for this clarification came as a result of the submissions made to the Minister despite the fact that encryption capability was removed from the Policy in February 2012.'

That is not correct, as I have shown. On this interpretation e.tv could encrypt the government subsidized boxes at a cost of only R100 million, which would be commercially feasible.

[54] Which position of the Minister are we to accept? They are at variance and the commercial implications are stark. The Minister's confusion as to the effect of the amendment shows its irrationality, and for that reason too it is in breach of the principle of legality and invalid. The appeal must succeed on the ground that the amendment was made in an irrational and thus unlawful manner and is inherently irrational as well.

The ultra vires challenge

[55] In addition to the rationality challenge, e.tv contends that the encryption amendment is ultra vires in terms of the ECA. This is because the Minister is not permitted to make binding decisions on ST box control issues that affect free-to-air broadcasters. The Minister is empowered by the ECA and the Constitution to make policies, but she cannot regulate. The regulatory authority is ICASA. e.tv argues that by purporting to prohibit subsidized ST boxes from having encryption capability ('shall not have capabilities to encrypt broadcast signals for the subsidized STBs') the Minister has transgressed her policy-making powers.

[56] Section 192 of the Constitution requires national legislation to 'establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society'. That legislation is the ICASA Act referred to above, section 4 of which determines ICASA's functions and powers. In *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* [2003] ZASCA 119; 2004 (3) SA 346 (SCA) Howie P confirmed that ICASA is 'an independent arbiter and it must be left to act independently, without governmental pressure, real or apparent, of any kind' (para 32).

[57] ICASA is given regulation-making powers by s 4 of the ECA. It is specifically given the power to regulate broadcasting services in chapter 9 of the ECA. The Minister, by contrast, is given no regulatory powers in respect of broadcasting by the ECA, nor can she make binding determinations. That was the effect of the decision in *e.tv 2012*, which held that the Minister does not have the power to prescribe to free-to-air broadcasters how they should manage ST boxes, or to prescribe or make binding decisions relating to ST box control. The decision of Pretorius AJ in *e.tv 2012* was not appealed against by Minister Pule, who announced that the department accepted the decision. So too did the SABC and M-Net.

[58] The court in *e.tv 2012* stated (paras 37 and 38):

'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 prescribe to free-to-air broadcasters how they should manage set top boxes. Even if she had such powers, her decision would have been administrative action as part of policy execution rather than policy formation.

It follows from what I have set out that the Minister has no legal power to prescribe or make binding decisions relating to set top box control.'

[59] The SABC, M-Net and the second group of NAMEC argue that the policy amendment is different from the direction to appoint Sentech as the manufacturer and supplier of the ST boxes. That is correct. But Minister Muthambi purported to bind free-to-air broadcasters. M-Net argues that the amendment must be interpreted in its context: the policy provides that it is the framework for digital migration, and is published to inform and guide the process. It aims to establish a policy environment within which the migration process is implemented and will assist government to meet its commitments to the 'people of South Africa as well as the global community, especially the developing world'. M-Net points out that the words 'will' and 'shall' are used interchangeably, and that the use of 'shall' in this context does not impose any duty.

[60] But the effect of the encryption amendment, as the Minister states in response to the application, is that the government will not subsidize the costs of encryption. The subsidized ST boxes will have no such capability. That has the effect of requiring free-to-air broadcasters to procure ST boxes with encryption capability for the eight million households that rely on terrestrial television. It will not be able to recover the costs from the five million households that cannot afford them. That seems to me to be a decision that has binding effect.

[61] e.tv relies for its argument that the amendment is ultra vires on *Minister of Education v Harris* [2001] ZACC 25; 2001 (4) SA 1297 (CC). That matter concerned a challenge to a policy enacted in terms of the National Education Policy Act 27 of 1996. The policy purported to determine the age at which children could first attend an independent school. Harris challenged the validity of the policy on the ground that the Minister did not have decision-making powers in terms of that Act. The Constitutional Court held that the Act did not confer on the Minister the power to make decisions.

[62] The policy stated that it gave notice of the 'age requirements for the admission of learners to an independent school or different grades at such a school'. It continued: 'A learner must be admitted to grade 1 if he or she turns seven in the course of' a calendar year. 'A learner who is younger than this age may not be admitted to grade 1. . . .'

[63] Sachs J said (para 11):

'Policy made by the Minister in terms of the National Policy Act does not create obligations of law that bind provinces, or for that matter parents or independent schools. . . . There is nothing in the Act which suggests that the power to determine policy in this regard confers a power to impose binding obligations. In the light of the division of powers contemplated by the Constitution and the relationship between the Schools Act [The South African Schools Act 84 of 1996] and the National Policy Act, the Minister's powers under section 3(4) are

limited to making a policy determination and he has no power to issue an edict enforceable against schools and learners. Yet the manifest purpose of the notice is to do just that.'

[64] M-Net seeks to distinguish *Harris* on the basis of the peremptory language in the notice; the objective of the notice, which was to achieve uniformity between independent and state schools by extending a rule in the Schools Act to independent schools and the fact that the Minister did not dispute that he purported to bind independent schools.

[65] The SABC argues that ICASA, like the authorities regulating schools, must consider policies but does not have to follow them. The policy, it argues, does not fetter ICASA. Nothing in the policy prevents ICASA from making a decision that the subsidized ST boxes would have encryption capability.

[66] In my view, Minister Muthambi has issued an edict. She has decreed that the subsidized ST boxes shall not have encryption capability. USAASA has said nothing on this score. It cannot make a financial decision that is not consonant with the policy. The Minister's decision does purport to bind. And that is borne out by the statements in the answering affidavit that say that government will not bear the costs of encryption and that if e.tv wishes to broadcast an encrypted signal it must provide the ST boxes to consumers at its cost. That, as has already been said, makes it commercially impossible for e.tv to encrypt its broadcast signals despite the statement in clause 5.1.2(C) that it is free to do so.

[67] In my view Minister Muthambi did purport to issue a binding direction, which she was not entitled or empowered to do. For this reason too the encryption amendment is invalid. The court a quo thus incorrectly found that the amendment was not ultra vires. The appeal must succeed on this ground as well.

The PAJA challenge

[68] e.tv, in the court a quo, challenged the policy amendment on the basis that it amounted to administrative action (implementation of a policy). It failed in this respect as well. On appeal, it maintains the challenge, but did not argue it at the hearing. In view of the findings that I have made as to the irrationality of the amendment, and as to it being ultra vires, it is not necessary to consider this ground of review as well.

Costs

[69] The last issue is that of costs. The four appellants are entitled to the costs of the appeal, including those occasioned by the employment of two counsel. The respondents should bear joint and several liability for these costs. The appellants are also entitled to the costs of the application in the court a quo.

Order

[70] For these reasons I order that:

1 The appeal is upheld with the costs of two counsel.

2 The respondents are ordered to pay the costs of the appeal jointly and severally.

3 The order of the court a quo is set aside and replaced with the following:

‘ (a) The application is granted with the costs of two counsel where so employed.

(b) Clause 5.1.2(B)(a) of the Digital Migration Policy is declared unlawful and invalid and is accordingly set aside.’

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C H Lewis

Judge of Appeal

APPEARANCES

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