

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG  
REPUBLIC OF SOUTH AFRICA

CASE NO. 34694/2012

In the matter between:

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e.tv (PTY) LIMITED

Applicant

and

MINISTER OF COMMUNICATIONS

First Respondent

SENTECH LIMITED

Second Respondent

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INDEPENDENT COMMUNICATIONS AUTHORITY  
OF SOUTH AFRICA ("ICASA")

Third Respondent

SOUTH AFRICAN BROADCASTING  
CORPORATION LIMITED ("SABC")

Fourth Respondent

JUDGMENT

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PRETORIUS GC, AJ

[1] E.tv and the SABC are terrestrial free-to-air television broadcasters in South Africa. They use analogue technology. For a number of reasons, including certain decisions of the International Telecommunications Union, South Africa must migrate from an analogue to a digital technology by June 2015.

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[2] Existing analogue television sets ("legacy TV sets") require a set top box ("STB") to convert the digital broadcast signal to an analogue signal. Future television sets will incorporate an

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integrated tuner or receiver and will not require a set top box to view the television broadcast.

- [3] In 2008 the Minister published the Broadcasting Digital Migration Policy. It was amended in 2012. After the publication of the policy in 2008, the Director-General of the Department of Telecommunications requested the SABC, working in cooperation with other affected free-to-air broadcasters, to commence a process to select a suitable set top box control vendor. 5
- [4] In the founding affidavit e.tv states that it and the SABC were already engaging on the issue when the Director General made his request. This allegation is not disputed. 10
- [5] According to the founding affidavit, the SABC and e.tv reached agreements regarding their joint management of set top box control, jointly prepared and agreed on the specifications which they required in relation to set top box control and jointly issued tenders in relation to the appointment of a vendor to assist in the provision of set top box software. 15
- [6] Ms Maboko Rosey Sekese deposed to the first respondent's answering affidavit. She is the Director-General: Department of Communications. She did not dispute that e.tv and SABC concluded a memorandum of understanding on 1 August 2012 inter alia providing for cooperation on the identification of the set top box control system and supplying vendor. 20
- [7] In dealing with the agreement of 2008 and the issuing of tenders, Ms Sekese disputed the agreement on behalf of SABC. She did 25

not indicate how she could do so on behalf of the SABC, or what personal knowledge she had of the matters she disputed.

[8] On 10 May 2012 the Minister sent the following letter to the chairperson of the board of SABC:

"Dear Dr Ngubane

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RE: Set Top Box ("STB") Control System

After having my Programme Management Office investigate technologies required to perform STB Control functions in the Digital Terrestrial TV (DTT) network the following recommendations and inputs were put forward to me:

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- robust STB Control is required in the DTT network to confirm to the BDM Policy
- Sentech has an existing STB Control System used on their satellite transmission network, which can also meet the STB Control requirements needed in the DTT network
- Sentech is prepared to upgrade the system to include both Satellite and DTT STB Control functionality
- The system will be located and managed at the Sentech technical facility where Sentech already had trained staff to operate the system.

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Initially the SABC was tasked to investigate STB control systems for the DTT network, however, as indicated above, the existing system at Sentech meets the requirements needed for the DTT project and therefore a completely new system is not required.

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As such, I am instructing Sentech to assume responsibility for the STB Control system and to go ahead with the project, immediately, to ensure that the DTT project timelines are maintained.

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Yours sincerely.

Ms Dina Pule MP

Minister"

- [9] The letter was not copied to e.tv. Sentech forwarded it to e.tv on 15 May 2012. As can be expected, the letter elicited a fairly strong response from e.tv. On 30 May 2012, e.tv's attorneys wrote to the Minister informing her that their *prima facie* view was that she had no lawful basis to instruct Sentech and requested written reasons for the decision and the legal basis for it. Apart from acknowledging receipt, the Minister never responded to the letter. The legal basis for her decision was only disclosed in the answering affidavit. 5 10
- [10] In June and July there a number of meetings between e.tv, the Minister, her special adviser, Sentech and the SABC discussing the dispute that had arisen. The dispute could not be resolved. 15
- [11] On 27 July 2012, the Minister issued a request for proposals ("RFP") for the manufacturing of government subsidised set top boxes. The RFP states that the set top box control / conditions of access software will be Nagravision. Nagravision has an existing relationship with Sentech. 20 25

[12] Since the dispute could not be resolved, e.tv launched a semi-urgent application on 12 September 2012. The Minister and Sentech oppose the application.

[13] ICASA, the third respondent and the SABC, the fourth respondent, did not file notice of opposition and did not participate in the proceedings.

[14] In the notice of motion, as amended, e.tv seeks the following relief:

"2. The decision of the Minister of Communications of 10 May 2012 to instruct Sentech Limited to assume responsibility for the set-top box control system for free-to-air digital terrestrial television is declared to be unlawful and of no force and effect and is reviewed and set aside;

3. It is declared that e.tv (Pty) Limited and the South African Broadcasting Corporation Limited and other free-to-air broadcasters are responsible for the set top box control system for free-to-air digital terrestrial television."

[15] The Minister opposes the relief sought in prayers 2 and 3. Sentech only opposes the relief sought in prayer 3.

[16] The Minister and Sentech filed answering affidavits and e.tv filed its replying affidavit on 10 October 2012. On 16 October 2010

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Sentech filed a supplementary affidavit. The Minister filed a supplementary affidavit on 19 October 2012. This elicited a replying affidavit to the supplementary affidavits that e.tv filed on 19 October 2012. The application was argued on 22 October 2012.

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- [17] It is clear from the relief sought that, if I grant prayer 3, prayer 2 must also be granted. However, in view of the fact that prayer 2 raises certain important matters, I shall deal with it separately.

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## Prayer 2

- [18] In their heads of argument, counsel for the Minister submitted that the instruction to appoint Sentech was an executive function and not administrative action. It can therefore not be reviewed on procedural grounds. In the alternative, they submitted that, if the decision was indeed administrative action, it should be set aside and declared null and void due to the fact that it was taken without having offered e.tv or the SABC the opportunity of making representations. It is common cause that e.tv and SABC did not have such an opportunity.

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- [19] In developing the argument that the Minister's decision was the exercise of executive power, counsel relied on a number of

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provisions of the Promotion of Administrative Justice Act, 3 of 2000 (as amended)("PAJA") and the Constitution.

[20] The provisions of PAJA are the following:

- 20.1 "administrative action" means any decision taken, or any failure to take a decision, by - 5
- (a) an organ of state, when -
    - (i) exercising a power in terms of the Constitution or a provincial constitution; or
    - (ii) exercising a public power or performing a public function in terms of any legislation; or 10
  - (b) ...
- which adversely affects the rights of any person and which has a direct, external legal effect, but does not include -
- (aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a),(b), (c), (d), (f), (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution." 15
- 20.2 "decision" means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision..." 20

20.3 "empowering provision" means a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken".

20.4 "organ of state" bears the meaning assigned to in section 239 of the Constitution.

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[21] Section 239 of the Constitution defines an "organ of state" as:

"(a) any department of state or administration in the national provincial or local sphere of government; or

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(b) any other functionary or institution -

(i) exercising a public power or performing a public function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation."

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[22] Sections 85(2)(b), (c) and (e) of the Constitution read as follows:

"85 Executive authority of the Republic

(1) ...

(2) The President exercises the executive authority, together with the other members of the Cabinet, by-

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(a) ...

(b) developing and implementing national policy;

(c) co-ordinating the functions of state departments and administrations;

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(d) ...; and

(e) performing any other executive function provided for in the Constitution or in national legislation."

[23] Section 192 of the Constitution provides as follows:

"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."

[24] This independent authority is the Independent Communications Authority of South Africa ("ICASA") established by Act 13 of 2000. The object of the ICASA Act is to establish the independent authority required by section 192 of the Constitution; regulate electronic communications in the public interest and regulate postal matters in the public interest in terms of the Postal Services Act and achieve the objects contemplated in the underlying statutes. ICASA is a juristic person that acts through a council. ICASA is subject only to the Constitution and the law and must be impartial and perform its functions without fear, favour or prejudice. It must also function without any political or commercial interference.<sup>1</sup> In *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa*,<sup>2</sup> the Supreme Court of Appeal described this independence as follows:

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<sup>1</sup> Section 3  
<sup>2</sup> 2004 (3) SA 346 (SCA) at para 32

"The relevant legislation declares [ICASA] to be an independent arbiter and it must be left to act independently, without government pressure, real or apparent, of any kind."

- [25] Counsel for the Minister submitted that her instruction to Sentech is action as contemplated in section (1)(a)(aa) of PAJA. 5
- [26] Although Sentech did not oppose the relief sought in prayer 2, their counsel, in opposing prayer 3, devoted a section of their heads to the submission that the Court may not trample into the Minister's policy domain and impose a decision on her. Those submissions were made on the assumption that there is a statutory vacuum, but are also relevant in considering the nature of the Minister's decision. 10
- [28] The primary object of the Electronic Communications Act, of 2005 ("ECA") is to provide for the regulation of electronic communications in the Republic in the public interest and for that purpose, *inter alia*, to provide a clear allocation of roles and assignment of tasks between policy formulation and regulation within the ICT<sup>3</sup> sector. 15 20
- [29] Section 3 forms part of Chapter 2 that deals with policy and regulations. In terms of section 3 the Minister may make policies 25

on matters of national policy applicable to the ICT sector, consistent with the objects of the ECA, the Broadcasting Act and the Independent Communications Authority of South Africa Act, and any regulations, determinations and guidelines made in terms of the Acts in relation to, *inter alia*, the application of new technologies pertaining to electronic communications services, broadcasting services and electronic telecommunication network services and any other policy which may be necessary for the application of the ECA or the related legislation. The Minister may also, after having obtained Cabinet approval, issue a policy direction in order to initiate and facilitate intervention by Government to ensure strategic ICT infrastructure investment and provide for the framework for the licensing of a public entity by ICASA in terms of Chapter 3 of the ECA. In terms of section 3(2) the Minister may, subject to subsections (3)(3) and (5) issue policy directions to ICASA consistent with the objects of the ECA and of the related legislation. Section 3(3) refers to policy directions relating to the granting, amendment, transfer, renewal, suspension or revocation of licenses. Section 3(5) obliges the Minister, when issuing a policy direction, to consult with ICASA, publish the text of such a policy direction by notice in the Government Gazette so that interested persons may express their views and publish the final version of the policy direction in the Government Gazette.

[30] Section 3(4) provides that ICASA, in exercising its powers and performing its duties in terms of the ECA and the related legislation must consider policies made by the Minister in terms of section 3(1) and policy directions issued by the Minister in terms of section 3(2).

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[31] Section 4 of the ECA sets out what ICASA must do. It may make regulations with regard to any matter which in terms of the ECA or the related legislation must or may be prescribed, governed or determined by regulation. Without derogating from the generality of the section, ICASA may make regulations with regard to technical matters necessary or expedient for the regulation of the services identified in Chapter 3 and any matter of procedure or form which may be necessary or expedient to prescribe for the purposes of the ECA or the related legislation.

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[32] The ECA makes a clear distinction between roles, power and of the Minister and ICASA. The Minister's role is limited to the development of policy. ICASA regulates.

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[33] The question of what constitutes executive action has been considered in a number of judgments. Some of these are conveniently referred to and commented on in Hoexter: Administrative Law in South Africa (pp 59-60).

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[34] In *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd*,<sup>4</sup> Harms DP said the following:

"I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments."

[35] In *Minister of Education v Harris*<sup>5</sup> the Constitutional Court considered whether section 3(4) of the National Education Policy Act, 27 of 1996, gave the Minister of Education the power to issue a notice "stating that a learner may not be enrolled in Grade One in an independent school if he or she does not reach the age of seven in the same calendar year. Section 3(4) empowered the Minister to -

"Determine national policy for the planning, provision, financing, co-ordination, management, governance, programs, monitoring, evaluation and well-being of the education system and, without derogating from the generality of [the] section [2] ... determine national policy for ... the admission of students to education institutions which shall include the determination of the age of admission to schools."

<sup>4</sup> 2001 (4) SA 501 (SCA) at para [7]

<sup>5</sup> 2001 (4) SA 1297 (CC)

[36] In coming to the conclusion that section 3(4) did not give the Minister the power to make binding law, the Constitutional Court held as follows:

"Policy made by the Minister in terms of the National [Education] Policy Act does not create obligations of law that bind provinces, or for that matter parents or independent schools. The effect of such policy on schools and teachers within the public sector is a different matter. For the purposes of this case, it is necessary only to determine the extent to which policy formulated by the Minister may be binding upon independent schools. There is nothing in the Act which suggests that the power to determine policy in this regard confers a power to impose binding obligations. In the light of the division of powers contemplated by the Constitution and the relationship between the Schools Act and the National Policy Act, the Minister's powers under s 3(4) are limited to making a policy determination and he has no power to issue an edict enforceable against schools and learners. Yet the manifest purpose of the notice is to do just that."

[37] In explaining the difference between policy formulation in the broad (political) sense and in the narrower (administrative sense) O'Regan J said the following:

"Policy may be formulated by the Executive outside of the legislative framework. For example, the Executive may determine a policy on road and rail transportation or on tertiary

education. The formulation of such policy involves a political decision and will generally not constitute administrative action. However, policy may also be formulated in a narrower sense where a member of the Executive is implementing legislation. The formulation of policy and the exercise of such powers may often constitute administrative action."

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[37] If one has regard to the clear distinction in the ECA between the authority and power of the Minister to make policy, and the power and obligation of ICASA to consider such policy when regulating the broadcasting industry, it is clear to me that the Minister does not have the power to describe to free-to-air broadcasters how they should manage set top boxes. Even if she had such powers, her decision would have been administrative action as part of policy execution rather than policy formulation.<sup>6</sup>

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[38] It follows from what I have set out that the Minister has no legal power to prescribe or make binding decisions relating to set top box control. To the extent that the Minister relied on the International Telecommunications Union ("ITU") agreements, I agree with e.tv's submission that the agreements do not constitute binding law in South Africa because they have not been approved by Parliament. Her decision should accordingly be set aside.

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<sup>6</sup> *Gray's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) para [24]; *Bullock NNO v Provincial Government North West Province* 2004

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### Prayer 3

[39] The ECA does not mention set top box control. That is not surprising. The Act regulates a rapidly developing industry based on continuous innovation.

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[40] Since the ECA is silent on set top boxes, its software and control, is there a statutory vacuum preventing any decisions until the vacuum is filled?

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[41] As already stated, e.tv relied on the ECA, the digital migration regulations and their licenses as authority for the submission that free-to-air broadcasters have the right to manage set top box control.

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[42] Sentech challenged this on the following grounds:

42.1 Neither their licenses nor ECA vest such authority in the free-to-air broadcasters;

42.2 Prayer 3 necessitates the Court trampling into the policy domain in imposing a decision on the Minister;

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42.3 The fact that the Minister may have no legal authority to make the decision does not mean that the responsibility for set top box control must vest in the free-to-air broadcasters.



[43] Sentech's counsel submitted that such responsibility does not vest in anyone until the Minister or Parliament makes a lawful decision allocating responsibility for set top box control. They further submitted that prayer 3 is vague, non-specific and uncertain and incorrectly elevates e.tv's and the SABC's disputed interest in the management of set top box control system above that of the state and owners of set top boxes.

[44] Sentech's counsel correctly submitted that a license authorises activities but does not vest authority. They referred to the different categories of licenses that are issued and argued that each license is limited in what it authorises the licensee to do. An individual broadcasting service license does not authorise the distribution of the signal, merely its production for intended reception by the viewers or listeners. In this regard they referred to the definition of "commercial broadcasting", "broadcasting", "television broadcasting service" and "broadcast signal distribution". They correctly submitted that signal distribution starts at the point where the broadcast signal is made available in its final content format. Signal distribution and the provision of electronic communication services are not covered or regulated by the broadcast licence.

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[45] They further submitted that set top boxes and aerials will be customer-owned and that the ECA does not regulate equipment owned by users or customers otherwise than prescribing that such equipment must be type-approved in terms of sections 35 and 36 of the ECA. They then referred to the definition of subscriber equipment in the ECA and the fact that according to this definition associated software of subscriber equipment forms part and parcel of customer equipment.

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[46] In the final analysis their argument is that the technical process of television broadcasting must, for the purposes of the ECA, be compartmentalised according to the type of licence. Counsel for e.tv countered this by emphasising that the definition of broadcasting refers to any form of unidirectional electronic communications intended for reception by the public and that it is incorrect to compartmentalise the broadcasting as Sentech submitted.

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[47] Sentech's counsel also argued that there is a dispute of fact whether the management of the set top box control system is absolutely necessary for free-to-air broadcasters in order to fulfil their broadcasting and networking function. In view of this dispute of fact, they submitted that the relief sought in prayer 3 cannot be granted in motion proceedings.

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- [48] Although it is clear that the technical process of broadcasting is covered by different licenses, one cannot ignore the fact that the viewer receives the television signal from an identified broadcaster, whether e.tv, the SABC or anyone else. It can therefore not be correct that e.tv or the SABC has no interest in how its signal is received by the viewer. 5
- [49] The fact that the set top box will belong to the viewer does not affect the interest that e.tv and the SABC have in any associated software. If anything, the definition of "subscriber equipment" supports the submission that the free-to-air broadcasters have the right to determine who will be responsible for managing set top box control. A subscriber is a person who lawfully accesses, uses or receives the retail service of a licensee for a fee. DStv is such a licensee. I am sure they will be taken by surprise, and alarmed, by an argument that they have no say in the software of the DSTV decoders. The fact that subscriber equipment is used by a subscriber, and may contain software, does not take away the right of the licensee to prescribe what software should form part of the subscriber equipment. 10 15 20
- [50] I have already found that the fact that the broadcasting digital migration policy has been published, does not give the Minister the right to prescribe to free-to-air broadcasters who should manage set top box control. The only authority that may regulate 25

this, is ICASA. The cases relied upon by Sentech in support of the submission that the Court should not intrude on the Minister's policy domain are all distinguishable.

- [51] The case of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*,<sup>7</sup> dealt with the allocation of fishing quotas. The decision was taken in terms of section 18 of the Marine Living Resources Act, 18 of 1998. The Minister delegated that power and authority to the Chief Director in terms of section 79 of the Act. The scope of the definition of "administrative action" in section 1 of PAJA did not concern the Constitutional Court since it was common cause that the decision constituted administrative action as contemplated by PAJA. 5 10
- [52] Paragraph 47 of the judgment forms part of the discussion of the reasonableness of the Chief Director's decision. In this case I am not dealing with the reasonableness of the Minister's decision. 15
- [53] In the ITAC judgment<sup>8</sup>, Scaw SA (Pty) Limited ("Scaw") obtained an interim interdict against ITAC preventing them from forwarding their recommendation to terminate certain anti-dumping duties in force against certain iron and steel wires, ropes and cables to the Minister of Trade and Industry ("the Minister"). Domestic legislation governs the imposition of anti-dumping duties. The 20

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<sup>7</sup> 2004 (4) SA 490 (CC)

Republic is also a signatory to the General Agreement on Tariffs and Trade (GATT"). This agreement was approved by the South African Parliament.

- [54] In terms of the International Trade Amendment Act, 2002 ("the Act") ITAC has the duty to make recommendations to the Minister. The Minister may ask the Minister of Finance to lift or impose anti-dumping duties on specified grounds. 5
- [55] In 2002 the Minister of Finance, acting on the recommendation of the Board on Tariffs and Trade ("BTT") ITAC's predecessor, imposed anti-dumping duties on certain products. In the case of Bridon UK's products, this amounted to 42,1%. 10
- [56] In February 2007, Scaw applied to ITAC to institute a sunset review, provided for in the anti-dumping duties regulations. It sought to persuade ITAC to extend the life of the existing anti-dumping duties. ITAC concluded that the lifting of the existing anti-dumping duties would not result in further dumping by Bridon UK and recommended to the Minister that the existing anti-dumping duties on imports of Bridon UK's products should be terminated. 15 20

- [57] The Act clothes the Minister with far-reaching authority in relation to trade policy. This includes the power to issue, subject to the Constitution and the law, trade policy statements or directives and the power to regulate imports and exports. ITAC exercises its functions subject the powers of the Minister. 5
- [58] The Constitutional Court first had to decide whether it was in the interests of justice to entertain an appeal against a temporary restraining order. In determining this, the Court had to consider what constitutional questions were raised. 10
- [59] The Act and the Board on Tariffs and Trade Act, 1986 ("BTT Act") required the Minister and the Minister of Finance to formulate and implement national policy and to perform specified executive functions relating to exports and imports of goods and other international trade activities. More pertinently, they are required to impose, change or remove anti-dumping duties. 15
- [60] The impugned recommendation of ITAC was made in terms of national legislation that regulates the administration of international trade and seeks to give effect to international obligations of the Republic. The Constitutional Court therefore held that there were constitutional issues. The setting, changing, or removal of anti-dumping duty is a policy-laden executive decision that flows from the power to formulate and implement 20 25

domestic and international trade policy. That power, in the words of Moseneke DCJ, resides in the heartland of the National Executive's authority.

[61] The Minister contended that the interdict, if granted, would be an unjustified limitation of his functions under the Act and the BTT Act. Under these Acts the Minister has a wide discretion in considering ITAC's recommendations. In making his or her decision it is open to the Minister to weigh any polycentric consideration, such as diplomatic relationships, the country's balance of payments, the regional or global trading conditions, goods needed to foster economic growth and so forth.

[62] From this discussion it is clear that the statutory scheme in the ITAC matter is completely different from the statutory scheme relating to broadcasting. In the ITAC matter the Minister had express authority. In this matter she has none.

[63] This is also not a case of a court being asked to prescribe or suggest to Parliament how best it should legislate in order to address a statutory vacuum of deficiency caused by a declaration of invalidity.

[64] ICASA has elected not to oppose the relief e.tv seeks. That in itself does not give e.tv and other free-to-air broadcasters rights,

but is an indication that ICASA seemingly does not believe that they are not entitled to the relief.

- [64] The relief is also not vague and unspecific. To the extent that there may be anything ambiguous or undefined, it is something for ICASA as regulator to deal with.

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I accordingly make the following order:

1. The decision of the Minister of Communications of 10 May 2012 instructing Sentech Limited to assume responsibility for the Set Top Box Control System for free-to-air digital terrestrial television is declared to be unlawful and of no force and effect and is reviewed and set aside. 10
2. Subject to the regulatory powers of the Independent Communications Authority of South Africa it is declared that e.tv (Pty) Limited, the South African Broadcasting Corporation Limited and other free-to-air broadcasters are responsible for the set top box control system for free-to-air digital terrestrial television. 15
3. The first and second respondents are ordered to pay the costs of the application, jointly and severally, such costs to include the costs of two counsel. 20

CG C PRETORIUS  
Acting Judge of the

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Date of hearing: 22 October 2012

Date of judgment: December 2012.

Counsel for the applicant: AE Franklin SC; S Budlender, J Berger.  
Instructed by: Rosin Wright Rosengarten.

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Counsel for the first respondent: P M Mtshaulana SC, M Lekoane.  
Instructed by the State Attorney.

Counsel for the second respondent: T W Beckerling SC, F Ismail  
Instructed by Cliffe Dekker Hofmeyr.

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