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THE IMPORTANCE OF PUBLIC CONSULTATION - *E.TV (PTY) LTD V MINISTER OF COMMUNICATIONS*

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On 31 May, the Supreme Court of Appeal (SCA) handed down a technical judgment on the amendment of the *Broadcasting Digital Migration Policy* (the Policy) in 2015 by the Minister of Communications (Minister). The issue concerned the legality of the Policy and was found by the SCA to be both procedurally and substantively irrational.

The Policy was first published in 2008 in terms of the *Electronic Communications Act* (ECA) which, together with the Constitution, empowers the Minister to make policy regarding broadcasting. The Policy is aimed at facilitating the migration of South Africa from analogue terrestrial television to digital terrestrial television, which is needed to free up signal space (digital migration process). Viewers who currently receive analogue broadcast signals (via aerials) will need set top boxes (STBs) to watch television when the migration takes place. This means the majority of television viewers will need STBs to convert the signal from analogue to digital to permit them to watch television. The issue is that indigent viewers will not be able to afford STBs as they will cost R600 each. However, the government intends to subsidise the purchase of these STBs for those households in need at no cost. It must be noted that there are more than eight million viewers who rely on terrestrial television - others use satellite television and decoders to decrypt the encrypted signal.

When the Policy was published in 2008, it stated that the subsidised STBs would have encryption technology to enable the above described decryption. The first amendment made by erstwhile Minister of Communications, Dina Pule, in 2012 made it clear that encryption capability was intended. In 2013 the then Minister of Communications, Yunus Carrim, published amendments for public comment and proposed that free-to-air broadcasters like e.tv and SABC pay for the encryption technology on the subsidised STBs if they so wished. E.tv welcomed the amendments because it wanted to encrypt its signal, as did the other respondents. One of the respondents was the National Association of Manufacturers of Electronic Components (NAMEC), who will manufacture the STBs. This is to ensure that only those permitted to access the content have it, in much the same way that subscription-based broadcasters, such as M-Net and MultiChoice operate. This is so free-to-air broadcasters can compete with the latter.

In 2015 the current Minister published the amendment which precluded the subsidised STBs from having encryption technology. This was done without consultation with the public or with the Independent Communications Authority of South Africa (ICASA) and the Universal Service and Access Agency of South Africa (USAASA), which regulates and distributes television. The amendment was quite different from the previous versions of the policy. In terms of this amendment, if e.tv wished to encrypt its signal, it would have to provide millions of STBs at its own cost, which goes against the intention of former Minister Carrim in the 2012 amendment.

E.tv thus brought an urgent application to the North Gauteng High Court for an order reviewing and setting aside the 2015 amendment because of the absence of consultation by the Minister prior to publishing the amendment. Neither the broadcasters nor the statutory bodies charged with the implementation of the ECA - ICASA and USAASA - were consulted. E.tv argued that the lack of consultation was unlawful and furthermore, that although it was an amendment of a policy, it nevertheless amounted to administrative action and should be set aside under the *Promotion of Administrative Justice* Act (PAJA). E.tv also put forward that it was irrational and thus breached the principle of legality, and that it was *ultra vires* - meaning that the Minister did not have the necessary authority (by law) to make the concerned amendments. The High Court rejected e.tv's arguments and rejected the application.

The SCA found that the Minister was required by the ECA to consult ICASA, USAASA, as well as broadcasters, before changing policy and she failed to do so. Therefore, the amendments were made unlawfully. The Minister argued that submissions made by e.tv regarding previous amendments were considered before the publishing of the current amendments. This then meant she assumed the content of the current and former amendments were identical, which is incorrect. The Court held that the fact that there was a marked difference between the earlier versions and the new meant there was a need for fresh consultation. Moreover, there are contradictions in the provisions. They state that e.tv can provide the required technology for decryption in the STBs at its own expense but clause 5.1.2(B)(a) states that these STBs will not have encryption technology. This leads to confusion and had there been consultation, this confusion would have been clarified.

The ECA demands openness and proper consultation in the shaping of policies that affect the public. The Constitution also refers to openness as a founding value. Failure to consult is therefore contrary to these provisions. Openness and accountability are the foundations of a democratic state and require the participation of those affected.

The SCA also found that the amendment was irrational because it attempted to achieve two purposes. The first was government avoiding paying for the encryption of the subsidised STBs. The second aim was to allow free-to-air broadcasters (such as the appellant) to pay for their own encryption. By precluding encryption of the subsidised STBs neither of the purposes of the amendment were achieved and the Policy cannot therefore be considered rational.

Finally, the SCA held that in passing the Amendment, the Minister exceeded her powers. This is because the Minister is not permitted to make binding decisions on STB control issues that affect free-to-air broadcasters. The Minister is empowered by the ECA and the Constitution to make policies, but she cannot regulate. The regulatory authority is ICASA. ICASA is established by section 192 of the Constitution.

This decision is a reiteration of the importance of public consultation when passing legislation or policy. The Constitution emphasises openness and accountability in its foundational values found in section one. Public participation is a way by which the public who are affected by such laws and policies, can hold the government accountable. The public participation element speaks to the openness of our society and no law which does not meet the muster of the Constitution can be passed.