DIGITAL MIGRATION SUSPENDED: HIGH COURT DELAYS ANALOGUE TV SWITCH-OFF PROTECTING ACCESS TO CRITICAL NEWS, KNOWLEDGE, AND INFORMATION

Category: Infrastructure and Telecommunications,Media and OTT
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*" Each day without access to news, public service announcements and educational programming results in irreversible loss of knowledge, awareness and democratic participation."**[1]***

As a member of the International Telecommunications Union (ITU), South Africa has agreed to migrate from analogue television to digital television. Having missed the initial deadline for digital migration in June 2015, Cabinet has made attempts to fast track the process. Recently, Cabinet decided that 31 March 2025 would be the ultimate date for analogue switch-off (ASO). Effectively, this would result in millions of South Africans losing access to television on the ASO date. Denying millions access to critical news, knowledge, and information. The urgent application at the High Court to delay analogue TV switch-off not only emphasised the need for public consultation and due process, but showcased the devastating legal consequences for the public where a person or body who has not been delegated the power, makes important decisions.

In the case of E.TV & Others v Minister of Communications and Digital Technologies & Others, the High Court was requested to undertake a two-part process of interdicting and then reviewing the Cabinet decision to permanently switch off analogue television broadcasting on 31 March 2025. Essentially, the court had to determine whether millions of people should be "plunged into a television blackout" pending the court's review, or to grant the interim relief to suspend the blackout until after the review.

The first issue the court had to consider was whether Cabinet had the power to determine the date for the ASO. In the previous E.TV case[2], the Constitutional Court had established that the Minister was empowered to set the ASO date.[3] This encouraged the High Court in concluding that the decision by Cabinet was unlawful.[4] The President and Cabinet, by virtue of executive authority, did not have the power to decide the ASO date. Even if they had such power, they failed to provide reasons, which would have rendered the decision arbitrary.[5] "…a functionary in whom a discretionary power is vested must himself exercise that power in the absence of a right to delegate".[6] Therefore, only the

Minister could have set the ASO date.[7]

Having established that the Minister was required to decide on the ASO date, the second issue for the High Court was to determine whether consultation was necessary. Considering the previous E.TV case, the High Court found that there was an obligation on the Minister to consult stakeholders regarding the actual date of the ASO.[8] Back in 2022, the Minister had considered written submissions by the public regarding the date for ASO, (which at the time was set for 31 March 2023). Having considered the submissions, the Minister was persuaded not settle for 31 March 2023, and instead he convened a steering committee to help determine the way forward. The Committee recommended a new date of 31 December 2024.

The applicants sent correspondence requesting further postponement, and the Minister advised that this would be deliberated on 4 December 2024. The reality was that, after the meeting on 4 December 2024, the stakeholders were never informed that the Minister or Cabinet were considering setting the ASO for 31 March 2025, nor were they invited to comment on this. This was contrary to the requirement for consultation.

The High Court reiterated the requirements for consultation where an organ of state adopts a change of stance, (established in the Telkom SA case[9]). The court noted that there was a duty to hear interested parties; to ensure that these parties were informed of proposed changes; and to maintain openness with stakeholders.[10] Therefore it was found that consultation was indeed a requirement under the circumstances.

The third issue for the High Court to consider was the justification of the limitation of rights. The High Court considered the objectives of Digital Migration; the Minister's estimates of how many people would be left without access if the ASO was allowed to proceed; and the reality of the States's inactivity in progressing the digital migration during 2023-2024. It became clear on the evidence that by 31 December 2024, over 1.2 million people would lose access to television. The High Court found that millions of South African's freedom of information would be violated if the ASO date remained. Furthermore, if interim relief was not granted, by the time of the court's review, there "would be little [a court] can do to provide effective relief of the violations…on the affected household's right to freedom of expression".[11] This is not just a temporary inconvenience, "Each day without access to news, public service announcements and educational programming results in irreversible loss of knowledge, awareness and democratic participation."[12] Therefore, the High Court found that the limitation on rights could never be reasonable or justifiable. In conclusion, the High Court ordered the suspension of the final ASO date and granted an interdict against any further steps being taken by the Minister, or other respondents, to implement the ASO.

The High Court's ruling is more than just a legal victory for the applicants – it is a win for millions of South Africans who rely on free-to-air television for news, education, and vital information. By suspending the analogue switch off, the High Court has reaffirmed the importance of inclusive digital migration, ensuring that no citizen is left in the dark.

As the battle over broadcast accessibility continues, this case serves as a crucial reminder that technological progress must be balanced with the public's right to information. PPM Attorneys remains at the forefront of media and telecommunications law, advocating for policies that protect both industry stakeholders and the public. For expert legal guidance in this evolving landscape, our team is ready to assist.

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[1] *E.TV & Others v Minister of Communications and Digital Technologies & Others* (GP) unreported

case no 2025-008928 para 68.

[2] *E.tv (Pty) Limited v Minister of Communications and Digital Technologies and Others* 2023 (3) SA 1 (CC).

[3] The Minister was empowered by s 85(2)(c) of the Constitution.

[4] *E.TV & Others v Minister of Communications paras* 29-30.

[5] *Minister of Justice and Ano v SA Restructuring and Insolvency Practitioners Association and Others* 2018 (5) SA 349 (CC) paras 49 and 55.

[6] *Fedsure Life Assurance Ltd v Greater Johannesburg Traditional Metropolitan Council* 1999 (1) SA 374 (CC) para 58; *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd* 2023 (1) SA 1 (CC) para 83.

[7] *E.TV & Others v Minister of Communications* para 78.

[8] Ibid para 44-45.

[9] *Telkom SA Soc Limited v Independent Communication Authority of South Africa* [2021] ZAGPPHC 120 (8 March 2021).

[10] Ibid at paras 35 and 42.

[11] *E.TV & Others v Minister of Communications* para 66.

[12] *E.TV & Others v Minister of Communications* para 68.