CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 140/16, 141/16 and 145/16

In the matter between:

ELECTRONIC MEDIA NETWORK LIMITED	First Applicant
MINISTER OF COMMUNICATIONS	Second Applicant
SOUTH AFRICAN BROADCASTING CORPORATION SOC LIMITED	Third Applicant
and	
E.TV (PTY) LIMITED	First Respondent
NATIONAL ASSOCIATION OF MANUFACTURERS OF ELECTRONIC COMPONENTS (FIRST GROUPING)	Second Respondent
SOS SUPPORT PUBLIC BROADCASTING COALITION	Third Respondent
MEDIA MONITORING AFRICA	Fourth Respondent
MINISTER OF TELECOMMUNICATIONS AND POSTAL SERVICES	Fifth Respondent
INDEPENDENT COMMUNICTIONS AUTHORITY OF SOUTH AFRICA	Sixth Respondent
UNIVERSAL SERVICE AND ACCESS AGENCY OF SOUTH AFRICA	Seventh Respondent
ASSOCIATION OF COMMUNITY TELEVISION – SA	Eighth Respondent

SOUTH AFRICAN COMMUNICATIONS FORUM	Ninth Respondent
SENTECH SOC LIMITED	Tenth Respondent
CELL C (PTY) LIMITED	Eleventh Respondent
TELKOM SOC LIMITED	Twelfth Respondent
TELLUMAT (PTY) LIMITED	Thirteenth Respondent
NATIONAL ASSOCIATION OF MANUFACTURERS OF ELECTRONIC COMPONENTS (SECOND GROUPING)	Fourteenth Respondent

Neutral citation:	*Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others* [2017] ZACC 17
Coram:	Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mojapelo AJ, Pretorius AJ and Zondo J
Judgments:	Mogoeng CJ (first judgment): [1] to [88] Cameron J and Froneman J (second judgment): [89] to [163] Jafta J (third judgment): [164] to [210]
Heard on:	21 February 2017
Decided on:	8 June 2017
Summary:	section 192 of the Constitution — Independent Communications Authority of South Africa Act — Electronic Communications Act — Broadcasting Digital Migration Policy — policy amendment — Minister of Communications separation of powers — legality review — legality — consultation — negotiation — rationality

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and replaced with:
   "1. The appeal is dismissed; and
   2. e.tv (Pty) Limited, SOS Support Public Broadcasting Coalition and Media Monitoring Africa are to pay the Electronic Media Network Limited's costs, including costs of two counsel."
4. e.tv (Pty) Limited, SOS Support Public Broadcasting Coalition and Media Monitoring Africa are to pay costs of the Electronic Media Network Limited in this Court, including costs of two counsel.

JUDGMENT

MOGOENG CJ (Nkabinde ADCJ, Mojapelo AJ and Zondo J concurring):

[1] Ours is a constitutional democracy, not a judiciocracy. And in consonance with the principle of separation of powers, the national legislative authority of the Republic is vested in Parliament[1] whereas the judicial and the executive authority of the Republic repose in the Judiciary[2] and the Executive[3] respectively. Each arm enjoys functional independence in the exercise of its powers. Alive to this arrangement, all three must always caution themselves against intruding into the constitutionally-assigned

[1] Sections 43 and 44 of the Constitution.

[2] Section 165 of the Constitution.

[3] Section 85 of the Constitution.

operational space of the others, save where the encroachment is unavoidable and constitutionally permissible.

[2] Turning to the Executive, one of the core features of its authority is national policy development.[4] For this reason, any legislation, principle or practice that regulates a consultative process or relates to the substance of national policy must recognise that policy-determination is the space exclusively occupied by the Executive. Meaning, the Judiciary may, as the ultimate guardian of our Constitution and in the exercise of its constitutional mandate of ensuring that other branches of government act within the bounds of the law, fulfil their constitutional obligations and account for their failure to do so, encroach on the policy-determination domain only when it is necessary and unavoidable to do so.[5]

[3] A genuine commitment to the preservation of comity among the three arms of the State insists on their vigilance against an inadvertent but effective usurpation of the powers and authority of the others. Absent that vigilance in this case, a travesty of justice and an impermissible intrusion into the policy-determination terrain would take place to the grave prejudice of the Executive or even the nation. For, that is bound to happen whenever the eyes of justice are unwittingly focused on peripherals rather than on the fundamentals.

[4] Driven by this reality, we were constrained to sound the following sobering reminder:

> "The Judiciary is but one of the three branches of government. It does not have unlimited powers and must always be sensitive to the need to refrain from undue interference with the functional independence of other branches of government.
>
> . . .

[4] Section 85(2)(b) of the Constitution.

[5] *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) (*Doctors for Life*) at paras 37-8.

> Courts ought not to blink at the thought of asserting their authority, whenever it is constitutionally permissible to do so, irrespective of the issues or who is involved. At the same time, and mindful of the vital strictures of their powers, they must be on high alert against impermissible encroachment on the powers of the other arms of government."[6]

[5] The determination of the issues must thus be grounded on and steered by the ever-abiding consciousness of the import of the principle of separation of powers. Permissible judicial intervention is quite distinct from the Judiciary's imposition of its preferred approach to the issues or what it considers to be the best or superior choice in relation to matters that the political arms are constitutionally mandated and therefore best-placed to handle. Properly contextualised, this is what this Court sought to convey in *Albutt* when it said:

> "Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected . . . . 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."[7]

[6] It needs to be said that rationality is not some supra-constitutional entity or principle that is uncontrollable and that respects or knows no constitutional bounds. It is not a uniquely designed master key that opens any and every door, any time, anyhow. Like all other constitutional principles, it too is subject to constitutional constraints and must fit seamlessly into our constitutional order, with due regard to the imperatives of separation of powers. It is a good governance-facilitating, arbitrariness and abuse of power-negating weapon in our constitutional armoury to be employed sensitively and cautiously.

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[6] *Economic Freedom Fighters v Speaker of the National Assembly* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) at paras 92-3.

[7] *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 51.

[7] That said, an issue that is incidental to policy-formulation is at the heart of this litigation. And it is whether one out of at least nine key roleplayers in the broadcasting sector should have been consulted again when the Broadcasting Digital Migration Policy was being developed further. It is in essence contended that the alleged failure to consult in relation to policy-determination or considerations of rationality justify judicial intervention and the setting aside of the policy.

Parties

[8] Applicants are the Electronic Media Network Limited (M-Net), Minister of Communications (Minister Muthambi or Minister) and South African Broadcasting Corporation SOC Limited (SABC). Some of the respondents are e.tv (Pty) Limited (e.tv), National Association of Manufacturers of Electronic Components (First Grouping), SOS Support Public Broadcasting Coalition (SOS), Media Monitoring Africa (MMA), Independent Communications Authority of South Africa (ICASA) and Universal Service and Access Agency of South Africa (USAASA).

Background

[9] The need to catch up with the latest technological developments in broadcasting was identified by South Africa several years ago. Consequently, in 2005 the Minister of Communications, Dr Ivy Matsepe-Casaburri, embarked on a consultative process that culminated in a 2008 policy decision in terms of which television signals would migrate from analogue to digital. That shift would enable the overwhelming majority of viewers, who presently receive analogue television signals, to watch television in the digital terrestrial television environment through a functionality known as set top boxes. Set top boxes will be required for the foreseeable future until television sets with the technology to unscramble digital signals are accessible to all. These boxes will thus be needed by the financially under-resourced, for as long as television sets with signal-unscrambling capabilities are beyond reach.

[10] e.tv was very much involved in the consultative process triggered by Dr Matsepe-Casaburri and described the role it played in policy-formulation, as crucial. Its strongly-held position at the time was that the incorporation of a decryption facility in set top boxes was "wholly unsuited for free-to-air television". It lamented its intended introduction into a free-to-air terrestrial environment on the basis that it "fundamentally changes the nature of free-to-air television broadcasting" and "removes the control over access to free-to-air television from the viewer/citizen to the broadcaster, transmission provider or a third party". e.tv also said decryption capabilities raised "critical constitutional, economic, financial and competition issues". It decried the exorbitant costs that would be occasioned by the incorporation of decryption capabilities into set top boxes. It labelled that policy "direction" as uncompetitive. That in its view would effectively mean that "*government would be subsidising the profits of a single* [conditional access] *provider*" in circumstances where conditional access is unnecessary for the purposes of digital migration. Finally, e.tv maintained that the basic set top box ought not to include decryption capabilities so as to curb production and incidental maintenance costs particularly because it was a bridging mechanism intended to allow analogue terrestrial television to receive digital signals. The SABC and M-Net agreed. But, it is precisely because this position of e.tv has in effect been adopted as policy by Minister Muthambi, that e.tv is aggrieved and litigating.

[11] Minister Matsepe-Casaburri formulated a policy that provided for a system capable of disabling the usage of stolen set top boxes outside South Africa. The policy also provided that those boxes were to have "capabilities to unscramble the encrypted broadcast signals so that only fully compliant [set top boxes] made or authorised for use in South Africa can work on the network". In sum, the policy provided for both a control system and decryption capabilities. What this entails is that set top boxes will be manufactured to incorporate technology that has the capabilities to decrypt encrypted television signals.

[12] In came Minister Dina Pule who also paid attention to this policy in 2011. She consulted stakeholders with a view to amending the policy. And this she did in 2012. The key issues provided for in her policy amendment were that the control system had to be robust. It had to ensure that "only conformant" set top boxes can work in the electronic communications network in South Africa and that multiple set top boxes were to be avoided for current and future free-to-air broadcasting services. Parties disagree on the meaning of this. Some argue that set top boxes were to have decryption capabilities, whereas others hold a different view. But this is a side issue that need not derail us.

[13] Minister Yunus Carrim took over the reins from Minister Pule. He consulted on whether set top boxes "should have a control capability or not". In 2013 he first held the Roundtable Discussion with broadcasters and other roleplayers before he published policy proposals that were somewhat similar to the policy of Minister Matsepe-Casaburri. More importantly, he was minded to distribute five million set top boxes that would have decryption capabilities. All parties, including e.tv, understood the consultative process to entail a solicitation of views on whether government set top boxes were to have decryption capabilities and whether it was a cost-effective proposition from a taxpayer's perspective. Also, that the free-to-air broadcasters who would choose to encrypt their signals and would need to use the decryption capabilities built into those set top boxes, would have to pay for usage.

[14] e.tv made a 180° about turn from its previous strongly-held and fully-motivated position. It supported the incorporation of decryption capabilities into set top boxes and was pleased that "free-to-air broadcasters could now decide how they wish to manage their signal and whether that signal would be encrypted." e.tv viewed as inconceivable any opposition to the proposed policy since broadcasters would now have "the right to choose whether or not to encrypt their signals". SABC, the Association of Community Television South Africa (Act-SA) and M-Net remained opposed to this policy "direction".

[15] When Minister Carrim's term of office expired, Minister Faith Muthambi was appointed. At that stage, Minister Carrim had not yet formulated a policy but had only solicited views on his draft from interested parties.

[16] Minister Muthambi pursued a policy "direction" that is significantly dissimilar to that of Minister Carrim in relation to the production specifications of set top boxes. She formulated a policy that is inclined to exclude decryption capabilities from set top boxes whilst leaving it open to free-to-air broadcasters to decide whether to encrypt their signals and if that be their preferred option, to do so with their own financial resources. The following statement issued on 13 March 2015 by Minister Muthambi's department explains her position:

> "Government has assured parliament that cabinet's endorsement of an inclusion of a 'control system' aims to protect multi-billion rand investment in the [set top boxes] from use outside of South Africa and that broadcasters who seek conditional access related to encryption of their broadcast content may do so at their own cost. Our responsibility is to protect the [set top boxes] that government is making an investment in. The issues beyond the box or the encryption of the signals is not our domain. Those who want to encrypt the signal or content so that they give rights to watch certain programs can do that and they can make the investment in that area."

[17] The Minister eventually published an amendment to the pre-existing policy on 18 March 2015. In line with this statement, the amendment rules out decryption capabilities as an integral part of government-supplied set top boxes and provides for a control system. To this, e.tv objects.

[18] And the real nub of its opposition is that Minister Muthambi did not consult them. Had she done so, they would have had the opportunity to in effect negotiate the possibility of a policy that accommodates decryption capabilities in government set top boxes. Their proposal amounts to virtually reverting to Minister Matsepe-Casaburri's policy and Minister Carrim's proposals that provided for the inclusion of decryption capabilities. e.tv says this approach would facilitate public

access to unpaid-for broadcasting and incentivise competition in the industry. Its attempt to open negotiations with the Ministry was unsuccessful and it was displeased.

[19] In pursuit of its preferred policy "direction", e.tv then applied to the High Court of South Africa, Gauteng Division, Pretoria, not only to interdict the Minister from implementing the policy but to also have it reviewed and set aside. That application was unsuccessful.[8] The Supreme Court of Appeal was then approached on appeal. And e.tv succeeded.[9] The SABC, the Minister, and M-Net have now each brought an application to this Court to challenge the decision of the Supreme Court of Appeal.

Issues

[20] The issues to be resolved are whether:

20.1 Minister Muthambi had the legal authority to make the policy-determination now being challenged or exceeded her powers.

20.2 The Minister was required to and did consult in terms of section 3(5) of the Electronic Communications Act[10] (ECA). If not,

20.3 Section 3(6) of the ECA also exempts the amendment of policies from consultation.

20.4 The policy-formulation process and its content are irrational.

Leave to appeal

[21] The SABC, Minister and M-Net each seeks leave to appeal against the decision of the Supreme Court of Appeal that invalidated and set aside the Minister's Broadcasting Digital Migration Policy amendment. e.tv, SOS and MMA are opposing.

[8] *e.tv (Pty) Ltd v Minister of Communications*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 26166/2015 (24 June 2015).

[9] *e.tv (Pty) Ltd v Minister of Communications* [2016] ZASCA 85; 2016 (6) SA 356 (SCA).

[10] 36 of 2005.

[22] Since this matter has its genesis in e.tv's challenge to the Minister's exercise of public power vested in her in terms of the ECA, these applications trigger the constitutional principle of legality into operation. And it is safe to hold that the Supreme Court of Appeal was correct to conclude that the Minister's policy amendment could properly be reviewed under the principle of legality and that it was unnecessary to deal with the Promotion of Administrative Justice Act[11] as the basis for review.

[23] Additionally, government and all key stakeholders in the broadcasting industry agreed in principle that the time had come for broadcasting to migrate from an analogue terrestrial television environment to the digital terrestrial television setting about a decade ago. The nation has since been anxiously waiting for policy facilitation. A challenge to the validity of that policy-determination raises an arguable point of law of such general public importance that it deserves the attention of this Court.

[24] Besides, applicants have reasonable prospects of success and it is in the interests of justice that leave to appeal be granted.

Legality

[25] One of the challenges mounted against Minister Muthambi's policy is that she lacked the legal authority to make it or exceeded her policy-making powers. e.tv contends that the impugned provisions of the policy essentially fall within the exclusive powers of ICASA. Also, that the Minister sought to make a policy that binds USAASA although a policy cannot in law have a binding effect. To the latter end, e.tv relies on *Harris*.[12]

[11] 3 of 2000.

[12] *Minister of Education v Harris* [2001] ZACC 25; 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC) (*Harris*). In January 2000 the Minister of Education published a notice which stated that a learner may only be admitted to grade one at an independent school if he or she turns seven in the course of that calendar year. The validity of the notice was challenged; one of the bases being that it unfairly discriminated against children of a certain age. The Court held that the Minister, under the National Education Policy Act, had the power to issue the notice he did, however that Act only gave the Minister power to determine policy and not to impose binding law. Thus in issuing the notice *that the Minister intended to have binding effect*, the Minister exceeded his powers and accordingly infringed the constitutional principle of legality.

[26] It bears repetition that policy-formulation is the exclusive domain of the executive arm of the State. The judicial arm would do well to resist the enticement or urge to inadvertently, yet impermissibly, encroach on the Executive's national policy-determination space on some elasticised rationality or other constitutional basis that purportedly justifies judicial intervention. Judicial intrusion in matters of policy-formulation is permissible when policy-determination constitutes a disregard for the law or Constitution. This would be the case for instance where the rule of law or principle of legality is not observed, such as where the Executive purports to exercise the power it does not have in the name or under the guise of policy-determination. Courts are thus empowered to intervene and even set aside policy but only under exceptional and separation of powers-sensitive circumstances.[13] Courts must always remember that ministerial policy-formulation fundamentally derives from section 85(2) of the Constitution which provides in relevant part:

> "The President exercises the executive authority, together with the other members of the Cabinet, by—
>
> . . .
>
> (b) developing and implementing national policy."

[27] So, foundational to any other policy-formulation exercise the Minister, as a member of Cabinet, might have to embark upon, is section 85(2)(b) of the Constitution. She enjoys the constitutional entitlement to exercise executive authority by "developing and implementing national policy". This is an all-encompassing constitutional policy-determination authority. And section 3(1) of the ECA empowers the Minister to "make policies on matters of national policy applicable to the [Information Communications and Technology] sector" in relation to "the application of new technologies pertaining to . . . broadcasting services". The reference to "national policy" in section 3(1) of the ECA finds resonance with "national policy" in section 85(2)(b) of the Constitution. There thus ought to be no disputation about where the Minister's original policymaking authority derives from even with regard to the

[13] *Doctors for Life* above n 5 at paras 37-8.

broadcasting digital migration policy. It is a constitutional power not to be lightly dislodged by a clamour for consultation, actuated by commercial interests masked with the appearance of the advancement of public interest, ensuring fairness, competition and a diversity of views broadly representing South African society.

[28] The Minister made the impugned policy-determination in terms of the powers vested in her by section 3(1)(d) of the ECA which provides:

> "**3 Ministerial policies and policy directions**
>
> (1) The Minister may make policies on matters of national policy applicable to the [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 communications network services."

[29] The power to make policies on matters that apply to the Information Communications and Technology sector in relation to the application of new technologies relevant to broadcasting services, does in my view extend to set top boxes. The latter are those new technologies. And their proposed specifications in relation to how they would apply to free-to-air broadcasting services fall well within the legal authority of the Minister to provide guidance on. She is thus not usurping any aspect of ICASA's constitutional powers "to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society"[14]. The Minister formulated a policy that allows free-to-air broadcasters to encrypt their signals if they so wish, provided they bear the costs of doing so. That also falls within her wide discretionary policy-making powers.

[14] Section 192 of the Constitution.

[30] National policy is not inconsequential. If it were, the Constitution would not have made express provision for it. It is intended to be an essential governance and service delivery-enabling tool in the hands of the Executive. And broadly speaking, policy is supposed to be a compendium of guidelines or principles on which decisions for the execution of an institution's mandate or vision are to be based. It essentially ought to give direction or point to the cause of action to be followed. As is the case with all other national policies, Minister Muthambi must have intended hers to be taken seriously by agencies and all other functionaries who needed guidance or direction on broadcasting digital migration. This is an important factor to bear in mind in determining whether she sought to bind USAASA or usurp the constitutional powers of ICASA. And it is within this context that the words used in the impugned clauses are to be understood.

[31] The primary basis for e.tv's contention that the policy seems to have a binding effect and was so intended is the use of the word "shall" in paragraph 5.1.2(B). This construction explains why *Harris* is said to be applicable to this policy. But *Harris* is distinguishable from this case.

[32] The impugned portion of the policy in *Harris* was accompanied by clauses that left an objective reader with no option but to conclude that the Minister's policy was meant to bind Members of the Executive Council (MECs) responsible for education in our provinces. It could not reasonably be interpreted in any other way. Here, paragraph 5.1.2(A) reads: "[set top box] control system in the free-to-air [digital terrestrial television] *will* be non-mandatory". And paragraph 5.1.2(B) reads that "the [set top boxes] control system for the free-to-air [digital terrestrial television] [set top boxes] *shall* not have capabilities to encrypt broadcast signals for the subsidised [set top boxes]". But paragraph 5.1.2(C) provides that individual broadcasters "*may* at their own cost make decisions regarding encryption of content". Additionally, throughout the document, the words "shall", "will" and "may" are used interchangeably.[15] And the

[15] The word "will" appears in the following paragraphs of the Amendment of Broadcasting Digital Migration Policy, GN 232 *GG* 38583, 18 March 2015 (2015 Amendment): 1.1.8, 3.3.1, 5.1.2.7, 5.1.2(A), 5.1.4, 7.2, and the

policy is said to be intended to provide a "framework"[16] that would "inform and guide"[17] the process and aims to "establish a policy environment within which the broadcasting digital migration is implemented".[18]

[33] All of the above have the cumulative effect of demonstrating that the policy was neither meant to bind nor does it have a binding effect on ICASA or USAASA. Its language cannot therefore be construed as peremptory merely because of the use of the word "shall" in clause 5.1.2(B).

[34] More telling though are the provisions of section 3(4) of the ECA. Unlike in *Harris* where the insulation of provinces or MECs from "the binding effect" of a ministerial policy-determination, was inferential and arguably uncertain especially to non-lawyers, here the position is different. Remember, the Minister of Education's age limitation policy in *Harris* was implemented by the MEC in the affected province. In all likelihood the MEC did not want to flout what appeared to be a clearly binding policy of the Minister. In this case, section 3(4) has an expressly insulating effect on whatever policy-formulation the Minister might come up with. It is the statute versus policy. The same law that binds both the Minister and the relevant agencies provides essentially that USAASA may "consider" the impugned policy. It is known not to be binding in terms of the law that gives ICASA or USAASA the power to be exercised with reference or due regard to that policy. In other words, before they can have regard to or apply the impugned policy in terms of their statutory powers, the agencies must first determine what that self-same statute says about the binding effect of that policy. And the statute makes it abundantly clear that they need only consider the policy.

executive summary. The word "shall" appears in the following paragraphs of the 2015 Amendment: 5.1.2(B), 7.2 and the executive summary. The word "may" appears in the following paragraphs of the 2015 Amendment: 5.1.2(C) and the executive summary.

[16] Broadcasting Digital Migration Policy, GN 958 *GG* 31408, 8 September 2008 (2008 Policy), paragraph 1.2.3(e).

[17] Amendment of Broadcasting Digital Migration Policy, GN 124 *GG* 35051, 17 February 2012, substitution of paragraph 2 of the Foreword by the Minister.

[18] 2008 Policy above n 16, paragraph 1.2.3(a).

[35] It bears repetition that in *Harris*, the language of the policy was consistently peremptory. The objective was to extend a rule made in terms of the Schools Act to independent schools. And the Minister of Education expressly admitted that he intended to make a binding policy and fought hard to defend its binding effect. That is not the case here. Minister Muthambi has made it abundantly clear that her policy is not binding and that it is nothing more than a policy choice or preference or statement. And section 3(4) of the ECA constitutes an express and crucial neutralising factor in relation to the possible binding effect of the policy, contended for by e.tv. This policy is thus not a binding rule or edict but a set of guiding principles. In line with *Arun* the policy amendment is "consistent with the operative legislative framework"[19] and falls within the Minister's powers. It is therefore not *ultra vires* but valid.[20]

Consultation

[36] The procedural challenge to the policy is two-pronged. First, that the Minister failed to comply with the consultation requirements set out in section 3(5) of the ECA. Second, that she made her policy after following an irrational procedure. The basis for the challenge is essentially that on both fronts, the requirements for consultation were not met and that all the Minister did was issue a policy. A proper resolution of this issue requires that we first reflect on how the consultative process has unfolded over the years in relation to the various iterations of policy drafts. But first, some observations.

[37] Given the prominent role of consultation in the determination of this matter, it behoves this Court to remind itself and the public of the rationale behind any consultative process. Consultation, as distinct from negotiations geared at reaching an agreement, is not a consensus-seeking exercise. Within the context of national policy

[19] *Arun Property Development (Pty) Ltd v City of Cape Town* [2014] ZACC 37; 2015 (2) SA 584 (CC); 2015 (3) BCLR 243 (CC) (*Arun*) at para 46.

[20] I have assumed without deciding that this policy deals with matters in relation to which it is not supposed to be binding. All of the above is based on the parties' submissions including the Minister's concession that her policy amendment was not meant to be binding, and the reading of the impugned provisions. But, it is worth noting that to the extent that the policy relates to the Universal Service Access Fund that is administered by USAASA, that Fund is in terms of section 87(4) of the ECA to be administered "subject to the control and in accordance with the instructions of the Minister".

development it must mean that a genuine effort is being made to obtain views of industry or sector roleplayers and the public. In other words, a genuine and objectively satisfactory effort must be made to create a platform for the solicitation of views that would enable a policymaker to appreciate what those being consulted think or make of the major and incidental aspects of the issue or policy under consideration. People or entities must be left to express themselves freely on as wide a range of issues, pertinent to a policy proposal, as possible. The standpoints of interested parties, who want to have their views taken into account, must thus be allowed to reach a policymaker. But, consultation fulfils a role that is fundamentally different from negotiation.

[38] Generally speaking, where there are two opposing positions and a party aggrieved by the ultimate policy-determination has had the opportunity to express itself properly in favour of each of the diametrically opposed possibilities, another round of consultation on the ultimate policy standpoint can hardly ever serve any legitimate purpose. If it is the first policy "direction" it prefers, then it is covered. If it is the second, it would also have been appropriately accommodated in terms of process. Consultation is not an inconsequential process or a sheer formality, particularly in relation to national policy development. It exists to facilitate a festival of ideas that would hopefully provide some enlightenment on the stakeholders' major perspectives so that policy-formulation is as informed as possible for the good of all, not some.

Alleged non-compliance with section 3(5)

[39] Two points must be made upfront. One, the requirements of the consultative process envisaged by section 3(5) of the ECA and procedural rationality had already been met when Minister Muthambi amended the policy in 2015. Two, this approach or conclusion renders it unnecessary to resolve issues around the applicability or otherwise of section 3(6) of the ECA to the amendment of policies.

[40] e.tv contends that ICASA, USAASA and interested persons should have been but were not consulted. All this is based on the provisions of section 3(5):

> "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 policy direction in the *Gazette*."

This reinforces the reality that the main and arguably sole repository of the constitutional and statutory authority to formulate broadcasting policy is the Minister. She initiates consultation "in order to obtain the views of interested persons" like e.tv.

[41] This subsection stipulates that the Authority, ICASA, and the Agency, USAASA, be consulted when a policy is being formulated. Though cited as parties to this litigation, they have decided not to oppose the Minister's application to protect the policy from being set aside by reason of the alleged non-consultation or invalidity. It must thus be reasonably assumed on their behalf that they find nothing wrong with the policy-formulation process as it affects them, and even as regards compliance with the provisions of section 3(5) of the ECA.

[42] Section 3(5) requires no more than that the views of interested persons be obtained. This is to be done by publishing the text of the draft policy by notice in the Gazette. Interested persons are to submit written submissions "in the manner specified in such notice in not less than 30 days from the date of the notice". This is a procedure a Minister must follow when she initiates a policy development process in terms of the ECA. It would be a misinterpretation of section 3(5) and a misunderstanding of the

concept of consultation if one were to approach it as if it is intended to allow parties to exhaustively discuss or iron out divergent views until some mutually acceptable basis to proceed from, is found. e.tv and other interested persons only have the right to ensure that their voices are heard during the consultation period before a final policy-determination is made.

[43] The stipulation that the views of interested persons are to be submitted in writing rules out the possibility of a legal entitlement to insist on some kind of a negotiated settlement on any major or incidental aspect of the policy. Interested persons ought to speak exhaustively on any aspect of the policy when presented with the section 3(5) opportunity. In this case, their written submissions would have had to include all key scenarios or possibilities relating to "what if" decryption capabilities are ultimately excluded to save costs, as was initially contended for by e.tv. More importantly, e.tv went all out to demonstrate why inbuilt decryption capabilities would be uncompetitive, too costly and most inappropriate, in response to the possibility raised by Minister Matsepe-Casaburri to include those capabilities. Similarly, it should like SABC, M-Net and Act-SA have spoken just as strongly and exhaustively to rule out the possibility of a policy that is different from Minister Carrim's proposals. This is so because the reasonable possibility of the Minister being persuaded by other broadcasters to go in the direction opposite to the draft has always loomed large. And no provision is made in the ECA for another round of "written submissions" within another period "not less than 30 days from the date of the notice" of a new text or changed position.

[44] What cannot be taken out of account is that the process of formulating the broadcasting digital migration policy, that would apply to or facilitate a transition from an analogue terrestrial television system to a digital terrestrial television environment, was never really finalised. Meaning, a point was never arrived at when a policy was made and applied to regulate migration from analogue to digital. All inputs made to the various iterations of policy proposals to help shape a policy that could be implemented, are therefore important and must be taken into account for any concern raised to be properly understood. This would help us determine whether it was necessary to consult

again regard being had to previous consultative processes and the particular issue over which consultation is currently being sought. In other words, for the purpose of determining whether Minister Muthambi's policy amendment attracted the need to consult, we must consider the opportunities parties were afforded to be heard, especially by Minister Carrim.

[45] Interested parties, including e.tv, have over the years had the opportunity to express their views and preferences on various versions of the broadcasting digital migration policy-formulation. e.tv has had all the opportunities it could ever have legitimately wished for, to influence the development of the policy on its two sharply opposing ends. We are now virtually grappling with e.tv's own battle of ideas. Its position is particularly striking in that it has been able to articulate quite forcefully at times persuasively, two diametrically opposed viewpoints. Initially, against the inclusion of decryption capabilities in set top boxes in order to save the taxpayers' money, avoid enriching individual entities at government expense and promote competition, but later in favour of the inclusion of decryption capabilities in government-supplied set top boxes. The latter is now said to be done for the promotion of competition and the advancement of the best interests of the public by ensuring that there is fairness and diversity of views broadly representing South African society.[21]

[46] The reality is that the issue of costs for inbuilt decryption capabilities was open to be addressed by those interested persons or stakeholders who deemed it necessary to deal with them in whatever way they saw fit when Minister Carrim published his policy proposals. e.tv could, knowing the strong views held by all other broadcasters and in response to the Carrim policy draft, have proposed that costs, to be paid by free-to-air broadcasters who would prefer to encrypt and therefore use the inbuilt decryption capabilities, be paid in advance. The costs issue is a specific, noteworthy but peripheral

[21] Section 192 of the Constitution provides:

> "National legislation must 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."

aspect of the Broadcasting Digital Migration Policy. Importantly, encryption is an option open to e.tv to pursue if it is so minded. It would be extremely difficult to explain why e.tv believes that the opportunity to make written submissions to the effect it now proposes was not open to it to make in response to Minister Carrim's proposals. This is so because all other broadcasters fought strenuously, at the Roundtable Discussion and through their written submissions, to have decryption capabilities excluded in order to save the taxpayers' money.

[47] It was then open to e.tv to make the same submissions it seeks to make in defence of Minister Carrim's proposals particularly because there was no guarantee that the final version would be the same as the proposals. That this is an avenue known by e.tv, just like other broadcasters, to have always been available to it, is manifestly evident from its approach to Minister Matsepe-Casaburri's draft policy that was significantly different from Minister Muthambi's amendment. There, e.tv dealt extensively with costs implications attendant to the proposed policy position.

[48] The only real difference is thus that e.tv failed to take advantage of the opportunity it had to address that reasonably foreseeable possibility. Had it done so, it would have sought to convince Minister Carrim and by extension Minister Muthambi to retain a feature of the policy that she has decided to drop. The issue of users having to bear the additional costs occasioned by decryption capabilities was by implication always on the table in the event of a decision being taken that is similar to the one initially advocated for by e.tv. This is evident from the representations made by all other broadcasters to Minister Carrim's policy proposals.

[49] To e.tv's knowledge, SABC and M-Net have always been opposed to the incorporation of decryption capabilities into government-supplied set top boxes. They expressed their opposition in very clear and strong terms to Minister Carrim's predisposition to government-supplied set top boxes that have inbuilt signal-unscrambling capabilities. One of the major bases on which SABC and M-Net opposed the inclusion of those capabilities was that it would drive up the costs of the

service and would amount to subsidising commercial broadcasters. In particular M-Net said:

> "The proposed [Broadcasting Digital Migration] policy amendments even agree with this assessment that it is a Pay TV technology, when they state that 'to avoid subscription broadcasters unfairly benefitting from the [set top box] control system, Government's investment in the [set top box] Control System will be recovered from those subscription broadcasters that choose to make use of the [set top box] Control System . . . .' *This raises the policy question of why government is funding the inclusion of an expensive Pay TV technology in the subsidised [free-to-air] [set top box], and requiring its inclusion in the retail [free-to-air] [set top box], thereby increasing the cost for manufacturers and consumers when there is no discernible public interest benefit for doing so.*"

[50] Not just SABC and M-Net but also Act-SA made it abundantly clear that they opposed Minister Carrim's proposals particularly as they related to decryption capabilities and costs. By the way, Act-SA represents all community television licensees in South Africa that were in existence as at 3 January 2014. They were Soweto TV, Cape Town TV, Bay TV, One KZN TV, Tshwane TV, North West TV and Bara TV. It is best to reproduce part of their representations dated 3 January 2014 fairly extensively:

> "4.1 Act-SA participated in the Roundtable Discussion convened by the Minister in September 2013 on the issue of [set top box] control.
>
> 4.2 During this process, Act-SA joined the SABC, the emerging manufacturers and Multichoice in opposing the inclusion of [set top box] control in the free-to-air set top box. *The only party which supported the inclusion of [set top box] control was e.tv.*
>
> 4.3 Act-SA's reasons for opposing the inclusion of a [set top box] control system were briefly as follows:
>
> 4.3.1 The encryption of all free-to-air services and the deployment of a [set top box] control or conditional access system to decrypt or unscramble these services is simply another kind of E-Toll! It takes

away an individual's right to free and unrestricted access to free-to-air broadcasting services;

4.3.2 The implementation of [set top box] control will result in the end of 'free-to-air' television as it is available to viewers in South Africa today;

4.3.3 This system will impose a fundamental change in how the South African public accesses public, commercial and community free-to-air television;

4.3.4 *The system benefits only the chosen few who have vested interests in a short term technology which has no added value to the poor* and will be out-dated before it even starts, because of delays in the [digital terrestrial television] roll out programme;

4.3.5 *The system is only for commercial gain and is not sustainable long term*;

5 *When we consider that every party to the Roundtable Discussion (other than e.tv) was opposed to the inclusion of [set top box] control*, we are surprised at the language which the Minister presented to Cabinet and the language which now appears in the proposed amendments.

. . .

10.1 *The Department should not make decisions to the detriment of the poor and at the expense of the taxpayer*.

10.2 We have never supported [set top box] control, it is not in the best interest of the country and overall objectives of [digital terrestrial television] will be compromised. *The proposed amendments will only further individual greed and personal wealth to the detriment of the poor and South Africans at large*.

. . .

10.4 If anyone must decide on [set top box] control, it should be the free-to-air TV broadcasters, which includes the community TV broadcasters represented by Act-SA.

10.5 Act-SA wants to ensure maximum access to free-to-air broadcasting services, rather than add expenses and restrict individuals from free information."

[51] The plight of the poor, and the costs for the inclusion of decryption capabilities to the taxpayer ranked very high on the list of the grounds for opposing

Minister Carrim's proposals. All other broadcasters argued quite forcefully that it was for the advancement of the commercial interests of only e.tv to include decryption capabilities and not at all in the best interests of the poor and broader public. All this was again raised as early as 3 to 5 January 2014. e.tv had all the notification or warning it could ever have needed that other broadcasters rejected the inclusion of decryption capabilities and that the costs burden they would impose on the taxpayer was high on the list of the grounds for opposition. So strongly did the other parties feel about the Carrim proposals that there was even a veiled threat of litigation in the event of these policy proposals not being changed.

[52] It has thus always been within the reasonable contemplation of the parties that Minister Carrim might be persuaded to keep the policy proposals unchanged or dump inbuilt decryption capabilities in line with the views of the overwhelming majority of broadcasters and with due regard to the enormous cost burden it would place on the taxpayer. The exclusion of decryption capabilities would, in line with e.tv's initial approach and, as consistently argued by all other broadcasters, relieve government of having to fund decryption technology. For, inclusion, does in e.tv's own words, effectively amount to subsidising profits of a single conditional-access provider. These contentions provided the bases for a reasonably foreseeable deviation from those proposals considering the production and administrative burden that would come with that unscrambling technology and the recovery of costs from users. The departure from the Carrim proposals could also be influenced by the fact that decryption is, according to e.tv's initial position, consistently shared by all other broadcasters, not necessary for purposes of digital migration. In any event, this policy facilitates a bridging mechanism that will not last forever.

[53] In substance, there really is nothing new about the debate held out, by e.tv, to be new. The costs issue was thoroughly ventilated in response to Minister Carrim's policy proposals by others like SABC, Act-SA and M-Net and e.tv could have done likewise. Minister Muthambi has virtually gone back to the position that e.tv and all others unanimously and eloquently argued for at first, as a sensible and cost-effective policy

position. It has always been a reasonable possibility that loomed large that decryption capabilities might be left out. To the knowledge of all parties, the live wire that has always run through all iterations of broadcasting digital migration policy initiatives is: to have or not to have the expensive decryption capabilities built into government-supplied set top boxes. For these reasons, by dropping or leaving out decryption capabilities the Minister was doing what was reasonably foreseeable or within the reasonable contemplation of the parties. And that reasonably foreseeable possibility ought to have attracted comment from e.tv. It chose, in the face of fierce opposition by other broadcasters to the Carrim proposals, not to seize the opportunity beyond expressing its satisfaction with the infusion of decryption capabilities into set top boxes and dismissively stating that it was inconceivable that anybody would oppose them. For this it has itself to blame.

[54] But why so much attention to e.tv's desire to reposition itself for greater commercial benefit whereas M-Net, Act-SA and SABC are left unscathed? It must be said that M-Net, unlike e.tv, does not at all depend or seek to rely on government resources or set top boxes in the furtherance of its private commercial interests. It funds its chosen business model. And so must e.tv fund its preferred new business plan. It is concerning that it seeks to ride on the back of a government project to realise its entrepreneurial vision. Just as M-Net, Soweto TV, North West TV, and Cape Town TV, for example, do not seek to derive assistance from the State through the broadcasting digital migration policy in the furtherance of their business interests so should it be with e.tv and all others. It is through those lenses that the competitiveness contended for must be viewed. The effect of the Muthambi policy is to virtually maintain the status quo. None of the broadcasters, including free-to-air broadcasters, would be required to do any more than they have previously been required to do. Nor would any be deprived of any advantage or privilege currently enjoyed in relation to access to their viewership and profit-making opportunities.

[55] e.tv would want to be able to harvest more profit, in the same way it accused others of seeking to do in its representations to the Minister Matsepe-Casaburri policy

proposals. This it seeks to achieve by having decryption capabilities incorporated into the government-supplied set top boxes designed to benefit financially challenged households. This is the same government subsidisation of profits of a single conditional access provider, it complained about in its comments on the Minister Matsepe-Casaburri policy proposals. It has in effect branded the position it previously embraced and fought for as irrational. What it considers to be rational now, is what it previously said was unconstitutional and presumably irrational.

[56] If SABC has been involved in some acts of corruption or in some uncompetitive practices, as suggested, that must be addressed. That conduct however requires a separate legal process altogether. For, regardless of who is involved, wrongdoing must not be condoned. Whatever its merits or demerits, actual or perceived malpractice should not be allowed or used to cloud the issues in this litigation. Long before the alleged collusion with Multichoice Propriety Limited took place, SABC and M-Net have been consistently opposed to the inclusion of decryption capabilities into government set top boxes. Their stance does not therefore appear to have been birthed by the alleged uncompetitive deal with Multichoice.

[57] Unlike other broadcasters who no doubt also have some commercial interests in the direction taken by the broadcasting digital migration policy, e.tv's actions threaten to stall unduly the full-scale rolling-out of set top boxes for which the nation has been waiting for about ten years. It follows that roleplayers and interested persons have had ample opportunities to air their views on various policy proposals by several Ministers of Communications especially those of Minister Carrim in response to which all other broadcasters argued strongly for the dumping of decryption capabilities because of their cost implications to the taxpayer. The requirements of section 3(5) had thus been fully met, when Minister Muthambi amended the policy.

[58] We are dealing with one and the same Ministry of Communications here. The development of the Broadcasting Digital Migration Policy is a project of that Ministry. It thus ought not to matter who the incumbent happens to be at any stage of the policy

development process. In this regard, Minister Carrim began the consultative process and broadcasters submitted their representations between 3 and 5 January 2014. Minister Muthambi was appointed to that portfolio on 25 May 2014, just under five months after the parties had communicated their views to the Ministry. As was to be expected, she took it upon herself to complete the unfinished business of her immediate predecessor. The consultative process facilitated by Minister Carrim catered fully for the gathering of whatever views broadcasters and other interested persons might have had on any aspect of the policy proposals. For this reason, whatever preliminary views the Ministry held at the time the proposals were published for comment, it must have been known by all that they were not unchangeably fossilised. The Ministry was always at large to make a policy decision that is radically different from the proposals, depending on how persuasive it found any of the representations to be. And this was done in a way that meets all the section 3(5) consultation requirements.

The effect of the Minister's selective consultation

[59] The Minister solicited the views of some undisclosed persons. In the policy development process the Minister may if she so wishes consult some interested persons or experts on broadcasting digital migration policy. Broadly speaking, the Minister may seek more enlightenment on any aspect of the policy-formulation exercise beyond the parameters of the prescribed consultative process. The legislation neither forbids nor regulates her zest for clarification or additional information from whomsoever it might be beneficially sourced. This is so because some latitude or a reasonable measure of flexibility ought to be allowed in the exercise of executive authority, without effectively undermining the values of openness and accountability. And this extends to the development of policy although she was under no obligation to consult.

[60] Although the Minister's consultation of some undisclosed stakeholders potentially taints the process in some way, it does not invalidate the policy. It needs to be reiterated that it is so because she is free from any constitutional constraints in the information-gathering exercise for the purpose of policy-formulation. Her disclosure or non-disclosure does not necessarily undermine any broadcaster or interested person's

right. e.tv could have but chose not to pursue readily available openness and accountability-enforcing mechanisms to achieve that objective.[22] More would be required to conclude that the only reasonable inference to draw from the Minister's ill-advised and unfortunate non-disclosure is that her consultation of some interested persons, necessarily redounded to the advantage of those who were consulted at the expense of the unconsulted. Her consultation with some stakeholders did not, without more, give e.tv the right to also be consulted, considering the opportunity it also had to oppose any change to the Carrim proposals.

[61] But this does not mean that a blind eye is to be turned to her concern-evoking evasive and "suspicious" responses or lack thereof to pertinent questions raised by e.tv. For, we live in a constitutional democracy, whose foundational values include openness and accountability. It is thus inappropriate for the Minister to not have volunteered the identities of those she consulted with and what the consultation was about, as if she was not entitled to solicit enlightenment or did so in pursuit of an illegitimate agenda. This conduct must be frowned upon and discouraged. It does not however constitute the necessary and unavoidable constitutional basis for judicial intrusion.

Procedural irrationality

[62] A separate and presumably alternative procedural attack on the policy is based on the following principle from *Democratic Alliance*:

> "The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the 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."[23]

[22] If injustice or prejudice is perceived then steps must be taken even in terms of the provisions of the Promotion of Access to Information Act 2 of 2000.

[23] *Democratic Alliance v President of the Republic of South Africa* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC) at para 36.

[63] This was aptly elaborated on and reinforced in these terms by *Motau*:

> "The principle of legality requires that every exercise of public power, including every executive act, be rational. For an exercise of public power to meet this standard, it must be rationally related to the purpose for which the power was given. It is also well established that the test for rationality is objective and is distinct from that of reasonableness."[24]

[64] On the strength of this principle e.tv contends that the potential impact of the decryption amendment on it and the public required of the Minister to consult them in order to take a rational policy decision. It essentially argues that its input on how it would cover the additional costs occasioned by the inclusion of decryption capabilities in the government-supplied set top boxes was critical to the rationality of the Minister's decision, that she took without first finding out what e.tv's position was. For this reason, e.tv argues that the Minister's policy decision was procedurally invalid or irrational.

[65] Consultation that meets the requirements of section 3(5) is not inferior to that which flows from principles articulated in *Motau*, *Albutt* and *Democratic Alliance.*[25] Both processes owe their legitimacy and completeness to the Constitution. None of them is exempt or detached from the spirit, objects and purport of our Constitution or Bill of Rights. We do not therefore have classes or categories of consultation – the inferior and unconstitutional and the constitutionally-inspired one. The consultative process must always be rational and constitutional. If it satisfies the demands of section 3(5), then that would be so precisely because it is rational. This section does in reality enable the Minister to obtain views from specified or interested parties in terms of the constitutionally-sourced policy-formulation process.

[24] *Minister of Defence and Military Veterans v Motau* [2014] ZACC 18; 2014 (5) SA 69 (CC); 2014 (8) BCLR 930 (CC) (*Motau*) at para 69.

[25] Id; *Albutt* above n 7 at para 51; and *Democratic Alliance* above n 23 at para 36. See also *Minister of Home Affairs v Scalabrini Centre, Cape Town* [2013] ZASCA 134; 2013 (6) SA 421 (SCA) (*Scalabrini*) at para 36.

[66] To suggest that a consultative process that meets the full rigor of the statutory requirements, might still not meet the requirements of, or needs some augmentation from, a constitutionally-inspired procedural rationality principle, can only derive from a misunderstanding of our constitutional jurisprudence. No law may be said to have sufficiently provided for a consultative process unless that process meets the procedural rationality test. We have but only one standard for consultation in our jurisprudence. And that is the standard that insists on a genuine and meaningful consultative process that passes constitutional muster, regardless of which legislation or legal framework regulates that process.

[67] For this reason, since the process provided for by section 3(5) has not been declared constitutionally invalid, when its demands have been met, as in this case, then no room exists for exploring the *Motau, Albutt* and *Democratic Alliance* procedural rationality avenue, for they are an integral part of the statutory process. That avenue may only be appropriately pursued where no statutory or other provision has been expressly made for consultation.

[68] e.tv made inputs to the policy initiated by Minister Matsepe-Casaburri and Minister Carrim's proposals for its amendment. All those views are presumably archived within the Ministry somewhere. They fall within the institutional memory of the Ministry. It was thus wholly unnecessary for the Minister to seek "e.tv's input on whether it would cover the additional costs associated with including encryption capabilities in the subsidised set top boxes". The policy was never about e.tv's special commercial interests or the niche it seeks to carve out for itself but always about obtaining whatever views interested persons might wish to express on all key aspects of the policy. And that was done in respect of the inclusion or exclusion of decryption capabilities by all broadcasters including e.tv itself. Additionally, the costs issue was thrown wide-open when Minister Carrim published his policy proposals for comment. The proposals specifically raised the issue of costs and it was dealt with fully by the broadcasters. This ought to have triggered the need for e.tv to speak against the possibility of dumping decryption capabilities and to propose how the objective of

saving costs could still be achieved without abandoning unscrambling capabilities. e.tv spurned that opportunity. No acceptable legal basis exists for the special treatment contended for by e.tv. This procedural irrationality point must also fail.

[69] Linked to both the procedural and substantive irrationality points is some reliance on section 192 of the Constitution. The section provides:

> "National legislation must 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."

[70] Section 192 of the Constitution has got very little, if anything, to do with the Minister's exercise of her policy-making powers. It explains the existence of ICASA, the constitutional obligations it bears and the guarantee of its independence. Properly understood, this provision informs us that ICASA is an independent authority whose mandate is to regulate broadcasting for the good of the public. When unfair reporting or a biased or inexcusable exclusion of some views happens, it is to ICASA that any aggrieved party may turn to lodge a complaint for possible intervention. ICASA is also constitutionally enjoined to level the broadcasting playing-field so that a diversity of views that broadly reflects the thinking of South African people, as opposed to one-sided propaganda-like narratives, may find expression.

[71] To seek to source the bases for the alleged procedural or substantive irrationality of the Minister's policy-determination from this section would, to say the least, be an unfortunate misapplication of the provision. This position extends to the legislation in terms of which ICASA exercises its powers.[26]

[26] The Independent Communications Authority of South Africa Act 13 of 2000.

Substantive irrationality

[72] To demonstrate that the Minister's policy is substantively irrational, e.tv relies on two grounds:

(a) The Minister is fatally confused as to the effect of the decryption amendment; and

(b) There is no rational connection between the purpose that the Minister seeks to achieve and the means chosen to give effect to that purpose.

[73] The impugned provisions of the Muthambi policy state that:

> "5.1.2(A) In keeping with the objectives of ensuring universal access to broadcasting services in South Africa and protecting government investment in subsidised [set top box] market, [set top box] control system in the free-to-air [digital terrestrial television] will be non-mandatory.
>
> 5.1.2(B) The [set top box] control system for the free-to-air [digital terrestrial television] [set top boxes] shall—
>
> (a) not have capabilities to encrypt broadcast signals for the subsidised [set top boxes]; and
>
> (b) be used to protect government investment in subsidised [set top box] 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."

[74] The ordinary meaning of these provisions is that:

(a) Government-supplied set top boxes will all have a control system.

(b) Those set top boxes will not have decryption capabilities.

(c) Free-to-air broadcasters will be at liberty to encrypt their signals but at their own expense.

(d) Commercial set top boxes would not be required to contain a control system.

Did the Minister misunderstand her policy?

[75] e.tv submits that the Minister misunderstood the effect of her encryption amendment. This it says is manifest from her conflicting statements at times suggesting that decryption capabilities are not to be built into government-supplied set top boxes and at times that it would be permissible. And that the latter would be achieved by e.tv investing in technologies and software compatible with government-supplied set top boxes.

[76] The impugned clauses of the policy are self-standing and must be interpreted within the context of the generic policy decision. What e.tv is doing, in relation to the so-called confusion or misunderstanding point, is to interpret not the policy as such, but averments made by the Director General and the Minister in their affidavits with little regard for the language of the impugned provisions themselves. The duty of this Court is to test the alleged irrationality of the policy primarily on the basis of the text itself but not on the clarificatory statements of the Minister or Director General.[27]

[77] The attempt to ground a challenge to the substantive rationality of the impugned provisions of the policy, largely on statements deposed to, is not legally sustainable and must therefore fail. In any event, the statements still do not sustain e.tv's contention that the Minister is confused. Anchored on the policy, they broadly present a coherent and legally sustainable policy position.

[27] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 89.

Absence of rational connection

[78] The contention that the policy is not rationally connected to the purpose for which it was made,[28] is based not only on the contents of the policy itself but primarily on the Minister's affidavit. Whether an affidavit may permissibly be relied on as the major interpretative tool still strikes one as an inappropriate approach. Be that as it may, the argument is that based on the Minister's affidavit, the purpose she seeks to achieve through the policy decision was not to prevent decryption. It was to save costs while at the same time enabling broadcasters to decide freely whether to encrypt and decrypt their digital signals at their own expense. The disconnect between the means and the purpose is said to be that whereas government would indeed save money as intended, the exclusion of decryption capabilities from the government-subsidised set top boxes would not allow e.tv to decide to encrypt. This is said to be so, because it would not be a commercially viable proposition to encrypt signals unless the broadcasting digital migration policy requires set top boxes to have inbuilt decryption capabilities.

[79] The additional reason advanced is that unless its encrypted signals is able to reach those five million deserving households, e.tv's decision to encrypt would not only be financially suicidal but would also place it in breach of its licence conditions. Knowing its licence conditions e.tv previously argued quite strenuously for the exclusion of decryption capabilities. Now, it says that, to do so would constitute a breach of its licence conditions.

[80] Government wanted to save money while embarking on this already expensive but laudable exercise for the good of five million economically disadvantaged households. And this it would achieve through a policy that dumps decryption capabilities. This approach accords with the policy "direction" strongly advocated for by e.tv in its previous written views in response to Minister Matsepe-Casaburri's draft policy that is contrary to the views it subsequently expressed in support of

[28] See *Motau* above n 24, *Albutt* above n 7; and *Democratic Alliance* above n 23.

Minister Carrim's proposals. The policy's purpose is not and would never have been to ruin or promote e.tv's commercial interests. It is not centred around individual players in the broadcasting industry. It is preoccupied with the interests of the financially under-resourced households. The purpose of the policy for this specific aspect of the overall government objective[29] was to relieve government of the exorbitant costs that would be necessitated by the inclusion of decryption capabilities. And it would succeed to do so, if the policy were implemented.

[81] Equally important is the freedom or opportunity it affords free-to-air broadcasters, who consider it to be a commercially viable proposition, to encrypt their signals provided they bear the costs for the decryption technologies. Nobody says that broadcasting digital migration is not feasible without the encryption of signals. On the contrary e.tv previously made a strong case to the effect that signal encryption is not necessary for purposes of migration. Now only e.tv, of all free-to-air broadcasters, wants to encrypt if only, to paraphrase e.tv's words, government can effectively subsidise its preferred business decision or strategy. This subsidy takes the form of government procuring set top boxes into which decrypting gadgets are incorporated. e.tv would then pay only for the signal-unscrambling device. This would spare it the costs of paying for its own set top box equivalent.

[82] Encryption is neither compulsory nor forbidden. It all depends on the depth of one's pocket and the commercial viability and soundness of signal encryption as an option. The cost implications of encrypting and decrypting one's broadcasting signals, ought to inform that decision. Needless to say, if the cost is too high to make business sense, it would then be foolhardy for any free-to-air broadcaster to encrypt signals. Government has taken a policy-decision that accords with the position of all other broadcasters. That policy dumps decryption capabilities and is cost effective. It effectively amounts to a ringing rejection of e.tv's preferred policy "direction". And e.tv effectively says that the policy is irrational.

[29] *Van der Merwe v Road Accident Fund* [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC) at para 33.

[83] In conclusion, the Ministry solicited views on the Broadcasting Digital Migration Policy. Finally, it made a policy-decision that would lead to set top boxes being given by government to five million under-privileged households. The need to save the taxpayers' money was identified. To achieve that goal, the Ministry chose not to factor decryption capabilities into set top boxes. e.tv in effect accepts that dumping decryption capabilities is a legitimate and effective cost-saving measure or strategy. It however contends that there is another and possibly more appropriate means of achieving the same purpose. And that it would have presented that other choice to the Ministry had it been consulted by Minister Muthambi before she finalised the policy. e.tv is asking this Court to endorse its apparently more inclusive and better means so that the Ministry may consider it for adoption.

[84] But that is exactly what *Albutt* cautions against. The enquiry is whether there is a rational connection between the means and the purpose. Since the answer is yes, and e.tv together with nine other television licencees were consulted, judicial intrusion is constitutionally impermissible. It is not for interested persons or courts to determine the means but for the Executive. And it is for the Executive to chop and change the means as many times as they wish to achieve the same objective, provided they do so within the bounds of the Constitution and the law. They may even change it in a way that accommodates e.tv's proposals at any time before or after the delivery of this judgment. That is their judgement call, not the courts'.

[85] What courts must always caution themselves against is the temptation to impose their preferences or what they consider to be the best means available, on the other arms of the State. Separation of powers forbids that. Again we say, that rationality is not a master key that opens all doors, anytime, anyhow and judicial encroachment is

permissible only where it is necessary and unavoidable to do so.[30] This is not such a case.

[86] Therefore the substantive rationality challenge fails on both grounds.

Costs

[87] e.tv, SOS and MMA should, but for *Biowatch*,[31] pay costs to all applicants on the basis that costs ordinarily follow the result. They however lose, not because their challenge to the policy is necessarily frivolous or vexatious but, because they seek to vindicate the rule of law and the principle of legality. Theirs was a case with some prospects of success, however thin. And *Biowatch*[32] requires that each party to such constitutional litigation is in these circumstances to pay its own costs. They are however to pay costs to the M-Net in all courts.

Order

[88] In the result the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and replaced with:
   "1. The appeal is dismissed; and
   2. e.tv (Pty) Limited, SOS Support Public Broadcasting Coalition and Media Monitoring Africa are to pay the Electronic Media Network Limited's costs, including costs of two counsel."
4. e.tv (Pty) Limited, SOS Support Public Broadcasting Coalition and Media Monitoring Africa are to pay costs of the Electronic Media Network Limited in this Court, including costs of two counsel.

[30] *Doctors for Life* above n 5 at paras 37-8; *Glenister v President of the Republic of South Africa* [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) at para 19; and *Economic Freedom Fighters* above n 6 at paras 92-3.

[31] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*) at para 43.

[32] Id.

CAMERON J AND FRONEMAN J (Khampepe J and Pretorius AJ concurring):

[89] At issue is whether an amendment to the Broadcasting Digital Migration Policy the Minister of Communications (Minister) published on 18 March 2015 (Amendment) was validly issued in terms of section 3 of the Electronic Communications Act[33] (ECA). The vital part of the Amendment was that, in contrast to the original policy, it omitted decryption capability from plans to distribute five million subsidised set top boxes to the country's poorest five million households. The set top boxes will enable those households to receive the impending, new, digital television signal without having to junk their current television sets, which can receive only the old, analogue signal.

[90] We don't need to understand the rights and wrongs of encryption. All we need know, for now, is that e.tv wants it, for self-interested commercial reasons – and that, for comparable reasons, the Electronic Media Network (M-Net) and the South African Broadcasting Corporation SOC Limited (SABC) oppose it. This is because, they contended, it would increase the cost of the service, which would amount to subsidising commercial broadcasters. e.tv is supported by two non-governmental organisations, SOS Support Public Broadcasting Coalition and Media Monitoring Africa, whose disinterested public-interest commitment to supporting encryption has never been questioned. M-Net, the Minister and the SABC opposed e.tv's review of the Minister's omission of decryption from the new policy. The Supreme Court of Appeal upheld e.tv's challenge. That decision is now before us.

[91] We have had the benefit of reading the judgment of Mogoeng CJ, for whose exposition of the facts and issues we are grateful (first judgment). We do not agree that the appeal should succeed and the order of the Supreme Court of Appeal be reversed. Specifically, we do not agree that the amendment is immunised from scrutiny by the

[33] 36 of 2005.

doctrine of separation of powers or any doctrine of Executive decision-making. It was a decision purportedly taken under a statute that empowered it. And it had to comply with the requirements of that statute and of the Constitution. In our view, though for reasons that differ from those the Supreme Court of Appeal gave, the Amendment was unlawfully issued, in breach of the Minister's constitutional and statutory obligations. For the reasons set out here, that Court was right to set it aside.

[92] Our reasons draw on the constitutional and statutory framework whose powers the Minister purported to invoke. They also draw on, first, the role of rationality in policy-making by the Executive as an indispensable part of a constitutional democracy based on participatory democracy and, second, on a simple application of rationality in process that provides grounds for vitiating the Minister's decision here.

The constitutional and statutory framework that bound the Minister

[93] Where do we start? With the Constitution, of course. We do not consider it helpful to characterise the issue this case presents as one trenching on the separation of powers. No one disputes that the Minister has the constitutional and statutory authority to make policy under section 3(1) of the ECA. The courts do not have constitutional or statutory policy-making authority and no-one has suggested otherwise.

[94] What the courts do have under the Constitution is the judicial authority and duty to determine the constitutional and legal constraints that govern the making of policy by the Executive. Part of those constraints lie in the principle of legality, an aspect of the rule of law. That, too, no one disputes. A logical and necessary component of the rule of law and the principle of legality is that the exercise of public power may not be irrational. Another aspect by now trite, that no one disputes.

[95] So, when courts apply the test of rationality, both in process and substance, they are not intruding on the Executive's authority to make policy. The test of rationality does not ask whether the policy is substantively good or bad – only whether the reasons

given for the making of the policy, and the means used to arrive at the policy, are rationally connected to the end sought.

[96] But it is necessary to spell out more clearly, for this case, that the rationality we talk about must be determined in the context of our own brand of constitutional democracy. And that brand is one of participatory democracy, designed to ensure accountability, responsiveness and openness.[34] In *Doctors for Life* decision this Court stated:

> "[Public participation] strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character, it acts as a counterweight to secret lobbying and influence-peddling."[35]

[97] So, when one determines whether consultation as a prerequisite to the determination of policy by the Executive has been complied with, one must ascertain whether the consultation has been done in a manner that rationally connects the consultation with the constitutional purpose of accountability, responsiveness and openness. No superimposed judicial stratagem of undermining separation of powers is at work here. To the contrary, rationality in process and substance is umbilically linked to the pulse-beat of our constitutional democracy, one based on accountability, responsiveness and openness.

[98] Hence, if accountability, responsiveness and openness are fundamental to our Constitution, then a consultation process that lacks those attributes needs to be explained. Where there is no explanation there is no reason, and where there is no reason there is arbitrariness and irrationality. Neither rocket science nor judicial conspiracy are needed to understand the simplicity, logic and, yes, moral suasion of it. We see below how applying these precepts in practice should upend what happened here.

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[34] Section 1(d) of the Constitution.

[35] *Doctors for Life* above n 5 at para 115.

[99] For at the heart of this case is how government may exercise its power to regulate broadcasting. The Constitution shows us how. It does so very beautifully. It posits specific values for regulating broadcasting. And it invests so much importance in those values that it houses them in Chapter Nine, which sets up independent state institutions[36] supporting democracy.[37] After creating the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission, the Chapter sets up an independent authority to regulate broadcasting. Section 192 provides:

> "National legislation must 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."[38]

[100] What work does this provision do for our constitutional democracy? Is it a once off instruction, simply telling Parliament to pass a piece of legislation? And once Parliament has passed the statute, is the provision expended, its work done? Does it then become a relic of constitutional history with "very little, if anything, to do with the Minister's exercise of her policy-making powers"?[39] No. Definitely not. The provision does far more. It remains alive, an operative part of a living Constitution. It perches atop a potent premise – that there is a general constitutional duty to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.

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[36] Section 181(1)(a)-(f).

[37] Section 181(2) provides that Chapter Nine institutions—

> "are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice."

[38] It may be an anomaly resulting from late inclusion during the drafting process that the authority section 192 requires Parliament to create is not listed together with the other six Chapter Nine institutions in section 181(1). See Delaney "The Constitutional Fate of ICASA in a Converged Sector" (2009) 25 *SAJHR* 152.

[39] See [70].

[101] The Constitution uses a practical mechanism to give effect to these values. Section 192 requires that national legislation be passed to establish an independent authority to regulate broadcasting. The purpose of the legislation is not merely to endow the authority with a mandate to regulate broadcasting in the way the Constitution requires. It is to give institutional embodiment to a vivid constitutional notion – a commitment to regulating broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.

[102] And this is exactly how Parliament understood its constitutional mandate when it enacted the Independent Communication Authority of South Africa Act[40] (ICASA Act) and the ECA. It locked the two statutes together. The ECA doesn't stand alone on a statutory island, isolated from the ICASA Act and from section 192. The two statutes lie entwined in a friendly, mutually inter-locking constitutional embrace, their provisions and purposes closely interlinked.

[103] They must be. Both owe their origin to section 192. And both seek, rightly, to fulfil its values. Thus, one of the express objects of the ECA is (subject to its provisions) to "promote, facilitate and harmonise the achievement of the objects of" the ICASA Act.[41] The object of the ICASA Act, in turn, is "to establish an independent authority", which it charges with a fourfold task.[42] This is "to regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society, as required by section 192 of the Constitution."[43] It is also to "regulate

[40] 13 of 2000.

[41] Section 2(o) of the ECA reads:

> "The primary object of this Act is to provide for the regulation of electronic communications in the Republic in the public interest and for that purpose to–
>
> . . .
>
> (o) subject to the provisions of this Act, promote, facilitate and harmonise the achievement of the objects of the related legislation."

The ECA defines "related legislation" as meaning the Broadcasting Act 4 of 1999, the ICASA Act and any regulations, guidelines and determinations made in terms of that legislation and not specifically repealed by the ECA.

[42] Section 2 of the ICASA Act.

[43] Section 2(a) of the ICASA Act.

electronic communications in the public interest"[44] as well as to regulate postal matters in the public interest.[45] And, the ICASA Act provides that ICASA's objects themselves include to "achieve the objects" of the ECA.[46]

[104] On top of this, the ECA expressly provides that the policies the Minister makes under it must be "consistent with the objects of" the ECA and the ICASA Act.[47] The Minister, of course, makes policies consistent with the ICASA Act only if her policies are true to the objects of that statute, which are drenched in the values section 192 spells out.

[105] And both statutes require, as a founding aspect of the constitutional order of which they form part, not only that decision-making under them must be rational, but that the processes by which decisions are reached are themselves rational. Rationality and process-rationality are not super-statutory add-ons. They are a fundamental prescription of the ECA itself, and not a loose-standing, super-imposed constitutional requirement. They are indeed an integral part of every decision-making process that any statute licenses.

[106] Let us pause for a moment to feel the force of this. The Minister is responsible for implementing the ECA. That statute's primary object is to provide for the regulation of electronic communications in the Republic "in the public interest".[48] The first-stated object of the ICASA Act is, in turn, to regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society, *as required by section 192 of the Constitution.*

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[44] Section 2(b) of the ICASA Act.

[45] Section 2(bA) of the ICASA Act requires the independent authority the statute establishes to "regulate postal matters in terms of the Postal Services Act".

[46] Section 2(c) of the ICASA Act provides that the object of the Act is to establish an independent authority which is to "achieve the objects contemplated in the underlying statutes".

The ICASA Act defines "underlying statutes" to mean the Broadcasting Act 4 of 1999, the Postal Services Act 124 of 1998 *and the ECA*.

[47] Section 3(1) of the ECA Act.

[48] Section 2 of the ECA.

[107] So, when the Minister makes policy under the ECA, she, too, does not stand alone on a statutory island. Not remotely. Her policy-making powers under the ECA are closely hemmed in by, enmeshed with and defined by not only the objects of the ICASA Act but by the constitutional values that underlie both statutes – including the fundamental constitutional requirement that all decision-making be rational. Indeed, how could the ECA possibly provide that ICASA – a constitutionally established body – "must consider policies made by the Minister" under the ECA,[49] unless the Minister, in formulating those policies, is bound to synchronise them constitutionally with ICASA's values and objects? How could the Minister make policy that must "be taken seriously by agencies and all other functionaries who needed guidance or direction on broadcasting digital migration"[50] if she could willy-nilly step outside the confines of the values and objects of those agencies that Parliament has prescribed?

[108] In hard-nosed practical terms, this interlocking statutory and constitutional web shows that the Minister wasn't ranging freely in a lofty Executive space where she was at large to formulate the policies she preferred. The statutes and the Constitution guided the Minister firmly when she purported to issue her Amendment. She was not free to disregard the constitutional imperative of regulating broadcasting in the public interest, and to ensure a diversity of views. Her Amendment not only had to be consistent with section 192. It also had to promote and facilitate convergence of telecommunications,[51] promote competition within the information, communications and technology (ICT) sector,[52] promote an environment of open, fair and non-discriminatory access to

[49] Section 3(4) of the ECA provides that ICASA in exercising its powers and performing its duties under both the ECA and the ICASA Act "must consider policies made by the Minister" in terms of section 3(1). The parallel provision in the ICASA Act is section 4(3A)(a).

[50] See [30].

[51] Section 2(a) of the ECA.

[52] Section 2(f), read with the definition of "ICT" in section 1 of the ECA.

broadcasting service[53] and promote the interests of consumers with regard to the price, quality and the variety of electronic communications services.[54]

[109] Most importantly, the Minister in making policy under section 3(1) had to promote the development of public, commercial and community broadcasting services which are responsive to the needs of the public.[55] And she had to "provide access to broadcasting signal distribution for broadcasting and encourage the development of multi-channel distribution systems in the broadcasting framework".[56]

[110] Can one discount all this on the basis that the Amendment constitutes the exercise of Executive authority under the Constitution or that scrutinising its patent missteps is an impermissible encroachment on the powers of the Executive, as the first judgment finds? Was the Minister making national policy as contemplated by the Constitution?[57] No. Not remotely. Section 85(2)(b) of the Constitution gives the President and the other members of the Cabinet power to exercise Executive authority "by developing and implementing national policy".[58] This is a grand and elevated pointer in the constitutional scheme. It is not a nuts and bolts provision that says

[53] Section 2(g) of the ECA.

[54] Section 2(n) of the ECA.

[55] Section 2(r) of the ECA.

[56] Section 2(x) of the ECA.

[57] See [26] to [30].

[58] Section 85 of the Constitution provides:

> "(1) The executive authority of the Republic is vested in the President.
>
> (2) The President exercises the executive authority, together with the other members of the Cabinet, by—
>
> (a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
>
> (b) developing and implementing national policy;
>
> (c) co-ordinating the functions of state departments and administrations;
>
> (d) preparing and initiating legislation; and
>
> (e) performing any other executive function provided for in the Constitution or in national legislation."

precisely *how* a particular policy must be developed in a specific statutory area. That the two statutes do.

[111] In delimiting the Minister's power to make policy, the ECA and the ICASA Act conform with section 85(2)(b). They give the Minister's constitutional policy-making power precision and content and boundaries and direction. They do not detract from the Executive's power. They regulate and define and delimit it, as is proper in a constitutional state subject to the rule of law. And her exercise of the power is subject to the courts' scrutiny, as is also proper in a constitutional state subject to the rule of law.

[112] Here we may contrast national policy-making in an everyday domestic area like the ICT sector with foreign policy. Foreign policy, this Court has said, "is essentially the function of the Executive".[59] And no piece of legislation regulates the Executive's power to determine foreign policy. By contrast, when a statute gives practical definition to a Minister's constitutional power to make national policy, as these two statutes do, it means that Parliament has exercised the legislative authority the Constitution confers on it.[60] Unless the statute is constitutionally invalid, it is a mistake to invoke the general constitutional power, and to treat it as hallowed, while ignoring its particular statutory embodiment.[61]

[113] The Minister's power to make policy isn't given practical realisation upstairs, in the heady heights of section 85(2)(b). That is done down here, in the gritty working mechanisms of the ECA and the ICASA Act. And the Legislature, exercising its

[59] *Kaunda v President of the Republic of South Africa* [2004] ZACC 5; 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC) at para 77.

[60] Section 43 of the Constitution provides that, in the Republic, the legislative authority of the national sphere of government is vested in Parliament. Section 55 provides for the exercise by the National Assembly of its legislative power.

[61] This chimes with the principle of subsidiarity in invoking a right in the Bill of Rights. It is well established that a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right. See *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31; 2016 (1) SA 132 (CC); 2015 (12) BCLR 140 (CC) at paras 44-66 (minority judgment) and paras 122, 159 and 181 (majority judgment).

constitutional authority, hemmed in the Minister's policy-making power. It provided that, in exercising that power under section 3(1) of the ECA, she must make policy that is "consistent with the objects of [the ECA] and of the [ICASA Act]". The Minister has not challenged these provisions. Rightly so. She is bound by them.

[114] Two details from section 3 of the ECA illuminate this. Making policies under section 3(1) is reserved exclusively for the Minister: the statute does not require her to consult Cabinet. This contrasts with the Minister's power under section 3(1A) to issue certain policy directions – that she may do only "after having obtained Cabinet approval".[62] Both provisions shelter comfortably under section 85(2)(b) – the one requiring Cabinet approval, the other eschewing it.

[115] The pure section 85(2)(b) national policy-making power is distinctive from both. For that is entrusted to the President "*together with* the other members of the Cabinet". Section 85(2)(b) contemplates primarily joint ("together") Executive policy-making in the national sphere. It is through statutes that the national Executive's general policy making power is particularised, informed and delimited – and conferred on Ministers. Exactly as the ECA and the ICASA Act do here.

[116] The detailed provisions of section 3(1) bear this out. The section 3(1) policy-making power is designed to give effect to the provisions of the ECA and the ICASA Act (and the other "related legislation") – more especially the objects of these statutes (which in turn aim to give effect to section 192 of the Constitution). It is a statutorily precise power that derives, but is not immunised, from scrutiny by section 85(2)(b) of the Constitution.

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[62] Section 3(1A) of the ECA provides:

> "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 in terms of Chapter 3."

[117] It is true that section 3(1) empowers the Minister to "make policies on matters of national policy applicable to the ICT sector". But the verbal echo of the Constitution's phrase "national policy" doesn't mean that in doing so the Minister bestrides the lofty spaces of section 85(2)(b), unencumbered by the statute, and that she can therefore claim immunity from scrutiny.[63] She must stay downstairs, implementing the statute, in accord with the injunctions of section 192 and the prescripts of the ECA and the ICASA Act.

[118] So we must conclude that the Minister in exercising her power under section 3(1) of the ECA to "make policies on matters of national policy applicable to the ICT sector" was exercising a statutory power, informed by constitutional values and deriving from high constitutional authority, but not protected from scrutiny by any lofty constitutional policy-making immunity.[64] This makes it hard to see how insisting that the Minister act in accordance with statutory prescripts binding on her – the constitutionality of which has not been challenged – can be impermissible judicial intrusion on Executive powers. To the contrary, this is a classic example of where "courts are not only entitled but are obliged to intervene".[65] The Minister's disregard of her constitutional and statutory obligations was patent.

Irrationality in substance and in process

[119] What legal controls govern the Minister's exercise of her section 3(1) policy-making power? We know she is bound by the statute and the prescripts of section 192. If she ignores any of the procedural requirements of section 3, her policy will be void for non-compliance with the statute. But if she commits no procedural misstep, does the Promotion of Administrative Justice Act[66] (PAJA) apply to check her

[63] See [27].

[64] See [26] to [30].

[65] *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) at para 183.

[66] 3 of 2000.

policy-making? The Supreme Court of Appeal, finding a procedural misstep, considered it unnecessary to decide this; and before us none of the parties claimed that PAJA applied. That may well be correct, for, in general, making policy does not constitute administrative action.[67] But we find it unnecessary to decide this. For even assuming PAJA doesn't apply, that does not mean section 3 leaves the Minister free to make policy without legal or constitutional constraint.

[120] In the courts below, the Minister accepted this. She conceded that her Amendment was subject to review under the principle of legality. When the matter came before this Court, she abandoned that stance. Now, for the first time, the Minister submitted, far-goingly, that her decision is "not subject to judicial review". This she said was because the policy does not in itself have any effect "and may never do so". It would have legal effect only if the Universal Service and Access Agency of South Africa (USAASA) decides to implement it.

[121] The ECA establishes USAASA as a state-owned entity of government.[68] The Minister herself appoints its board.[69] The ECA provides that it "must consider policies made by the Minister" under section 3(1).[70] And it "must" exercise its powers "in accordance with any policy direction issued by the Minister"[71] under section 3(2). The Fund USAASA controls, the Universal Service and Access Fund – the very Fund that government will use to fund the manufacture and distribution of the set top boxes at issue here – "must be administered by [USAASA] subject to the control and in accordance with the instructions of the Minister".[72] This is the body the Minister contends stands at first base to give her Amendment its first flush of legal effect – not

[67] The definition of administrative action in PAJA expressly excludes the section 85(2)(b) national policy-making function.

[68] Sections 80-91 of the ECA.

[69] Section 80 of the ECA.

[70] Section 3(4) of the ECA.

[71] Section 81(1) of the ECA.

[72] Section 87(4) of the ECA.

a moment before. "Must be administered." "Subject to the control and in accordance with the" Minister's instructions.

[122] These provisions make it idle to try to paint the Minister as issuing legally inconsequential advice to USAASA which it is free to adopt or ignore. USAASA is plainly bound by the Minister's instructions. This means the Minister's contentions about the legal impact of her Amendment are wrong. There can be no doubt that her decision to issue the Amendment hit the real world with a perceptible thud. It had a legally cognisable effect – even if only in obliging ICASA and USAASA to take account of it.[73] And then there's the Minister's direct, hands-on control over USAASA's Fund. Only in a world of legal fancy could it be imagined that her Amendment had no inherent effect. And, what's more, review under the principle of legality does not require, as PAJA does, that the decision has direct, external, legal effect for it to be reviewable.

[123] It follows that the Minister in issuing the Amendment was subject to legality scrutiny. In issuing policies she must act rationally. The principle of legality, which underlies our constitutional order, requires it. All exercises of public power must be "capable of being analysed and justified rationally".[74] Khampepe J recently emphasised that "review for rationality is about testing whether there is a sufficient connection between the means chosen and the objective sought to be achieved".[75] She summarised the position on behalf of the Court thus:

> "The principle of legality requires that every exercise of public power, including every executive act, be rational. For an exercise of public power to meet this standard, it must be rationally related to the purpose for which the power was given. It is also well

[73] Section 3(4) of the ECA.

[74] *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 84.

[75] *Motau* above n 24 at fn 101.

> established that the test for rationality is objective and is distinct from that of reasonableness."[76]

[124] But, more even, how the Minister works out her policy must be also rational. This is a principle of lawfulness itself that underlies her every exercise of her powers under the ECA. She cannot attain rationality in outcome if the means she employs to get there is irrational. This means that the process she follows in formulating policy must be rationally connected to the purpose for which the power to issue policy is conferred. The question this Court stated in *Democratic Alliance* is "whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality".[77]

[125] The Court went on to explain that, if in a particular case there is a failure to take into account relevant material, that failure would constitute "part of the means to achieve the purpose for which the power was conferred".[78] And if that failure had an impact on the rationality of the entire process, "then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole":

> "There is therefore a three-stage enquiry to be made when a court is faced with an executive decision where certain factors were ignored. The first is whether the factors ignored are relevant; the second requires us to consider whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and the third, which arises only if the answer to the second stage of the enquiry is negative, is whether ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational."[79]

[76] Id at para 69.

[77] *Democratic Alliance* above n 23 at para 37.

[78] Id at para 39.

[79] Id.

[126] That is what happened here. The Minister adopted an irrational means of formulating the Amendment. The steps she took were not rationally related to her end in formulating the Amendment. And two unexplained aspects of her conduct underscore the conclusion that she acted irrationally. We now see why.

What happened here?

[127] The first judgment notes that the Minister's purpose in promulgating the Amendment was not to prevent decryption – it "was to save costs":[80] "Government wanted to save money while embarking on this already expensive but laudable exercise"[81] of bringing set top boxes to those who could least afford it. "And this it would achieve through a policy that dumps decryption capabilities".[82]

[128] This analysis is correct. The evidence shows that cost was pivotal to the decision to dump decryption by promulgating the Amendment. But how that happened shows a critical failure of rational policy-making. The Minister sought to save costs by dumping decryption – but costs were already to be saved via the proposal of the then Minister, Minister Carrim – and no further costs were to be saved by the Amendment. This was because e.tv was willing to fund the cost differential of including decryption. It supported Minister Carrim's proposed amendments requiring that it and other broadcasters eventually foot the bill, while government funds the costs upfront.

[129] But why should government even pay those costs upfront? Good question. That would entail an outlay of public funding for the benefit of commercial broadcasters who would use the decryption capability. The question should have been put to e.tv. e.tv was willing to pay the upfront costs – thereby insulating government from any additional outlay of public funds, at any stage. But the Minister was uncertain of the

[80] See [78].

[81] See [80].

[82] Id.

extent to which e.tv would cover the costs. Instead of asking e.tv, the Minister decided to dump decryption – to save costs. That was irrational process of the highest order.

[130] The first judgment holds that—

> "e.tv could, knowing the strong views held by all other broadcasters and in response to the Carrim policy draft, have proposed that costs, to be paid by free-to-air broadcasters who would prefer to encrypt and therefore use the inbuilt decryption capabilities, be paid in advance."[83]

That is true. Why did e.tv not do so? The reason is telling. It didn't have to *because it was invited to make submissions on the funding model proposed by Minister Carrim* – not to propose its own model. And that is precisely the point. The Minister did not have the information that was critical to make her decision rational – that is whether e.tv was prepared to cover the costs in advance. This after e.tv had already made it clear that the costs could be recovered from it. For it was only if e.tv was not prepared to cover the costs in advance that the Minister could rationally conclude that dumping decryption would in fact save government costs (in the form of immediately required funding). Instead, irrationally, she decided to save costs by dumping decryption without knowledge or consultation: decryption that Minister Carrim had unimpeachably concluded was necessary to advance the objects of the ICASA Act.

[131] The details show why the Minister's decision was irrational.

[132] The question of encryption versus non-encryption, and the excess cost of adding decryption, was a central issue from 2013. In that year, Minister Carrim stated that government was adverse to "subscription broadcasters unfairly benefiting from the [set top box] Control System" by government paying the additional costs of adding decryption capability to set top boxes. Minister Carrim proposed to amend the policy so that "[g]overnment's investment in the [set top box] Control System will be

[83] See [46].

recovered from those subscription broadcasters that choose to make use of the [set top box] Control system".[84] In other words, government would foot the decryption costs upfront, but would afterwards bill the broadcasters who would benefit.

[133] Why was the government prepared at all to advance the decryption costs upfront though later reclaiming them? One factor Minister Carrim spelled out was the need to "[r]educe the extent of monopolisation and encourage competition by creating space for new players in the pay television market without them unfairly benefiting from the Government subsidy".[85] In other words, to do so would encourage competition – but not at government expense. Encouraging competition, as shown earlier, plainly accorded with both the letter and spirit of section 192 of the Constitution and the ECA.[86]

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[84] Paragraph 5.1.2.7(A) of Minister Carrim's proposal. Proposed Amendment of Broadcasting Digital Migration Policy (As Amended), GN 954 *GG* 37120, 6 December 2013. Minister Carrim's explanatory statement of 20 December 2013 spelled this out:

> "(i) The cost to the government of control will be about R20 per subsidised box.
>
> (ii) Broadcasters wanting to use the control system will have to pay the government. They will pay the other costs related to the control system."

[85] Minister Carrim explained in the explanatory statement:

> "In deciding on government policy, we took the following criteria into account:
>
> (i) The need to begin implementing the migration as soon as possible, given that South Africa is five years behind schedule, the ITU June 2015 deadline looms and there is an urgent need to release radio frequency spectrum.
>
> (ii) Ensure that the Government subsidy is used productively.
>
> (iii) Stimulate the local electronics industry and create jobs.
>
> (iv) Benefit emerging entrepreneurs.
>
> (v) Reduce prospects of the South African market being flooded by cheap [set top boxes] that are not fully functional.
>
> (vi) Best serve the viewers' needs.
>
> (vii) Protect the interests of the SABC against commercial broadcasters.
>
> (viii) Be sensitive to rapid changes in the broadcasting and ICT sector as a whole.
>
> (ix) Recognise the increasing use of mobile phones, rather than televisions, for Internet and other services.
>
> (x) Reduce the extent of monopolisation and encourage competition by creating space for new players in the pay television market without them unfairly benefitting from the Government subsidy.
>
> (xi) Recognise the majority of the broadcasters are opposed to a control system.
>
> (xii) Reduce the prospects of the possibility of more challenging legal action from broadcasters and entrepreneurs that would hold-up the migration process."

[86] Section 2(f) of the ECA.

[134] e.tv in response commended government's decision. In its submission of 5 January 2014 to Minister Carrim's proposed amendments, it explained that indeed the decryption costs would be borne by the manufacturer and the broadcasters. Just what e.tv said becomes important later, since the Minister said it was unclear. Here's what e.tv said:

> "The cost of encryption is not a barrier to implementation of the 'smart' free-to-air [digital terrestrial television] platform. Since a low-cost encryption system would be used, it does not add significant additional cost to the [set top boxes]. The additional cost to the [set top boxes] would be a once-off encryption royalty of under $2 per [set top box], which is payable by the manufacturer. (This royalty is substantially less than the costs of making the [set top box] MPEG 4 and HO). All other costs are carried by the free-to-air broadcasters who choose to use the encryption system – the initial capital set-up costs (including capex), the [set top box] activation costs, and the operational and maintenance costs are minimal and constitute a negligible investment for the broadcasters choosing to encrypt their signals."

[135] This submission proceeds on the premise that government will fund the upfront cost differential of adding decryption (because government would have to pay the manufacturer, who would have to pay the "once-off encryption royalty"). e.tv also confirmed that it would definitely use the decryption capabilities – meaning it was prepared to stump up the costs.[87]

[136] These events following Minister Carrim's proposal evidence a clear understanding that government would include decryption capabilities in the subsidised set top boxes and that e.tv – whether alone or not – planned to use decryption and pay government back for its upfront outlay.

[87] It said it will be "making use of the [set top box] Control system to encrypt its [digital terrestrial television] channels irrespective of whether other free-to-air channels choose to do so".

[137] Then Minister Muthambi took over. In May 2014, she succeeded Minister Carrim. On 6 November 2014, she indicated that she needed to undertake extensive consultations on decryption with various stakeholders. These were not named, but included other government departments. This was because, she said, "the issue of Control Access or No Control Access will have a wide-ranging impact on the future of broadcasting, communications and on the majority of citizens in this country".

[138] The Minister did not explain why she considered the submissions already received through the formal, statutorily mandated process inadequate. Nor did she indicate that she considered further consultation necessary because of any major change to the existing policy or the draft amendments her predecessor promulgated.

[139] On 4 March 2015, Cabinet approved the Broadcasting Digital Migration Amendment Policy.[88] This included a control system in the set top boxes – but Minister Muthambi's department on 8 March 2015 for the first time indicated that the "control system" excluded "an encryption of the signal to control access to content by viewers".[89] And the Amendment, which Minister Muthambi published on 18 March 2015, provided that encryption "will be non-mandatory".[90] For the first time, the policy specified through the Amendment that the set top box control system shall "not have capabilities to encrypt broadcast signals for the subsidised [set top boxes]".[91] Instead, individual broadcasters could "at their own cost" decide on encryption of content. The effect of this was that state-subsidised set top boxes would be specifically precluded from being manufactured with decryption capabilities.[92]

[88] Released on 5 March 2015.

[89] The Department's statement welcomed "the Broadcasting Digital Migration Amendment Policy with the inclusion of the control system in the Set Top Box".

[90] Paragraph 5.1.2(A) of the Amendment.

[91] Paragraph 5.1.2(B) of the Amendment.

[92] All the parties understood this to be the effect of the Amendment, though the Minister's answering affidavit appears to display some confusion about this. That forms a separate basis on which e.tv seeks to review her decision – which in view of our conclusion is not necessary to consider here.

[140] e.tv wrote to the Minister. It asked her for reasons for the Amendment – particularly for excluding decryption. The Minister responded that this was a Cabinet decision and e.tv was not entitled to reasons.

[141] But the reasons finally emerged. They did, in this litigation. Minister Muthambi filed an affidavit in the High Court. It was deposed to on her behalf by the Acting Director-General of her Department, Mr Norman Ndivhuho Munzhelele. The deposition explained why the Minister dumped decryption.

[142] In its founding affidavit, e.tv alleged that the Minister's sole justification for the Amendment was that she sought to "clarify" that "government will not pay for encryption". Minister Muthambi did not deny this. She explained that the Amendment entailed "no encryption at government's expense". This was, amongst other reasons, because "the software for encryption is significantly expensive and would result in substantial additional costs for government". Decryption, the Minister warned, "also requires subscriber management, which would place an additional cost on government – in terms of financial and human resources."[93] "Significant costs and resources that are required to do so", the Minister's affidavit concluded, "are the main reason for not providing encryption capabilities". Summing up government's position, the Minister's affidavit explained:

> "It is not the policy of government to incur costs to ensure that the [free-to-air] broadcaster that chooses to encrypt must, effectively, be subsidised by government from the public purse to facilitate competition."

[143] The Minister went further. She accused e.tv of wanting "government to incur further public spending to facilitate encryption of broadcasts". This made it clear that

[93] The Minister's affidavit proceeds:

> "In order to honour the right of [free-to-air] broadcasters to decide for themselves whether they would wish to encrypt their broadcasts, the [Broadcasting Digital Migration] Policy leaves the choice to do so to [free-to-air] broadcasters, but at their expense. These include privately owned and funded [free-to-air] broadcasters, as well as the public broadcaster, the SABC."

government was resiling from Minister Carrim's position that it was willing to pay the added decryption costs upfront, though raking them back later. Government now, Minister Muthambi explained, was not prepared to stake any capital, at any stage, on decryption:

> "[G]overnment has no responsibility to spend public money in order to improve the position of [free-to-air] broadcasters from their current position to a better position post digital migration."

And:

> "As far as the government is concerned, the reason why the government refuses to pay the costs of encryption is simply a question of costs and the manner in which the government has prioritised its spending of taxpayers' money."

[144] In its replying affidavit, e.tv reiterated that it was prepared to cover the additional costs – and was in fact in negotiation with a supplier who would install the decrypting capabilities in the subsidised set top boxes, at e.tv's cost:

> "Indeed, e.tv's present position is that . . . subject to the successful conclusion of negotiations with Nagravision . . . . It is prepared . . . to pay for the additional encryption-related costs identified by the Minister in her answering affidavit."[94]

[94] e.tv added that it was—

> "already at an advanced stage of its negotiations with Nagravision. Nagravision is an international company that specialises in providing encryption systems and software. It already provides, for example, the encryption system and software to be used by Sentech to encrypt the broadcast signals transmitted by satellite on a free-to-air basis to areas of the country which will not be able to receive terrestrial broadcasts once digital migration occurs. These encrypted broadcasts signals are also already fed by Sentech to the [digital terrestrial television] transmitters. The main costs in relation to encryption concerns the software license cost, which is charged on a per [set top box] basis. The SABC suggest, for example, in its answering affidavit that a figure of $2 per [set top box] is charged - meaning a total of R100 million for the five million boxes. The computation of and the precise amount involved are the main issues in the ongoing negotiations between e.tv and Nagravision. This is so given that e.tv accepts that it will bear this cost by virtue of its decision to encrypt, in accordance with clause 5.1.2(C) of the Policy. (Obviously if other broadcasters in due course wished to encrypt, e.tv and those broadcasters would have to share the costs concerned)."

[145] By now the extent of the misunderstanding – if we are to accept, in favour of the Minister, that what happened was a misunderstanding – had become plain. The impact of the Amendment was that e.tv would not be able to spend its own money on including decryption capabilities in the subsidised set top boxes. This was even though the Minister appreciated that the SABC, a public body, might in future also want to use these capabilities – in which case, the Minister's affidavit says, the SABC "shall take the necessary steps to finance that change of mind".

[146] But why did Minister Muthambi consider costs a wholly preclusionary factor – when e.tv had placed on record, before Minister Carrim, that it was willing to repay government any upfront costs it incurred? From the Minister's deposition, a two-fold answer emerges. First, the Minister – reversing Minister Carrim's stance – was now unwilling to expend any government capital, at all, at any stage, on decryption. Second, the Minister wasn't sure what e.tv meant when it said it would cover costs. The Minister's affidavit expressed uncertainty about the extent to which e.tv, or the manufacturer of the set top boxes, would in fact cover the costs. This emerges from the Minister's answering affidavit in response to paragraph 3.7 of e.tv's 2014 submission.[95] Her affidavit complained that in so far as e.tv there said that some of the costs are payable by the manufacturer—

> "it has not told anyone the terms thereof and whether such terms are terms which the government should accept insofar as the government subsidised [set top boxes] are concerned."

[147] This evinces a gross defect in the Minister's process. The Minister expresses mystification regarding "the terms" on which costs are payable – and about whether government should accept them. This was a critical element of the consultation process that took place under Minister Carrim. Yet the Minister took no step to clarify her uncertainty.

[95] See [134].

[148] If the Minister was concerned about cost to government, and if cost was the reason why the Amendment dumped decryption, why not find out from e.tv what exactly the position was? What would the manufacturer cover – and what would e.tv cover? e.tv's replying affidavit rightly called the failure to engage with it on this "specially startling"—

> "given that e.tv was the only broadcaster whose stated plans would be hindered by the amendments and that e.tv was the only broadcaster, who could indicate to the Minister whether it was prepared to pay for the additional costs in allowing encryption capability on the subsidised [set top boxes]."

[149] As this Court said in *Democratic Alliance*, the steps in the process followed by the Minister have to be "rationally related to the end sought to be achieved".[96] And, if they are not, the question is whether the absence of a connection between a particular step is "so unrelated to the end as to taint the whole process with irrationality".[97]

[150] Here, the Minister sought to save costs. But the objective she sought to attain was illusory, since e.tv had already tendered to cover costs. And, to the extent that its tender was unclear, rational pursuit of her objective of cost-saving by dumping decryption required her to clarify with e.tv what its tender entailed. The means she pursued to attain the end of cost-saving was so glaring – so irrationally unrelated to that end – that the whole process she adopted in promulgating the Amendment was tainted by irrationality. It must be set aside.

[151] We also do not see what difference it makes that Minister Muthambi picked up a process that her predecessor Minister Carrim initiated. The crucial point is that neither Minister invited consultation, nor obtained any views or submissions, on the crucial question of whether e.tv was prepared, in the event that government was not, to foot the costs upfront.

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[96] *Democratic Alliance* above n 23 at para 37.

[97] Id.

[152] Two further aspects of how the Minister went about her work underscore this conclusion. The Minister does not explain two strange aspects of her consultation process. The first is whether she consulted ICASA and USAASA, the "Authority" and "Agency" respectively, whom she needed to consult in terms of section 3(5) of the ECA.[98] The second is her failure to disclose who she consulted with after the formal consultation process was allegedly completed.

[153] Nowhere in her papers does the Minister state, as a fact with documented proof, that notice was given to ICASA and USAASA. The first judgment skirts this:

> "Though cited as parties to this litigation, they [ICASA and USAASA] have decided not to oppose the Minister's application to protect the policy from being set aside by reason of the alleged non-consultation or invalidity. It must thus be reasonably assumed on their behalf that they find nothing wrong with the policy-formulation process as it affects them, and even as regards compliance with the provisions of section 3(5) of the ECA."[99]

[154] Whether ICASA and USAASA are content with the Minister's policy formulation is not the issue. The issue is whether they have been consulted in terms of the ECA. And they do not state that they did receive notice. Nor does the Minister. No explanation, no reason: unreason, arbitrariness, irrationality.

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[98] Section 3(5) provides:

> "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 policy direction in the *Gazette*."

[99] See [41].

[155] Next is what happened after the Minister's alleged compliance with the statute's consultation requirements. The Minister admits that she went out and consulted other persons and entities, but not e.tv. She does not explain why she did so and she does not say who she consulted. The first judgment is rightly critical of this:

> "But this does not mean that a blind eye is to be turned to her concern-evoking evasive and 'suspicious' responses or lack thereof to pertinent questions raised by e.tv. For, we live in a constitutional democracy, whose foundational values include openness and accountability. It is thus inappropriate for the Minister to not have volunteered the identities of those she consulted with and what the consultation was about, as if she was not entitled to solicit enlightenment or did so in pursuit of an illegitimate agenda. This conduct must be frowned upon and discouraged."[100]

We agree wholeheartedly.

[156] But then the first judgment concludes:

> "It does not however constitute the necessary and unavoidable constitutional basis for judicial intrusion."[101]

With this we emphatically disagree.

[157] The Minister does not tell us why further consultation was necessary, nor who she consulted with. In this, she failed to adhere to fundamental constitutional values of accountability, responsiveness and openness. And for it she offers no explanation. She does not seek to explain why this is not an instance that opens the door to "secret lobbying and influence-peddling". No explanation, no reason: unreason, arbitrariness, irrationality.

[100] See [61].

[101] Id.

[158] These two instances, on their own, sufficiently demonstrate irrationality in the consultation process, contrary to the fundamental constitutional demands of accountability, responsiveness and openness. These factors have absolutely nothing to do with any assessment of the merits of e.tv's claims, nor that of any of the parties who made their views on the policy known. There is no intrusion on the merits of policy-making by the Minister.

[159] The same applies to a further consideration. The change in policy that the Minister envisaged was an amendment both of the original policy of Minister Matsepe-Casaburri and that envisaged by Minister Carrim. In terms of section 3(6) of the ECA the consultation provisions of section 3(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)". The Minister issued a policy under section 3(1) and not a policy direction under section 3(2). Despite some fancy distinguishing footwork in argument it seems clear that an amendment of a policy by the Minister had to comply, again, with the provisions of section 3(5). This did not happen.

[160] For these reasons, too, the appeal has no merit.

[161] Laying lawyers' language aside, the Minister seems to have missed an opportunity to facilitate provision of access to encrypted signals for the poor at no cost to government – while at the same time fulfilling the objects of the ECA by encouraging the development of multi-channel distribution systems. e.tv's grievance that the Minister did not consult it is not a lawyers' stratagem. Its argument seeks to import common-sense into the process of consultation. And the requirement of process rationality should ensure that common-sense prevails.

[162] And, finally, what do we make of e.tv's about-face?[102] One might venture that the burdensome task of public-policy formulation is not a television gameshow, in which contestants are trapped by and penalised for their own previous protestations. The very point of rational governance, and of consultation to enable it, is to allow and even encourage shifts and nuances of position on both sides. On an issue as important as encrypting set top boxes for South Africa's poorest television viewers, consultation required nothing less.

Order

[163] We would therefore grant leave to appeal, but dismiss the appeal, with costs, including the costs of two counsel.

JAFTA J:

[164] I have had the benefit of reading the judgments prepared by the Chief Justice (first judgment), Cameron J and Froneman J (second judgment). The first judgment reaches a different outcome from the second and third. While I agree with the outcome proposed in the first judgment, I am unable to support some of the reasoning furnished for it. I disagree with the second judgment and the remedy it proposes.

[165] The facts are comprehensively set out in the first judgment and as a result it is not necessary to repeat them here.

[166] As I see them, the issues raised in this appeal are whether the Minister of Communications (Minister) had authority to effect the impugned amendment to the policy and if she did, the further issue is whether the amendment was rational.

[102] See [14].

[167] The resolution of these issues requires us to interpret and apply to the facts, the relevant legislative provisions. These are the provisions of section 3 read with section 2 of the Electronic Communications Act (ECA).[103] Section 2 stipulates that the primary objects of this Act are to provide for the regulation of electronic communications in the public interest. To facilitate the realisation of this purpose, the section lists a number of objects which may be pursued. These include promoting the convergence of broadcasting and information technologies; ensuring the provision of broadcasting services by diverse persons or communities; promoting an environment of open, fair and non-discriminatory access to broadcasting services and encouraging investment, including strategic infrastructure investment in the communications sector.

[168] Section 3 empowers the Minister to make national policy applicable to the information, communications and technology sector. Apart from being consistent with the objects of the ECA, such policy must relate to, among others, the application of new technologies pertaining to broadcasting services.

[169] In addition, section 3(1A) and (2) authorises the Minister to issue a policy direction consistent with the objects of the ECA and national policies, in relation to a number of issues listed in these subsections. Section 3(3) limits the Minister's power to make policy or policy direction with regard to the granting, renewal, transfer, suspension or cancellation of a licence, to the extent permitted by the ECA. It is apparent from this provision that the Minister is allowed to make policy or policy direction in respect of operational matters which fall within the domain of the Independent Communications Authority of South Africa (ICASA), established in terms of the Independent Communications Authority of South Africa Act (ICASA Act).[104] Some of those operational matters may fall under the jurisdiction of the Universal Service and Access Agency of South Africa (USAASA).

[103] 36 of 2005.

[104] 13 of 2000.

[170] The authority to make policies which regulate ICASA's operational matters appears to be inconsistent with section 192 of the Constitution.[105] The Constitution requires Parliament to pass legislation establishing an independent authority to regulate broadcasting in the public interest. The ICASA Act is such legislation and ICASA is the authority mentioned in section 192. Ministerial policies on ICASA's operational matters like the granting of broadcasting licences would ordinarily be at odds with ICASA's independence.

[171] It is apparent from section 3(4) that Parliament was aware of this issue. The provision makes it plain that both ICASA and USAASA are not bound to follow policies or policy directions of the Minister when exercising their powers or performing their duties. Instead, these bodies are required to merely take such policies into consideration. In this way their independence is protected.

[172] Section 3(5) regulates the procedure which must be followed by the Minister when issuing a policy or granting a policy direction. It provides:

> "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 view of interested persons, publish the text of such policy direction by notice in the *Gazette*—
>
> (i) declaring his or her intention to issue the policy direction;
>
> (ii) inviting interested persons to submit written submissions in relation to the 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 direction in the *Gazette*."

[105] Section 192 provides:

> "National legislation must 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."

[173] A reading of section 3(5) reveals that it lays down three requirements, two of which must be met before the issuing of a policy. The first is that the Minister must consult ICASA or USAASA, as the case may be. The second is that she or he must obtain the views of interested parties on the proposed policy. To this end, the section requires the Minister to publish the text of the proposed policy in the Gazette. This publication must declare his or her intention to issue policy and invite interested persons to submit written submissions on the policy. The publication must afford the interested parties at least 30 days within which to submit written submissions and may also specify the form to be followed in lodging those submissions.

[174] The Minister is required to take those submissions into account when finalising the policy. The final version of the policy must also be published in the Gazette.

Lack of authority

[175] e.tv argued that the impugned amendment constituted a binding decision on ICASA by stipulating that:

> "The [set top box] control system for the free-to-air [digital terrestrial television] [set top boxes] shall . . . not have capabilities to encrypt broadcast signals for the subsidised [set top boxes]."

[176] It was submitted that by so doing the amendment impermissibly intruded into the terrain of ICASA, an independent authority established by the Constitution to regulate broadcasting. It was contended that the Minister's authority to make policy or amend it, does not cover the making of binding decisions on set top boxes control issues because those issues form part of the regulation of broadcasting which falls exclusively under the jurisdiction of ICASA.

[177] This argument proceeds from an incorrect assumption. It is assumed that ICASA was bound to implement the amendment that said the set top boxes shall not have capabilities to decrypt broadcast signals for the subsidised set top boxes. This premise

overlooks the express terms of section 3(4) which require both ICASA and USAASA to merely consider policies when exercising their powers or performing their duties. The obligation to consider does not mean that these entities must implement those policies. The obligation is that they should take the policies into account. It is left to these entities to choose, out of their own free will, to follow or implement the policies in question or to deviate from them.

[178] It is the power to choose whether to implement a particular policy in performing duties which removes the inconsistency between the policy-making power and the institutional independence of these entities. Therefore, it is incorrect to contend that ICASA and USAASA are bound by policies and policy directions made by the Minister in terms of section 3 of the ECA. They are not.

Consultation

[179] e.tv submitted that section 3(5) applies to the process of amending a policy and since Minister Muthambi had failed to comply with this section, the amendment was invalid for want of compliance with the prescribed procedure. It is true that Minister Muthambi did not adhere to the requirements in section 3(5) before effecting the amendment. She did not publish the text of the amendment in the Gazette. Nor did she declare her intention to amend the policy. She also failed to invite interested persons to make written submissions on the amendment she contemplated effecting.

[180] But this is not the end of the matter. The antecedent question is whether section 3(5) applies to the process of amending policy. For if it does not, her failure to comply would have no effect on the validity of the amendment.

[181] The Minister, the South African Broadcasting Corporation (SABC) and the Electronic Media Network (Pty) Ltd (M-Net) argued that section 3(5) does not apply to an amendment. They submitted that the text of the provision expressly states that it applies when a policy or policy direction is issued. It is true that the section makes no reference to an amendment. But e.tv countered by submitting that the word "issuing"

must be given a wider meaning to include both the issuing of an original policy and its amendments. Construing section 3(5) as not applying to amendments would, contended e.tv, undermine openness and consultation promoted by the provision which must be interpreted purposively. It submitted further that the section must be read in a manner that promotes the values of openness, transparency and accountability.

[182] While one may not quibble with the approach advanced by e.tv to the interpretation of section 3(5), it must be pointed out that the approach concerned cannot be invoked to extend the scope of the provision beyond the limits of its language. The provision states in unequivocal terms that the duty to consult and obtain views of interested parties arises when issuing a policy or policy direction. The scope of the section is not determined by the word "issuing" but by the words "policy" and "policy direction".

[183] Ordinarily these words may include amendments to policy or policy direction. However, section 3(5) must not be read in isolation. It must be read together with other parts of section 3. For instance subsections (6), (7) and (8) make it clear that a policy direction referred to in section 3(5) does not include an amendment. These subsections regulate the procedure that must be followed in amending a policy direction. It would be remarkably odd for Parliament to use the word "policy" in an expansive sense that includes amendments and the words "policy direction" in a restrictive sense that excludes amendments, in the same sentence.

[184] The scheme of section 3, when read in its entirety, suggests that policy and policy direction as used in subsection (5) do not include amendments. Parliament considered it necessary to regulate procedure for amendments of policy directions separately. There appears to be no discernible reason for restricting this separation of procedure to policy directions only. The only reasonable explanation that presents itself is that it was an oversight on the part of Parliament not to include the amendment of a policy in the provisions of subsections (6), (7) and (8).

[185] These subsections read:

> "(6) 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).
>
> (7) Subject to subsection (8), a policy direction issued under subsection (2) may be amended, withdrawn or substituted by the Minister.
>
> (8) Except in the case of an amendment contemplated in subsection (6), the provisions of subsection (3) and (5) apply, with the necessary changes, in relation to any such amendment or substitution of a policy direction under subsection (7)."

[186] What emerges from an examination of these provisions is that subsection (6) exempts the Minister from the procedural obligations under subsection (5) in the case of an amendment of a policy direction where representations had been received after publication in terms of subsection (5). This means that if at the time of issuing the original policy direction there was compliance with subsection (5) and representations were received, that process need not be repeated when the Minister seeks to amend the original policy direction. This makes perfect sense. Otherwise the process would be unnecessarily repetitious.

[187] But if no representations were received following the subsection (5) publication, the Minister must repeat the publication process in the Gazette before effecting an amendment. This is required by subsection (8).

[188] The Minister argued forcefully that when Parliament amended subsections (2), (3), (4) and (5) with effect from 21 May 2014, it overlooked to amend subsections (6), (7) and (8), to extend the latter subsections to cover the amendment of a policy. Apparently before the 2014 amendments, subsection (5) made reference to the issuing of a policy direction only. Hence subsections (6), (7) and (8) referred to amending a policy direction only. When a "policy" was included in subsection (5), these three subsections were not amended to refer to a policy as well, owing to an oversight.

[189] It does not appear that the distinction in the approach to procedure relating to amending policies and policy directions was deliberate. As mentioned, one cannot discern any reason for this distinction and the purpose it serves. In the present circumstances I accept that the source of the distinction is the oversight mentioned by the Minister. Consequently, subsections (6), (7) and (8) must be read as applying to the amendment of a policy.

[190] Reading words into a statutory provision in order to cure a defect, is a remedy that our courts frequently apply in appropriate circumstances. Sometimes this is done to remedy a constitutional defect.[106] On other occasions, it is done in an interpretation exercise.[107] Long before the adoption of the Constitution, our courts added words to a statute where it was practically impossible to have a "sensible meaning" without reading words into the provision.[108] In *Vauhghan-Heapy* the Court said:

> "It is, however, quite apparent from pronouncements such as these that the power in a Court to supplement the language of a statute is confined to those rare instances where incomprehensibility would be the alternative to doing so. It is necessity therefore that becomes the mother of intervention."[109]

[191] Here the necessity stems from the fact that without adding the word "policy" to subsections (6), (7) and (8), there would be no provision regulating an amendment of policy. It would be absurd to require the Minister to follow a consultation procedure when issuing a policy but to be free to do as she or he pleases when she or he amends the same policy. This is to happen where the ECA prescribes a procedure for amending

[106] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC).

[107] *Masetlha v President of the Republic of South Africa* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) at paras 66-8; *Govender v Minister of Safety and Security* [2001] ZASCA 80; 2001 (4) SA 273 (SCA).

[108] *Vauhghan-Heapy v Natal Performing Arts Council* 1991 (1) SA 191 (D); *S v De Abreu* 1975 (1) SA 106 (RA); *R v Le Roux* 1959 (4) SA 342 (C); *Ngwenya v Hindley* 1950 (1) SA 839 (C).

[109] *Vauhghan-Heapy* id at 196.

a policy direction. That could not have been contemplated at the time the 2014 amendments of the ECA were enacted.

[192] Accordingly, I conclude that Minister Muthambi was exempted by subsection (6) from repeating the subsection (5) process which was followed by Minister Matsepe-Casaburri when she issued the original policy. It is common cause that representations were received before the policy in question was issued. There was no need for Minister Muthambi to repeat the process.

Procedural rationality

[193] Relying on decisions of this Court in *Democratic Alliance*[110]and *Albutt*[111] as well as the decision of the Supreme Court of Appeal in *Scalabrini,*[112] e.tv argued that the amendment was procedurally irrational. Counsel for e.tv placed a heavy reliance on the following statement made in *Scalabrini*:

> "[T]here are indeed circumstances in which rational decision-making calls for interested persons to be heard. That was recognised in *Albutt v Centre for the Study of Violence and Reconciliation and Others*, which concerned the exercise by the President of the power to pardon offenders whose offences were committed with a political motive . . . it was held that the decision to undertake the special dispensation process under which pardons were granted, without affording the victims an opportunity to be heard, must be rationally related to the achievement of the objectives of the process."[113]

[194] It must be pointed out immediately that here we are concerned with the question whether e.tv should have been afforded the opportunity to make fresh or further representations to those made under the subsection (5) process before the original policy was made. We are not dealing with a case where there were no representations at all.

[110] *Democratic Alliance* above n 23.

[111] *Albutt* above n 7.

[112] *Scalabrini* above n 25.

[113] Id at para 68.

The circumstances referred to in *Scalabrini* do not arise here in light of the exemption in section 3(6).

[195] Invoking *Albutt* and *Democratic Alliance*, e.tv submitted that there was no rational relation between the means adopted in the amendment it challenged and the object of the amendment. In *Democratic Alliance* this Court defined the procedural rationality standard in these terms:

> "The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose, for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitute means towards the attainment of the purpose for which the power was conferred."[114]

[196] Quite evidently what this statement means is that whatever means chosen must be rationally linked to the realisation of the purpose for which the power was conferred. In the case of multiple steps, the question is whether one of those steps is "so unrelated to the end as to taint the whole process with irrationality". This illustrates that the standard does not require each and every step taken to be rationally related to the purpose. The step that is not rationally related to the purpose must have undermined the achievement of the purpose for which the power was conferred, for it to have tainted the whole process with irrationality.

[197] Yacoob ADCJ outlined this part of the standard in *Democratic Alliance* thus:

> "We must look at the process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the absence

[114] *Democratic Alliance* above n 23 at para 36.

> of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality."[115]

[198] When applying the rationality test a court must always bear in mind this caution from *Affordable Medicines*:

> "As the *Lawrence* case makes it plain, the Court sought to achieve a proper balance between the role of the legislature on the one hand, and the role of the courts on the other. The rational basis test involves restraint on the part of the Court. It respects the respective roles of the courts and the legislature. In the exercise of its legislative powers, the legislature has the widest possible latitude within the limits of the Constitution. In the exercise of their power to review legislation, courts should strive to preserve to the legislature its rightful role in a democratic society. It is this guiding principle that should inform the test for determining whether legislation that regulates practice but does not, objectively viewed, impact negatively on choice, passes constitutional scrutiny"[116]

[199] Underpinning this approach is the principle that a proper balance must be maintained between the role of other arms of Government and the courts.[117]

[200] Here it is not disputed that Minister Muthambi sought to achieve two purposes through the impugned amendment. The first was to secure the set top boxes and the second was to save costs. The question that arises for determination is whether there was a rational connection between the amendment (means) and the object of saving costs. The question of security is not disputed.

[201] It cannot be gainsaid that the decryption capability would increase costs of producing the set top boxes. Even e.tv asserted that if it were to produce set top boxes on its own the costs would be prohibitively high, hence it was in favour of the decryption

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[115] Id at para 37.

[116] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (*Affordable Medicines*) at para 86.

[117] Id at para 83.

capability being added to the set top boxes subsidised by Government. It was submitted that e.tv was willing to cover the additional costs and refund the Government later.

[202] It follows that excluding the decryption capability from the set top boxes would save costs. Accordingly, there is a rational connection between the amendment and the objective of saving costs.

[203] But e.tv contends that its offer to cover the additional costs and refund Government later bears a rational relation to the purpose of saving costs. It is not clear to me how a policy that says Government will pay for the additional costs during production of the set top boxes only to be refunded later, would be saving costs. It seems to me that such a policy would be requiring Government to advance money to e.tv on the promise of a refund later.

[204] e.tv does not offer to pay the additional costs at the time of production, which would avoid the paying of the costs by Government at the initial stage. Only if it were to be so, one might talk of the offer constituting a cost saving measure. This is because Government would not be required to carry the additional costs occasioned by the inclusion of the decryption capability. However, even if the offer by e.tv were to be rationally related to the purpose of saving costs, it would not mean that the means chosen by the Minister were not rationally related to that purpose. It would be a question of different means, both related to the same purpose. That is hardly a basis on which the procedural rationality ground may succeed.

[205] In *Albutt* this Court was at pains to point out that the discretion to choose the means to achieve the objectives of a statute is that of the Executive. And where that discretion has been exercised to select certain means, interference by courts is not warranted if the selected means are rationally connected to the objective sought to be achieved. There, Ngcobo CJ stated:

> "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 other 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."[118]

[206] It follows that even if the means identified by e.tv were more appropriate, it cannot be said that e.tv has established the ground of procedural irrationality.

[207] This matter is distinguishable from *Albutt* and *Democratic Alliance*. In *Albutt* the objectives sought to be achieved were "national unity and national reconciliation". This Court held that the means chosen by the President which excluded hearing the victims of the offences committed with a political motive, could not achieve those objectives. It was for this reason that it was said that there was no rational connection between the chosen means and the objectives in question.

[208] Similarly, in *Democratic Alliance* the President was empowered to appoint "a fit and proper person" as the National Director of Public Prosecutions. A commission of inquiry had pronounced that the candidate chosen by the President was not a person of honour and integrity. These attributes were stipulated by the empowering legislation. In assessing the suitability of the candidate, the President failed to investigate whether those findings accurately reflected the character of that candidate. In the light of the adverse findings by the inquiry, the President could not rationally have been satisfied that the chosen candidate met the requirements for appointment. Consequently the means selected could not have enabled him to attain the purpose for which the power was conferred.

[118] *Albutt* above n 7 at para 51.

[209] It is apparent from these cases that the means selected in them thwarted the achievement of the purposes for which the power was conferred. The present is not such a case.

[210] For these reasons I support the order proposed in the first judgment.

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