

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 2025-_____

In the matter between:

E.TV (PTY) LIMITED	First Applicant
MEDIA MONITORING AFRICA	Second Applicant
SOS SUPPORT PUBLIC BROADCASTING COALITION	Third Applicant
and	
MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES	First Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
SENTECH SOC LIMITED	Third Respondent
INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA	Fourth Respondent
SOUTH AFRICAN BROADCASTING CORPORATION SOC LIMITED	Fifth Respondent
CAPE TOWN TV	Sixth Respondent
TSHWANE TV	Seventh Respondent
SOWETO TV	Eighth Respondent
1KZN TV	Ninth Respondent
FAITH TV	Tenth Respondent
MEDIA DEVELOPMENT AND DIVERSITY AGENCY	Eleventh Respondent

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SUPPORTING AFFIDAVIT

I, the undersigned,

WILLIAM ROBERT BIRD

hereby state under oath:

1. I am the director of **MEDIA MONITORING AFRICA (MMA)** and a member of the Working Group of the **SOS SUPPORT PUBLIC BROADCASTING COALITION (SOS)**, and am duly authorised to depose to this affidavit on behalf of both MMA and SOS.
2. The contents of this affidavit are, unless indicated otherwise, within my personal knowledge, and are, to the best of my belief, true and correct.

OVERVIEW

3. MMA and SOS support the relief sought in the notice of motion, and the reasons advanced for it in the founding affidavit, and thus join this application as second and third applicants.
4. I confirm that Antonio Sergio Lee of the first applicant (**e.tv**) has been authorised to depose to the founding affidavit on behalf of MMA and SOS, and confirm the contents of that affidavit as far as they concern MMA and SOS.

5. MMA and SOS wish to add the following issues to that affidavit from our unique experiences and perspectives concerning the analogue switch-off (**ASO**):

5.1 the unlawful exclusion of MMA and SOS from the consultations; and

5.2 the devastating impact of premature ASO on the public, the South African Broadcasting Corporation SOC Ltd (**SABC**) and community television broadcasters.

6. Before doing so, I will set out the interest of MMA and SOS in this matter.

INTEREST OF MMA AND SOS

7. The second applicant, **MMA**, is a non-profit organisation with its principal place of business at Suite 2, Art Centre, 22 Fourth Avenue (Corner Fourth Avenue and Sixth Street), Parkhurst, Johannesburg.

7.1 MMA has been monitoring the media in South Africa and across the African continent since 1993. Since then, MMA has developed from a pure monitoring-based project to an organisation that implements successful media strategies for change and actively promotes principles of democracy and respect for human rights.

7.2 MMA's objectives are to promote the development of a free, fair, ethical and critical media culture in South Africa and the rest of the continent. The three key areas that MMA seeks to address through a human rights-based approach are media ethics, media quality and media freedom.

8. The third applicant, **SOS**, is a non-profit organisation with its principal place of business at Suite 3, Art Centre, 22 Fourth Avenue (Corner Fourth Avenue and Sixth Street), Parkhurst, Johannesburg.

8.1 SOS is a civil society coalition that represents a broad spectrum of civil society stakeholders committed to the broadcasting of quality, diverse, citizen-orientated public interest programming, particularly by the SABC, that is aligned with the objectives of the Constitution and the Electronic Communications Act, 2005 (**ECA**).

8.2 As an institution established to drive public interest broadcasting, SOS also engages in the advancement of community broadcast media across South Africa. It is made up of a broad range of civil society organisations as well as individuals (including academics, freedom of expression activists, policy and legal consultants, actors, script-writers, film makers, producers and directors).

9. Both MMA and SOS have a strong and demonstrable track record of acting in the public interest on key issues affecting the media and broadcasting services.

9.1 The Constitutional Court accepted, in *SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation (SOC) Limited and Others* [2018] ZACC 37; 2019 (1) SA 370 (CC), that SOS and MMA are “non-profit organisations that campaign for access to high quality public broadcasting that is in the public interest.”

9.2 That is confirmed by our accepted involvement in prior litigation around digital migration policy, in *Electronic Media Network Limited and Others*

v e.tv (Pty) Limited and Others [2017] ZACC 17; 2017 (9) BCLR 1108 (CC), where we were respondents.

9.3 In *e.tv (Pty) Ltd v Minister of Communications and Digital Technologies and Others; Media Monitoring Africa and Another v e-tv (Pty) Ltd and Others* [2022] ZACC 22; 2023 (3) SA 1 (CC), which directly concerned ASO, the Constitutional Court held that MMA and SOS were "affected parties" in relation to the setting of the ASO date (at paragraph 52).

9.4 MMA and SOS thus have the requisite interest and standing to institute this application alongside *e.tv*.

THE UNLAWFUL EXCLUSION OF MMA AND SOS FROM CONSULTATIONS

MMA and SOS's right to be consulted

10. In the *e.tv* litigation described in the founding affidavit, MMA and SOS sought and secured leave to intervene in *e.tv*'s application. We participated in both the High Court proceedings and the Constitutional Court appeal.

11. In those proceedings, MMA and SOS submitted that premature ASO would affect three categories of people adversely:

11.1 those who qualified, but had not yet registered, for state-sponsored set-top boxes (**STBs**) – approximately 2.26 million households at the time;

11.2 those who had registered either before or after the deadline, but whose STBs had not been installed; and

- 11.3 those who did not qualify for state-sponsored STBs but were unable to procure STBs in the marketplace due to, *inter alia*, a global shortage of microchips, including chips required for installation in STBs (**the missing middle**).
12. MMA and SOS further argued that, while the High Court order provided limited protection to those who had registered for but not received STBs, it offered none to the remaining groups. And even for those who had registered, it was unlikely, if not impossible, that the Minister would be able to install the requisite number of STBs (at the time 507,251) before the extended date of 30 June 2022.
13. On 28 June 2022, the Constitutional Court delivered its judgment, holding *inter alia* as follows (with emphasis added):

[48] The consultations [i.e. those preceding the ASO date of 31 March 2022] that took place during the preparation of the BDM Policy are not equivalent to consultations to determine the analogue switch-off date. By their very nature, consultations to determine the analogue-switch-off date would involve different aspects than consultations in preparation for the BDM Policy. For example, critical questions raised in consultation before the analogue switch off date would have sought to determine the number of persons who qualify to receive STBs, who would likely register for STBs before the analogue switch-off date and how long it would take, at the current rate of installation, for all households that wish to register to receive STBs to be supplied with such.

...

[51] ... in the light of the Minister's submission that her decision was an executive one made in terms of section 85 of the Constitution, her decision in relation to the analogue switch-off date must comply with the Constitution in order to be lawful. I emphasise, lawfulness demands compliance with the Constitution. It cannot be denied that switching off analogue transmission is an integral part of digital migration; more than being connected to it, it is part of it. Therefore, digital migration policy discussions must include an opportunity where the affected parties are given notice and afforded an opportunity to make representations on the analogue switch-off date.

[52] The decision concerning the analogue switch-off date is not a mechanical determination as the facts of this case show. Important interests

are at stake. Following **Albutt**, it was not procedurally rational for the Minister to set the analogue switch-off date without notice to the industry and affected parties, like MMA and SOS to obtain their views on the matter.

[53] In the result, the Minister's decision not to give notice and take account of the representation received regarding the analogue switch-off date with the public or affected parties is unlawful.

14. Despite the judgment of the Constitutional Court, the Minister failed to consult, properly or at all, with MMA and SOS concerning the further registration process and the selection of the ASO dates (neither the 31 December 2024 date nor the 31 March 2025 date). Accordingly, insofar as MMA and SOS is concerned, the Minister breached and is in wilful contempt of this judgment. As I explain below, the Minister failed to consult with MMA and SOS at all apart from receiving certain limited representations from SOS in 2023.
15. Had the Minister done so, they would have heard from MMA and SOS about the number of persons qualifying to receive STBs, those who still needed to register before ASO, the progress (or lack thereof) that the Department was making with registrations and installations and the difficulties faced by the missing middle in sourcing STB's. In failing to consult with MMA and SOS, the Minister deprived himself and the government of an opportunity to make informed decisions.

The 31 December 2024 ASO date

16. MMA and SOS were not given notice before the 31 December 2024 ASO date was promulgated, nor were we afforded an opportunity to make representations on it, either before it was promulgated or thereafter, which at least the commercial free-to-air broadcasters were (through the BDMC).

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17. Nevertheless, MMA and SOS did not merely accept the status quo. We wrote to the then Minister requesting that he consult with us concerning the ASO date. Copies of the letters are attached marked **WB1**, **WB2** and **WB3**. The annexures to the letters have not been included to avoid burdening these papers, but will be made available to the Court should it wish.
18. It emerges from these letters that MMA and SOS:
- 18.1 made repeated requests for consultations and further information;
 - 18.2 stressed that we wished to avoid further litigation on ASO;
 - 18.3 explained that digital migration remained delayed due to (i) the cost of STBs, (ii) post offices closing down, and (iii) the lack of STBs for the 'missing middle' (those who did not qualify for state-sponsored STBs but also could not afford DStv or OpenView equipment and subscriptions), and, in view of these delays, ASO could not take place; and
 - 18.4 recorded that they were not consulted regarding the 31 December 2024 ASO date.
19. MMA and SOS received a single response from the Minister's attorneys, a copy of which is attached marked **WB4**, to the effect that he believed he had consulted enough, and would not be consulting with MMA and SOS any further. Similarly, the annexures to this letter have been excluded. The Minister was clearly aware of his obligation to consult MMA and SOS concerning both the registration process and the ASO date.

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20. The installation goals have fallen woefully short and very few STBs have been properly installed following the Constitutional Court judgment. There have been significant delays in installing subsidised STBs. Most critically, there has been an extremely poor uptake of STBs resulting from the failure of the Department to undertake the tasks required of them in relation to the installation of STBs. I understand that, approximately 28% of the television viewing population, who access free-to-air television solely by analogue means, have not had STBs installed and will be entirely without access to any television content should the final ASO date be implemented. This translates into millions of people who will no longer have television on which they rely for news and entertainment.
21. Not only were MMA and SOS not consulted by the Minister as set out above, but we were not invited to regular meetings of the BDMC, including those relating to the rate of installations and the readiness of the country for ASO.
22. Had MMA and SOS been given the opportunity to attend these meetings, they could and would have made submissions concerning the rate of installations, the lack of commercially available STBs and how this would impact the missing middle, the impact on the SABC of the final ASO in the provinces of Mpumalanga, Free State, Northern Cape, Limpopo, and North West, where the SABC transmitters were switched off (while those of e.tv were not). These provincial ASOs impacted not only on the SABC's audiences who lost access to all the SABC channels but its concomitant revenue from advertising, on which it is heavily reliant.
23. MMA and SOS would have also been in a position to make detailed submissions on behalf of members of the public, concerning their plight and the impact that

ASO would have on them. For example, MMA and SOS would have been able to alert the Minister to:

- 23.1 the global chip shortage occasioned by the Covid-19 pandemic and the impact that this has on STB manufacturing;
- 23.2 the fact that DTT STBs are not generally available in the retail market, denying the missing middle the opportunity to purchase them;
- 23.3 the fact that those households earning anything above the threshold for a state-sponsored STB (even if only by a few Rand) have no disposable income due to the rising costs of living, and will thus not be able to afford to purchase the necessary equipment to enable them to watch television after ASO;
- 23.4 the difficulties encountered with the registration process;
- 23.5 the fact that the SA Post Office is in dire straits, including being insolvent (according to the Auditor General), has no coherent business plan, and has closed over 366 of its offices across the country since it entered business rescue (with many more closed prior to it entering business rescue), most of which were in poor and rural areas thereby impacting the ability of indigent members of the public to register for STBs; and
- 23.6 the need for the Department to conduct an accessible, comprehensive and long-term public education campaign around the fact and implications of ASO.

The 31 March 2025 ASO dates

24. MMA and SOS were also not consulted in respect of the 31 March 2025 date.
25. As the 31 December 2024 ASO date approached, we exchanged several letters and emails with the Minister (copies of which are attached marked **WB5**, **WB6**, and **WB7**).
26. Facing the imminent threat of litigation, the Minister (and Cabinet) sought to defer the issue and placate the stakeholders by inviting them, on the shortest of notice, and without an agenda, to a meeting on 5 December 2024. As explained in e.tv's founding affidavit, this meeting was not a consultation but a "briefing", where stakeholders were merely informed *a fait accompli* that the ASO date had been moved to 31 March 2025. There was no opportunity to make representations and to meaningfully influence the decision, as it had already been taken behind closed doors. I asked the Minister about the reasons that underpinned the decision. No meaningful answer was given, beyond the Minister stating that cabinet had considered 'relevant factors'.
27. The meeting of 20 December 2024 did nothing to remedy the situation. It, too, took place on short notice and without an agenda which would have enabled participants to contribute to the meeting, and was a one-way briefing. There was no opportunity for MMA and SOS (or any of the other stakeholders, including the SABC and Community Broadcasters) to meaningfully influence the decision to implement ASO on 31 March 2025, which remained set in stone as far as the Department was concerned. The stated purpose of the meeting was to advise stakeholders of the Department's plan for the rollout of state-sponsored STBs prior to 31 March 2025. But a copy of the plan was not provided to any of us,

whether before or at the meeting. At the meeting, Karen Leigh Thorne of Cape Town TV recorded the difficulty of convening the meeting not only on short notice, but during the holiday period when many people were away.

28. MMA and SOS requested a copy of the plan on the same day, but it was only provided to us over one month later. As it was sent to me after 22:30 on 20 January 2025, I only saw it on 21 January 2025 (a copy is attached to e.tv's founding affidavit). No explanation was given for the delay. We had also requested a copy of the minutes of the 5 December 2024 meeting. These have still not been provided, with no explanation.
29. In any event, as explained in detail in e.tv's founding affidavit, the Minister's STB rollout plan is wholly unworkable, and will still result in millions of South Africans being left behind on 31 March 2025.
30. On 22 January 2025, a day after having seen the plan, our attorneys wrote a letter to the Minister's attorneys (a copy of which is attached marked **WB8**), inter alia recording the unlawful lack of consultation, explaining the patent flaws in the rollout plan, and demanding that, by 12h00 on Friday 24 January 2024, "the Minister postpones the ASO date of 31 March 2025 indefinitely, pending proper consultation with our clients and other affected parties, and the achievement of 90% migration of analogue viewers to digital" (para 32).
31. On 23 January 2025, the Minister's attorneys responded with a letter (a copy of which is attached marked **WB9**), requesting an indulgence to respond "by end of next week" (i.e. 31 January 2025), as the Minister was out of the country.

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32. On the same day, our attorneys replied with an email (a copy of which is attached marked **WB10**), rejecting the request for an indulgence in view of the obvious urgency of the matter.
33. Other than acknowledging receipt of the aforesaid email, at the date of deposing to this affidavit, nothing further has been heard from the Minister or his attorneys.

IMPACT OF PREMATURE ASO ON THE PUBLIC, THE SABC AND COMMUNITY BROADCASTERS

The nature of free-to-air television services

34. A free-to-air service is defined in section 1 of the ECA as "*a service which is broadcasting capable of being received without payment of subscription fees*". This is important because it means that people who have a television set are able to receive a free-to-air service without paying for the service, as long as they have the requisite receiver set.
35. Free-to-air television services play an important role in providing information to the populace because, due to their free distribution basis, they are able to provide even the poorest with access to television broadcasts – a key source of news, current affairs, public service announcements, educational programmes, culture, sport and other entertainment.
36. The nature of the free-to-air programming to be provided is dependent on the nature of the free-to-air service and on the regulations and licence conditions which govern that service as prescribed or set by ICASA.

37. There are a number of analogue free-to-air television services available in South Africa: some national, and some local (the community broadcasters). Free-to-air services are critical to providing television programming in a variety of languages.

Analogue free-to-air broadcasters in South Africa and their obligations

The SABC

38. There are three public broadcasting free-to-air television services, namely SABC 1, 2 and 3.

38.1 SABC 1 and 2 have the following obligations:

- 38.1.1 significant local content obligations (65%) in terms of the SA TV Content Regulations (2016);
- 38.1.2 significant sports-related obligations in respect of designated national sporting events under the Sports Broadcasting Regulations, 2010 (as amended twice in 2021);
- 38.1.3 making services available to South Africans in all official languages – section 10(1)(a) of the Broadcasting Act, 1999;
- 38.1.4 reflecting both the unity and diverse cultural and multilingual nature of South Africa and all of its cultures and regions – section 10(1)(b);
- 38.1.5 striving to be of high quality in all of the languages served – section 10(1)(c);

- 38.1.6 providing significant news and public affairs programming that meets the highest standards of journalism, as well as fair and unbiased coverage, impartiality, balance and independence from government, commercial and other interests – section 10(1)(d);
 - 38.1.7 significant educational programming, both curriculum-based and informal, on a wide range of social, political and economic issues, including human rights, health, early childhood development, agriculture, culture, religion, justice and commerce, and contributing to a shared South African consciousness and identity – section 10(1)(e);
 - 38.1.8 enriching the cultural heritage of South Africa by providing support for traditional and contemporary artistic expression – section 10(1)(f);
 - 38.1.9 striving to offer services to children, women, the youth and the disabled – section 10(1)(g);
 - 38.1.10 including programmes made by the SABC as well as those commissioned from the independent production sector – section 10(1)(h); and
 - 38.1.11 national sports programming, including developmental and minority sports.
- 38.2 SABC 1 and 2 also have service-specific programming obligations under their respective licences, including:

- 38.2.1 specific prime-time and non-prime-time obligations in respect of non-English programming, including in marginalised languages (isiNdebele, Xitsonga, and Tshivenda on SABC 1 and isiNdebele, siSwati, Xitsonga, and Tshivenda on SABC 2);
- 38.2.2 sign-language programming, particularly in respect of news during prime time but also of other genres during the day; and
- 38.2.3 hours required for specific genres, including news, current affairs, informal knowledge building, documentary, drama, children's programming and educational programming.
- 38.3 SABC 3 is a public commercial broadcasting service. Its broadcasting obligations include:
- 38.3.1 local content obligations (45%) in terms of the SA TV Content Regulations (2016);
- 38.3.2 significant sports-related obligations in respect of designated national sporting events under the Sports Broadcasting Regulations, 2010 (as amended twice in 2021);
- 38.3.3 the public commercial broadcasting obligations set out in section 11 of the Broadcasting Act, 1999, including those applicable to commercial services;
- 38.4 In addition, service-specific programming obligations are set out in SABC 3's licence, including:

- 38.4.1 time-based programming in languages other than English;
 - 38.4.2 material that caters for all sectors of South African society and programming on and relevant to health-related issues, gender issues, and all age groups; and
 - 38.4.3 hours required for specific genres, including news, current affairs, informal knowledge building, documentary, drama, and children's programming.
39. The impact on the SABC has already been explained above. The fact that it prematurely switched off analogue transmitters in five provinces before there had been an adequate uptake of STBs has shown, in a very real way, what the impact of ASO taking place on 31 March 2025 will have on millions of South Africans. Those viewers in the five provinces who still do not have STBs can no longer access the SABC channels – with a knock on effect on the viability of the SABC. Following the SABC analogue switch-off in the Free State, its overall viewership went down by 30%, but e.tv – which did not switch off its transmitters in the province – saw its viewership increase.

e.tv

40. There is one national commercial, independent, free-to-air television service, namely e.tv. Its broadcasting obligations include:
- 40.1 significant local content obligations (45%) in terms of the SA TV Content Regulations (2016);

17
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40.2 significant sports-related obligations in respect of designated national sporting events under the Sports Broadcasting Regulations, 2010.

41. In addition, service-specific programming obligations are set out in its licence, including:

41.1 time-based obligations to broadcast in languages other than English, including obligations not to place reliance on a single language other than English;

41.2 hours required for specific genres, including drama, information programming, news and current affairs, and programming targeted at children.

Localised community free-to-air broadcasters

42. There are six localised community free-to-air television services, namely 1KZN TV, Cape Town TV, Tshwane TV, Soweto TV, and Faith TV (formerly Trinity Broadcasting Network).

43. 1KZN TV provides services in Northern KwaZulu-Natal. Its obligations set out in its licence include: a language distribution of isiZulu 60% and English 40%; and specified percentages of programming in community news, sport, documentaries, arts, feature films, government, education, drama, children, youth, religion, and actuality.

44. Cape Town TV provides services in the Greater Cape Town Metropolitan area. Its obligations set out in its licence include: a language distribution of isiXhosa (15%), Afrikaans (15%), English (70%); and specified percentages of

programming in community news, sport, documentaries, arts, feature films, government, education, drama, children, youth, religion, and actuality.

45. Tshwane TV provides services in the Greater Tshwane area. Its obligations set out in its licence include: a language distribution across isiXhosa, Afrikaans, English, Sepedi, Setswana, isiZulu and Tshivenda; and specified percentages of programming in community news, sport, documentaries, arts, feature films, government, education, drama, children, youth, religion, and actuality.
46. Soweto TV provides services to Greater Soweto. Its obligations set out in its licence include: a language distribution of isiZulu and isiXhosa (50%), Sesotho (30%) and English, Sepedi and Setswana (20%); and specified time bound requirements of news as well as programming from within the coverage area.
47. Faith TV provides services to the Christian communities of the Eastern Cape. Its obligations set out in its licence, include: a language distribution of English (50%), isiXhosa (30%) and Afrikaans (20%); and specified time-bound obligations in news, informal knowledge building, children, and women.
48. In addition, each community broadcaster has significant local content obligations (65%) in terms of the SA TV Content Regulations (2016).
49. ICASA is required to regulate broadcasting "in the public interest" in terms of section 192 of the Constitution. As is clear from the regulations and licence conditions of all the above free-to-air television broadcasters, ICASA has taken pains to ensure the availability of a wide range of programming, in an equitable spread of different official languages. Critically, at present, the only way to make

this programming available to significant numbers of people, is through free-to-air broadcasts.

50. Community TV already operates with limited resources and stands to lose much of its terrestrial audience who do not own DTT signal reception equipment. Community broadcasters such as Cape Town TV forecast an audience loss of about 30% if its audience is not migrated to platforms which carry them. At the same time, community broadcasters are unable to afford the radical increase in transmission costs occasioned by the need to hire many transmitters from Sentech because of the architecture of the single-frequency network in the existing multiplexes. There is still no solution to the issue of vastly increased transmission costs for community TV broadcasters in the DTT environment. This fact is a real and present threat to the continued existence of the community television sector in South Africa.
51. Cape Town TV gets around 30-40% of its audience on its analogue FTA signal – highlighting the bottom line: no broadcaster can afford to lose this proportion of its audience. I refer to the confirmatory affidavit of Karen Leigh Thorne (executive director of Cape Town TV) filed with this affidavit.
52. Community Broadcasters were also not consulted prior to the imposition of the 31 March 2025 ASO date. Had they been consulted, they would have been in a position to explain these issues to the Minister.
53. According to the Broadcast Research Council of South Africa (**BRC**)'s TAMS (20 January 2025):

20
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- 53.1 28% (more than a quarter) of the population or 4,332,147 households rely entirely on analogue terrestrial television signal to access free-to-air television services; and
- 53.2 only 26% of the population has access to television on free-to-air digital signals (via DTT and DTH).
54. Consequently, if analogue free-to-air services were to be switched off, free-to-air television's audiences on any platform would drop from a total of 54% of the population (taking into account analogue, DTT and DTH free-to-air) to only 26% of the population, leaving 28% entirely without access to television services of any kind.

Impact on the public, especially the poor

55. The Department has committed to subsidising the roll out of STBs to qualifying poor households (those earning less than R3,500 per month). However, this has not happened. To this day, 28% of households receive television via analogue free-to-air terrestrial television; that is, they lack any access to digital television (whether via STBs, newer television sets capable of receiving DTT, subscription DTH or free-to-air DTH).
56. The Department has plainly delivered far fewer subsidised STBs than promised, given the number of households without access to digital television.
57. There are several patent problems with the Department's current rollout plan, as pointed out in our letter of 22 January 2025 (**WB8**). These are the following:

- 57.1 Even the planned rollout cannot achieve the stated goal of ensuring 90% coverage before 31 March 2025. This, apart from the fact that the rollout plan presented by the Minister during the previous *e.tv* litigation failed dismally, reveals that the current plan is unrealistic and unachievable.
- 57.2 Even if one accepts that the information contained in the plan is correct, and that there are 447,815 registered households who need STBs to be installed prior to ASO, the plan on its own terms is premised on the fact that this number of installations cannot be achieved.
- 57.3 There is no reason why the STB rollout should only be in the four 'priority' provinces identified. In the remaining provinces, where the SABC has switched off its analogue transmitters, there are millions of people with no access to the SABC channels. These people will be without access to television at all should ASO proceed on 31 March 2025. These people, including not only those who have registered for state-sponsored STBs installed, but also the missing middle, are just as entitled to access free television as are those in the identified four primary provinces. They are being unlawfully and arbitrarily discriminated against, and the public promise made to them – of not leaving them behind – is being broken.
- 57.4 Even in the 'priority' provinces, the plan envisages a substantial shortfall of installations by 31 March 2025. If the number of households in the priority provinces requiring STBs total 244,848, this will mean that when ASO takes place, the remaining approximately 203,000 households who have registered for state-sponsored STBs, will lose access to free-to-air television.

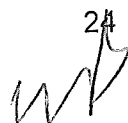
- 57.5 Under the plan, by 31 March 2025, the installations even in the priority provinces would not have reached the 90% threshold. More than 76,000 of the 244,848 registered households will not have STBs installed. Thus, the installations reached by 31 March 2025 will be less than 70% - way short of the 90% promised.
- 57.6 Taken across all provinces, 319,675 registered households will not have received STBs by 31 March 2025. In other words, of those who have already registered (being 447,815), only 128,140 would have received them, being 28% of the total remaining STBs to be installed.
58. The poor and marginalised in the country (namely, those whose only access to television programming is via analogue free-to-air terrestrial television services) which consists of 28% of the television household population according to the BRC, will be entirely without access to any television content at all from the ASO scheduled for 31 March 2025.
59. This will render millions of people, mainly the most marginalised, entirely unable to access televised news, current affairs, public service announcements, sport, culture, religious programming, informal knowledge building, educational content and entertainment provided by the SABC, e.tv and the community television broadcasters.
60. This would be a severe deprivation of the right to receive information and ideas (guaranteed by section 16(1)(b) of the Constitution) for the poor and marginalised – who can least afford such deprivation. It would also be a serious breach of the Minister's obligations (under section 7(2) of the Constitution) to respect, protect,

promote and fulfil the rights in the Bill of Rights, and to act in accordance with his public promises that e.tv has detailed in its founding affidavit.

61. Indeed, instead of seeking to respect, promote and fulfil the section 16(1)(b) right to receive information and ideas, the Minister would, retrogressively, remove a significant portion of the public's (and in particular the poor's) current access to information and ideas.

Impact on the free-to-air broadcasters

62. The SABC is the public broadcaster. According to its latest annual report (2023/4), advertising and sponsorship revenues made up approximately 73% of its total revenue. This is reflected in the Summarised Financial Performance of the SABC from its latest annual report (**WB11**), where advertising and sponsorship revenue made up R3 658 098 000 of the SABC's total revenue of R5 084 207 000.
63. As set out in the founding affidavit, e.tv is entirely dependent on advertising and sponsorship to fund its broadcasting services.
64. We do not have figures for advertising and sponsorship revenues for free-to-air community television broadcasters, but they too are largely dependent on these for their financial sustainability, as they are also prohibited by their licences from earning income via subscriptions.
65. According to the BRC, the primary way that the SABC and e.tv make money is based on their audience make-up and market share, as advertisers rely on these figures to make advertising purchasing decisions. If advertisers are looking at mid to low LSMs (for example, large consumer brands such as Shoprite, Pick n

24


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Pay, Unilever, MTN, etc) then there will be no free-to-air television services on which to purchase advertising. The BRC anticipates that this advertising will stop immediately. The SABC does earn some revenue from television licence fees and from government, but this is only 19% of its income.

66. If the free-to-air audience diminishes from 54% of South Africa's television-viewing population to 26%, which is the likely effect of implementing ASO on 31 March 2025, it will have a catastrophic impact on free-to-air television broadcasters' revenues. This will be the case despite the fact that free-to-air television channels are available, through some of the subscription services, to 47% of the population.
67. If advertisers do not purchase advertising on free-to-air television channels, then SABC 1, 2, 3, e.tv and the community broadcasters are all likely to collapse within a matter of months, if not weeks – with the public and commercial broadcasters potentially losing over three quarters of their income.
68. The premature ASO also unfairly favours the subscription broadcasting sector by switching off analogue signals before sufficient migration to free-to-air digital alternatives has been achieved. This will skew the broadcasting ecosystem, by encouraging subscription broadcasting to be the *de facto* choice of the population (at least the proportion of the population that can afford it) for accessing television content.
69. Favouring the subscription broadcasting sector is not in the public interest in a developing country with vast inequalities in access to resources and information, particularly in the long term, as there is no guarantee that a subscription service is, or will be in the future, affordable and accessible to all. In fact, as it stands,

even at its lowest tier, subscription services are unaffordable to a large swathe of the South African population. The public should never have to pay to access the public broadcaster.

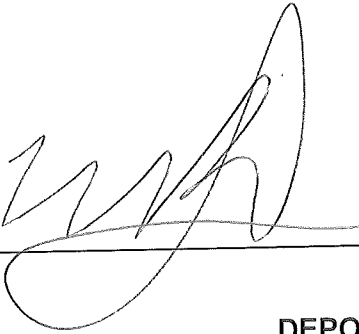
70. The proposed ASO will bring about a situation in which South Africans access free-to-air television (whether public, commercial or community) via subscription broadcasting services. This is anathema to basic principles of accessible free-to-air broadcasting, particularly of public broadcasting services. Moreover, DStv as the dominant subscription broadcaster, denies subscribers who can no longer afford to pay their subscriptions, access to the free-to-air channels, including the SABC and e.tv channels, by cutting off all the channels made available through their service.

CONCLUSION

71. For the reasons set out above, MMA and SOS pray for the relief set out in the notice of motion.


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DEPONENT

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn to before me at WESTCLIFFE on this the 24th day of January 2025, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.



COMMISSIONER OF OATHS

JOHN MAKGATLE MAKATE
Practicing Attorney
45 Jan Smuts Avenue
Johannesburg, 2193
Commissioner of Oaths

"WB1"

ROSENGARTEN & FEINBERG

Contact

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ATTORNEYS

Address

To: Minister of Communications and Digital
Technology

9 March 2023

Le Val, Ground Floor
North Block, South Wing
45 Jan Smuts Avenue
Westcliff, Johannesburg, 2193
South Africa

Att: Honourable Minister Gungubele

Our reference:

Dan Rosengarten

Email: mgungubele@parliament.gov.za

danr@rf-law.co.za

Daniel Basckin

danielb@rf-law.co.za

Dear Honourable Minister Gungubele,

RE: ANALOGUE SWITCH OFF

1. We act on behalf of Media Monitoring Africa, and SOS Support Public Broadcasting Coalition ("our clients").
2. We and our clients would like to congratulate you on your appointment. Our clients look forward to many years of fruitful engagement with you and your department.
3. Our clients understand that you have a challenging task ahead of you dealing with numerous issues, including the long awaited 'analogue switch off' ("ASO").
4. In order to properly introduce our clients, we set out a brief introduction of each of them below:
 - 4.1. MMA is Media Monitoring Africa ("MMA"), an NGO that has been monitoring the media since 1993. MMA aims to promote the development of a free, fair, ethical and critical media culture in South Africa and the rest of the continent. The three key areas that MMA seeks to address through a human rights-based approach are, media ethics, media quality and media freedom. In the last 25 years, MMA have conducted over 200 different media monitoring projects – all of which relate to key human rights issues, and at the same time to issues of media quality. Through its work, MMA engages in a range of legislative, litigious, and advocacy processes relating to the triad of information rights, which include the rights to privacy, freedom of expression, and access to information.
 - 4.2. SOS is the SOS Support Public Broadcasting Coalition ("SOS"), a civil society coalition that advocates for the presence of robust public broadcasting in the public interest to deepen our constitutional democracy. The coalition represents non-governmental organisations (NGOs), community-based

Partners Dan Rosengarten & David Feinberg Senior Associate Daniel Basckin

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organisations (CBOs), community media, independent film and TV production sector organisations; academics, freedom of expression activists and concerned individuals. SOS campaigns for an independent and effective public broadcaster. SOS engages with policy makers, regulators, and law makers to secure changes to promote citizen friendly policy, legislative and regulatory changes to public and community broadcasting public broadcasting.

5. As you will be aware, the process of digital migration has been ongoing for some time. Most recently, MMA and SOS were successful in joining e.tv as co-applicants in litigation against your predecessor, relating to the declaration of 31 March 2022 as the analogue switch off date ("**the initial ASO date**"). On appeal to the Constitutional Court, our clients were further successful in having the declaration of the initial ASO date declared irrational and unlawful. A copy of the Constitutional Court judgement, handed down on 28 June 2022, is attached marked "A".
6. Following the order of the Constitutional Court, your predecessor undertook a course of action summarised below:
 - 6.1. On 8 July 2022, she published a decision by way of Government Gazette to set a new deadline for the application, by members of the public, for Government subsidized Set Top Boxes ("**STBs**"). This new deadline was 30 September 2022.
 - 6.2. On 9 December 2022, the previous Minister published a notice by way of Government Gazette which set out her intention to determine the date for final switch-off of the analogue signal and the end of dual illumination, as 31 March 2023 ("**the new ASO date**"). The previous Minister called for written submissions on or before 27 January 2023.
7. In response to the call for written submissions, our clients prepared and delivered the submissions attached marked "B", dated 27 January 2023. A very high level summary of the submissions is set out below:
 - 7.1. The submissions pointed out that the new deadline for registering for STBs by 30 September 2022 was unlawful and procedurally irrational for reasons including that (i) the new deadline was a 'hard' deadline, with no further assistance offered to the indigent after this deadline, (ii) no reason for the imposition of a hard registration deadline of 30 September 2022 was given; (iii) no study was undertaken by the Minister in order to determine, inter alia, how many households would be affected by ASO; (iv) public communication regarding the new deadline was ineffective and near non-existent; (v) the period of 12 weeks afforded to the remaining households to register (which was recorded in the judgement as being at least 2.5 million households) was wholly insufficient. The Constitutional Court had this to say regarding STB registration:

[63] It is not up to this Court, in terms of rationality, to second guess the method utilised by the Minister. The method chosen to gather the necessary information to make an informed decision on the analogue switch-off date was, according to the Minister, the STB registration process. However, what this Court must consider is whether the "means selected are rationally related to the objective sought to be achieved". Therefore, can it be said that the STB registration process and the deadline, in the manner in which it was conducted, is rationally related to the objective sought to be achieved, being the transition to digital television, without causing millions of persons to lose access to television on the analogue switch-off date?

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[64] Requiring registration for STBs is an entirely permissible requirement, provided that people are properly informed and given reasonable opportunity to register. ...

- 7.2. The submissions substantially dealt with the new ASO date, and set out myriad reasons why this date was unachievable. These reasons include that:
- 7.2.1. Over a third of the South African population watch free-to-air television via analogue means. **The new ASO date would mean that these tens of millions of South African citizens would lose access to a vital source of free news, education, public service announcements, and entertainment.**
- 7.2.2. The new ASO date would have a massively detrimental impact on the SABC, which is currently without a board, and cannot give meaningful input to the ASO decision. Any decision taken in the absence of input from the public broadcaster would be contrary to the objects of the Electronic Communications Act, which includes protecting the viability of public broadcasting services.
- 7.2.3. ASO cannot be determined unless all qualifying households have been fully and properly informed of the need to register and the consequences of not registering, have been canvassed as to their reasons for not registering and have, after duly registering, been provided with a functional STB. In any event, SOS and MMA are of the view that no ASO date can be determined for so long as analogue terrestrial television reliance continues to run at approximately one third of the population.
8. On 6 March 2023, our client received a response to its submissions which in effect rejected each submission and seemed to indicate that ASO would occur on 31 March 2023. At this stage, fortunately, no date for ASO has been gazetted. A copy of this response is attached marked "C".
9. As it stands, and considering the previous Minister did not declare an ASO date, you will no doubt have the task of assessing where the digital migration process currently stands. We assume this will include assessing all representations made in response to the call for written submissions, including our clients' submissions attached as annexure "B".
10. We and our clients hold the view that before declaring ASO, it will be necessary for you to fully and properly consider the history of this matter including all papers filed in the High Court and Constitutional Court resulting in the decision of the Constitutional Court referred to above; the decision regarding the hard deadline of 30 September 2022 for registration by the indigent for subsidised STBs; the call for submissions and the numerous submissions made pursuant thereto. We point out that our clients' request for copies of all submissions made in response to the call for submissions (which are, in our and our clients' view, public documents), was for reasons unknown, irrationally refused by your predecessor. **We humbly request that you urgently provide us with all submissions made by interested parties during the public consultation process.**
11. We and our clients believe that a full consideration of the above information (together with such other information which may be required for a full, proper and rational decision to be taken regarding ASO) will require quite some time together with further consultation regarding certain issues. All this cannot be properly undertaken before 31 March 2023 and accordingly, any decision regarding ASO should be delayed

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until the aforesaid tasks and further consultations have been finalised. The premature promulgation of an ASO date will have grave consequences for millions of South Africans reliant on free-to-air television as their only source of news, current affairs, entertainment and access to public service announcements. It may also result in further unnecessary litigation and hence a further delay in ASO which is clearly in no person's interest.

12. The Constitutional Court, at paragraph 40 of its judgement, had this to say regarding ASO consultation:

[40] ... For example, critical questions raised in consultations before the analogue switch-off date would have sought to determine the number of persons who qualify to receive STBs, who would like to register for STBs before the analogue switch-off date and how long it would take, at the current rate of installation, for all the households that wish to register to receive STBs to be supplied with such.

13. Whilst the previous Minister was content to solely receive written representations, the repercussions of ASO suggests to our clients that mere written representations are inadequate. Our clients are of the view that further consultation with all parties is an absolute necessity, prior to any final decision being taken regarding the ASO date. **To this end, our clients will make themselves available for any consultations, and further request to meet with you directly, as soon as possible at a mutually convenient time to discuss their submissions and the pressing concerns set out therein.**

14. In the interim, **we seek your urgent confirmation that ASO will not happen on 31 March 2023**, as foreshadowed by the previous Minister's notice. We trust that ASO will only happen on a future date once further consultations have taken place.

15. We look forward to hearing from you.

Yours faithfully,



Dan Rosengarten
Rosengarten & Feinberg

MB
JM

"WBZ"

ROSENGARTEN & FEINBERG

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Address

Le Val, Ground Floor
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South Africa

To: Minister of Communications

16 August 2023

Attn: Honourable Minister Gungubele

Our reference:

Email: NNqaba@dcdt.gov.za

Dan Rosengarten

danr@rf-law.co.za

Daniel Basckin

danielb@rf-law.co.za

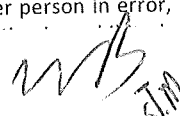
Dear Sir

RE: ANALOGUE SWITCH OFF / MEDIA MONITORING AFRICA / SOS SUPPORT PUBLIC BROADCASTING COALITION

1. As you are aware, we act on behalf of MMA and SOS.
2. On 9 March 2023, shortly after your appointment, we wrote to you concerning issues pertaining to analogue switch-off. For ease of reference, a copy of our letter is attached ("our letter").
3. To date, we have not received a substantive response from you to our letter. However:
 - 3.1. In response to our letter dated 9 March 2023, we received an email from Sybil Lyons-Grootboom on the same day, in which she advised us that she intended bringing our letter to your attention; and
 - 3.2. As we had not received a reply to our letter, on 20 March 2023, we again wrote to Ms Lyons-Grootboom enquiring when we could expect to receive a substantive reply to our letter.
4. In response to the 20 March 2023 email, and on 22 March 2023, Ms Lyons-Grootboom wrote to us and apologised for the delay stating that she would "follow-up and revert later".
5. Subsequent to the undertaking given by Ms Lyons-Grootboom that she would "follow up and revert later" we have had heard nothing further from either her or from you.
6. We understand that the ASO date has been promulgated into stages, the first stage having taken place at the end of July 2023. We place on record that our clients were not consulted in relation to your determining the date for ASO. In this regard, as you are aware, a judgment was handed down by the Constitutional Court on 28 June 2022 concerning a challenge to the declaration of the ASO date by your predecessor as being 31 March 2022. A copy of the judgment was attached to our previous letter to you dated 9 March 2023, but should you still require a copy, we will make it available to you.
7. We hold the view that, in view of the import of the judgement, you were required to consult our clients before deciding to promulgate the dates for ASO.

Partners Dan Rosengarten & David Feinberg Senior Associate Daniel Basckin

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8. We addressed various issues arising from the Constitutional Court judgment as well as the action taken by your predecessor in our letter to you dated 9 March 2023. We refer you in this regard to paragraphs 6, 7, 8 and 9 of the letter and request that you consider those paragraphs together with the contents of this letter.
9. Of course, ASO did not occur on 31 March 2023 as previously determined by your predecessor. Given that when you were appointed, no ASO date had been promulgated, and as stated in paragraph 9 of our letter, you were tasked with assessing where the digital migration process stood when you were appointed so that you could fully and properly deal with the question of ASO, the ASO date and all related matters. This included issues pertaining to the previous cut off date promulgated by your predecessor relating to when the indigent needed to register for STBs and when the STBs would be supplied and installed.
10. As previously pointed out to you, at paragraph 40 of its judgment, the Constitutional Court held regarding the issue of consultation prior to the declaration of ASO as follows:

*"[40] ... for example, critical queries raised in consultations before the analogue switch off date would have sought to determine the number of persons **who qualify to receive STBs** who would like to register for STB's before the analogue switch off date and how long it would take, at the current rate of installation, for all the households that wish to register to receive STBs to be supplied with such."*
11. Insofar as issues pertaining to the registration of STBs is concerned, the Constitutional Court's discussion on the issue prevailing at the time and pertaining to the application before it, is set out from paragraph 58 onwards. Once again, we request that you consider the passages dealing with the registration process.
12. To date, and notwithstanding correspondence and our clients making various submissions in relation to the absolute cut off for registrations (after which no STB registrations would be permitted) imposed by your predecessor following the Constitutional Court judgment, you have not dealt either with our clients' previous submissions in this regard or the issue of registrations generally.
13. There has been no rational explanation made by you or your predecessor as to why the cut off date was imposed and, more importantly, why registrations would not be accepted after that. The obvious impact of this is that those who had not registered by the cut off date will not receive a subsidised STB. You will appreciate that there are a substantial number of people who either did not or, more importantly, could not register and will not have access to FTA television after final ASO.
14. The problems associated with the registration process are detailed in the application and argument presented in the matter which was ultimately decided by the Constitutional Court.
15. Some of the problems already identified by our clients include the following:
 - 15.1. Access to post offices for purposes of registration was and remains difficult and costly if not impossible. This has been exacerbated by the fact that a substantial number of post offices have closed down;
 - 15.2. Given the cost and difficulty of accessing certain post offices, for example in rural areas, those who were requested to provide further information, simply could not afford to do so again; and
 - 15.3. Access to STBs was limited.
16. These problems have been compounded by poor installations of STBs.
17. Concerning the above, our client requests the following information urgently:




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- 17.1. The total number of people who registered before the cut off date for registration; and
 - 17.2. How many STBs still need to be installed;
 - 17.3. What quality assurance processes are in place to ensure that STBs were installed correctly, receive signal, and provide an accessible signal to a person's television set; and
 - 17.4. What plans the Department intends making regarding those who were unable to register for whatsoever reason in regard to their continuing to access FTA television following ASO.
18. Irrespective of the position concerning registration by those requiring subsidised STBs, it is important to recognise that the Constitutional Court judgment recognised that your predecessor's decision not to give notice and take account of representations received regarding the ASO date with the public or affected parties was unlawful. Moreover, the Constitutional Court held in this regard that:
- "[52] The decision concerning the analogue switch-off date is not a mechanical determination as the facts of this case show. Important interests are at stake. Following Albutt it was not procedurally rational for the Minister to set the analogue switch-off date without **notice to the industry and affected parties like MMA and SOS** to obtain their views on the matter."*
19. In these circumstances, our client holds the view that prior to announcing the two ASO dates, you were obliged to obtain the views of all affected parties, including our clients. You did not do so. For the reasons set out herein and in the Constitutional Court judgment, by failing to consult with our clients prior to taking your final decision, your decision remains procedurally irrational and unlawful.
 20. Had you given our clients the opportunity to make their views known during the consultation process preceding the declaration of the ASO dates, they would have spent some time dealing with the interconnection between ASO, the registration process, the need to ensure that all those requiring subsidised STBs received them and that, even those who did not qualify for subsidised STBs were unable to purchase STBs from the retail market given the shortages of STBs in the market. Declaring a date for ASO without considering these matters could deprive millions of people reliant on FTA television, access to such television after ASO.
 21. In these circumstances, our clients maintain that without further consultations with them and dealing fully and properly with the registration process and your predecessor's position, the date of 31 December 2024 for final ASO cannot be sustained. However, our client is cognisant of the importance of ASO and the need for digital migration and does not want to become embroiled in any dispute with you or anyone else concerning the date of ASO thereby delaying it further. To this end, our client believes that issues pertaining to registration for STBs and distribution of STBs to all those who may need them, is still possible before ASO. We accordingly request that a meeting be held with our clients for purposes of discussing the issues contained herein read together with our client's previous submissions as soon as possible.
 22. It goes without saying that all our clients rights regarding the matters set out herein are reserved.
 23. We look forward to receiving your urgent response.

Kind regards,



Dan Rosengarten
Rosengarten & Feinberg



MB
J.M

"WBS"

ROSENGARTEN & FEINBERG

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ATTORNEYS

Address

To: Minister of Communications

28 November 2023

Le Val, Ground Floor

Attn: Honourable Minister Gungubele

Our reference:

North Block, South Wing

Email: NNgaba@dcdt.gov.za

Dan Rosengarten

45 Jan Smuts Avenue

danr@rf-law.co.za

Westcliff, Johannesburg, 2193

South Africa

Daniel Basckin

danielb@rf-law.co.za

EXTREMELY URGENT WITH PREJUDICE

Dear Sir

RE: ANALOGUE SWITCH OFF / MEDIA MONITORING AFRICA / SOS SUPPORT PUBLIC BROADCASTING COALITION

1. We refer to our correspondence sent to you on behalf of Media Monitoring Africa and SOS Support Public Broadcasting, dated 9 March 2023 and 16 August 2023 ("our letters"). Copies of our letters are attached for ease of reference.
2. Despite a lapse of many months, we have not received a substantive reply to either letter.
3. Our clients are concerned by this given that the correspondence deals with a matter of national interest and importance. Analogue switch off has already been the subject of lengthy litigation and a Constitutional Court decision. By communicating with you, our clients are hoping to avoid any further litigation. We remind you that the Constitutional Court had the following to say about your consulting with our clients regarding analogue switch off:

"[52] The decision concerning the analogue switch-off date is not a mechanical determination as the facts of this case show. Important interests are at stake. Following Albutt it was not procedurally rational for the Minister to set the analogue switch-off date without notice to the industry and affected parties like MMA and SOS to obtain their views on the matter."

4. In all these circumstances, in order to avoid the possibility of further litigation relating to ASO, we require a substantive and meaningful response to our letters by no later than close of business on 6 December 2023. It is crucial that the issue of availability and installation of set-top-boxes are dealt with urgently. We further repeat our clients' request for an urgent meeting to discuss our clients' letters and the issues set out therein.
5. In the event that we do not receive a full, proper and meaningful response to our letters, we will assume that you do not intend dealing with any of the aspects raised in our correspondence and our clients reserve the right to take whatever steps may be necessary in the circumstances.

Partners Dan Rosengarten & David Feinberg Senior Associate Daniel Basckin

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J.M

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& FEINBERG

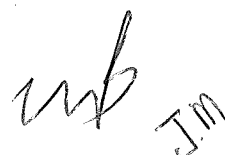
ATTORNEYS

6. To the extent that this results in litigation, we intend relying on all the letters sent by us to you.
7. We look forward to your urgent response.
8. Please acknowledge receipt of this letter.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'DR', written in a cursive style.

Dan Rosengarten
Rosengarten & Feinberg

Handwritten initials 'mb' and 'JM' in black ink, located in the bottom right corner of the page.

"WB4"

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Email: info@hmchaane.co.za



Our Ref	HM Chaane / R Seepane/M00388
Your Ref	

20 December 2023

ROSENGARTEN & FEINBERG ATTORNEYS
LE VAL, GROUND FLOOR
NORTH BLOCK, SOUTH WING
45 JAN SMUTS AVENUE
WESTCLIFF, JOHANNESBURG, 2193

PER ELECTRONIC MAIL: danr@rf-law.co.za; and
danielb@rf-law.co.za

Dear Sir,

RE: ANALOGUE SWITCH OFF/ MEDIA MONITORING AFRICA/ SOS SUPPORT PUBLIC BROADCASTING COALITION

1. As you should by now be aware, we act for the Department for Communications and Digital Technologies ("the Department or our client")
2. Your letter marked without prejudice dated 28 November 2023, directed to the Honourable Minister Gungubele MP has been brought to our attention for an apposite reply.
3. At the outset, please note that our instructions are not to deal with each, and every allegation or contention contained in your letter under reply. Our client's failure and/or election to deal with such allegations or contentions must not be construed as an admission of the correctness of the contents thereof or acquiescence therewith. Our client reserves the right to deal with each allegation, contention and/or innuendo contained therein at a later stage, in the appropriate forum and should the need therefore arise.
4. That being so, we note from the contents of your letter that ~
 - 4.1. Your client is concerned that it directed correspondence to our client regarding a matter of national interest apropos the Analogue Switch off ("the ASO");
 - 4.2. The ASO has already been a subject of lengthy litigation and a constitutional decision;

Managing Director: Hope Chaane (LLB, CPFL)
Director: Rebokilwe Seepane (BA (Law), LLB, LLM: Labour Law)
Consultant: Thato Manala (LLB)
Candidate Attorney: Matipa Tswai BA (Law), LLB
Candidate Attorney: Khensani Mawai: (LLB)
Office Manager: Kholo Mokaba



WB
J.M

- 4.3. Your client directed correspondence to our client in order to avoid further litigation regarding the ASO owing to the Judgement of the Constitutional Court;
- 4.4. It is crucial that the issue of availability and installation of set-to boxes are dealt with urgently;
- 4.5. Your client request for a further urgent meeting to discuss your client's letters and issues raised in those letters; and
- 4.6. Our client is directed to reply to your letter under reply by no later than 06 December 2023.
5. Our client is at a loss in an attempt to comprehend what your client's letter under-reply is intending to convey except for a threat of litigation in the event our client fails to meet with your client or react to this letter adequately.
6. That being said, as far back as 06 March 2023, our client directed a letter to your client addressing the very same issues which your client is raising in the letter under-reply, a copy of our client's letter is attached hereto for your ease of reference.
7. On 16 June 2023, our client issued a media advisory memorandum, on the very same issues. The media briefing was held on Tuesday, 20 June 2023.12. As you will note from the attached report of June 2023, our client has already consulted extensively on the ASO.
8. As a norm, our client's rights are reserved.
9. Be so advised.

Your faithfully,

R Seepane

ELECTRONICALLY TRAMSITTED WITHOUT SIGNATURE

Director

Rseapane@hmchaane.co.za

Managing Director: Hope Chaane (LLB, CPFL)
Director: Rebokilwe Seepane (BA (Law), LLB, LLM: Labour Law)
Consultant: Thato Manala (LLB)
Candidate Attorney: Matipa Tswai BA (Law), LLB
Candidate Attorney: Khensani Mawai: (LLB)



W/S

J.M

"WBS"

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ATTORNEYS

Address

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Westcliff, Johannesburg, 2193
South Africa

To: **The Honourable President of the Republic of South Africa** **2 December 2024**

**The Honourable Minister Malatsi,
Minister of Communications and
Digital Technologies**

Our reference:
Dan Rosengarten
danr@rf-law.co.za

c.c. Ms Gwen Ngwenya

Daniel Basckin
danielb@rf-law.co.za

c.c. Mr Mpho Matwane

By email

Dear President Ramaphosa and Minister Malatsi

RE: SCHEDULED ANALOGUE SWITCH-OFF FOR 31 DECEMBER 2024

1. We act on behalf of Media Monitoring Africa ("MMA") and SOS Support Public Broadcasting ("SOS").
2. MMA is a non-profit organisation that implements successful media strategies for change and actively promotes principles of democracy and respect for human rights. MMA's objectives are to promote the development of a free, fair, ethical and critical media culture in South Africa and the rest of the continent. The three key areas that MMA seeks to address through a human rights-based approach are media ethics, media quality and media freedom. In doing so, it acts for, amongst others, members of the public. One of its central areas of focus is media freedom of expression.
3. SOS is a civil society coalition that represents a broad spectrum of civil society stakeholders committed to the broadcasting industry which is aligned with the objectives of the Constitution and the Electronic Communications Act, 2005. SOS was established to, amongst others, drive public interest broadcasting and engage in the advancement and protection of community broadcast media in South Africa. It is made up of a broad range of civil society organisations, trade unions and their federations and individuals.
4. Both MMA and SOS have a strong and demonstrable history of acting in the public interest on key issues affecting the media and broadcasting services. This has been recognised by the Constitutional Court. They have been involved in prior litigation around the digital migration policy and analogue switch off ("ASO").

Partners Dan Rosengarten & David Feinberg Senior Associate Daniel Basckin

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5. Recently, MMA and SOS intervened in the matter of *e.tv (Pty) Ltd v Minister of Communications and Digital Technology and others* dealing with issues pertaining to ASO. It did so both in the High Court and subsequently in the Constitutional Court.
6. It was as a result of the aforesaid Constitutional Court decision that the ASO date was postponed. The Constitutional Court decision was reported as *e.tv (Pty) Limited and Others v Minister of Communication and Digital Technologies and 11 Others*, CCT89/22 & CCT92/22.
7. Our clients understand that eMedia and its subsidiary, e.tv, have communicated to you regarding the ASO date currently scheduled for 31 December 2024. This letter is written in support of what is contained in that letter dated 1 December 2024 and seeks the same relief as set out in that letter which is detailed more fully below.
8. The Constitutional Court held that the Minister had a duty to consult with MMA and SOS and that any decision regarding ASO would be procedurally irrational should the Minister fail to do so:

*"[52] The decision concerning the analogue switch-off date is not a mechanical determination as the facts of this case show. Important interests are at stake. Following Albutt it was not procedurally rational for the Minister to set the analogue switch-off date without **notice to the industry and affected parties** like MMA and SOS to obtain their views on the matter."*

9. On 9 December 2022, the previous Minister, Ms Ntshaveni, published a notice by way of Government Gazette which set out her intention to determine the date for final switch-off of the analogue signal and the end of dual illumination, as 31 March 2023. The previous Minister called for written submissions on or before 27 January 2023.
10. In response to the call for written submissions, MMA and SOS prepared and delivered submissions dated 27 January 2023, which are made available under cover of this letter marked "A". The submissions are 24 pages long. To assist the President and the Minister, a very high level summary of the submissions is set out below:

- 10.1. The submissions pointed out that the new deadline for registering for Set Top Boxes ("**STBs**") by 30 September 2022 was unlawful and procedurally irrational for reasons including that (i) the new deadline was a 'hard' deadline, with no further assistance offered to the indigent after this deadline, (ii) no reason for the imposition of a hard registration deadline of 30 September 2022 was given; (iii) no study was undertaken by the Minister in order to determine, inter alia, how many households would be affected by ASO; (iv) public communication regarding the new deadline was ineffective and near non-existent; (v) the period of 12 weeks afforded to the remaining households to register (which was recorded in the judgement as being at least 2.5 million households) was wholly insufficient. The Constitutional Court had this to say regarding STB registration:

*[63] It is not up to this Court, in terms of rationality, to second guess the method utilised by the Minister. The method chosen to gather the necessary information to make an informed decision on the analogue switch-off date was, according to the Minister, the STB registration process. **However, what this Court must consider is whether the "means***

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selected are rationally related to the objective sought to be achieved". Therefore, can it be said that the STB registration process and the deadline, in the manner in which it was conducted, is rationally related to the objective sought to be achieved, being the transition to digital television, without causing millions of persons to lose access to television on the analogue switch-off date?

[64] Requiring registration for STBs is an entirely permissible requirement, provided that people are properly informed and given reasonable opportunity to register. ...

- 10.2. The submissions substantially dealt with the ASO date of 31 March 2023, and set out myriad reasons why this date was unachievable. These reasons include that:
- 10.2.1. Over a third of the South African population watch free-to-air television via analogue means. The ASO date of 31 March 2023 would mean that these tens of millions of South African citizens would lose access to a vital source of free news, education, public service announcements, and entertainment.
- 10.2.2. ASO cannot be determined unless all qualifying households have been fully and properly informed of the need to register and the consequences of not registering, have been canvassed as to their reasons for not registering and have, after duly registering, been provided with a functional STB. In any event, SOS and MMA are of the view that no ASO date can be determined for so long as analogue terrestrial television reliance continues to run at approximately one third of the population.
11. As it would happen, 31 March 2023 was **not** declared the ASO date.
12. Mr Gungubele was appointed the Minister of Communications on 6 March 2023. Following his appointment, the Minister declared 31 December 2024 as the final ASO date ("**final ASO date**"). He did so by consulting only with the broadcasters, but not MMA and SOS.
13. Minister Gungubele, throughout the process leading up to the promulgation of the final ASO date of 31 December 2024 as well as thereafter, failed to consult with either MMA or SOS concerning ASO and how the promulgation of the final ASO date would affect the interests of the parties MMA and SOS represent. These parties include, amongst others, the most vulnerable members of society, being the indigent who are unable to afford the necessary equipment to enable them to watch free-to-air television following ASO. This section of the population will, after ASO, be left "*in the dark*" and will be unable to watch free-to-air television which, for most of them, is the only source of news and current affairs, and source of obtaining public service announcements and a means of accessing both sports and entertainment.
14. The failure to consult was exacerbated by the fact that MMA and SOS communicated with the Honourable Minister Malatsi's predecessor requesting that the Minister consult with each of them concerning ASO. Copies of the relevant communications sent to the erstwhile Minister are attached under cover of this letter marked "**B**". MMA and SOS received no substantive response to these letters beyond perfunctory correspondence from the State Attorney's office.
15. Notwithstanding that MMA and SOS (as well as community broadcasters) were not consulted regarding the final ASO date, MMA and SOS understand that the Minister did consult with

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broadcasters. MMA and SOS understand that the final ASO date was based on an agreement with the broadcasters that ASO only takes place as and when the necessary STB installation target was reached, and there were sufficient STBs in the market for persons needing to acquire one to access FTA television.

16. These goals have not been achieved. There have been significant delays in installing subsidised STBs. Most critically, there has been an extremely depressed uptake of STBs, to the effect that over 28% of the television viewing population **solely access television through analogue means**. These persons will be entirely without access to any television content at all from the final ASO date.
17. MMA and SOS understand that there have been numerous meetings of the Broadcast Digital Migration Committee (“**BDM**”) from which both MMA and SOS have, inexplicably, been excluded. It is during these meetings that poor STB registration and uptake were discussed.
18. Regarding the above, and the current status of the matter, it is important to recognise that as at 30 June 2024 there were **approximately 4.3 million houses (equating to more than 14 million South Africans) who still accessed free-to-air television solely by means of analogue broadcasts** and who stand to lose all access on the final ASO date. Much like e.tv, the information available to MMA and SOS indicates that there has been very little STB installation progress in households who qualified for subsidised STBs and that uptake remains critically low.
19. MMA and SOS understand from e.tv, who were part of the BDM meetings, that there are at least 469,000 indigent households who have registered for a government sponsored STB but have not yet been provided with one. This represents a substantial number of people. Given that ASO is little more than four weeks away, there is no hope that these indigent households will receive an STB before 31 December 2024 and they will therefore be without access to free-to-air television during the holiday period, and thereafter, should ASO proceed as envisaged on 31 December 2024.
20. This much was recognised by the Minister when, on 19 November 2024, he stated in Parliament that the broadcasting regulator, ICASA, had come to his office *“expressing their concern with the looming deadline and the implications that it can have”*. This position adopted by ICASA is a substantial about-turn from its earlier position when, in the previous litigation, it supported the earlier ASO dates prescribed by the Minister. Moreover, the irrationality of the ASO date of 31 December 2024 has been acknowledged by the Minister who said in Parliament, on the same date, that :

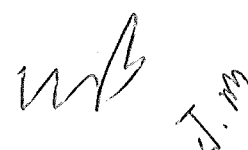
“No rational individual would argue against the fact that everything points out that the soil is fertile for extension”.
21. No doubt the Minister recognised that the paltry installation rate of little more than an average of 3,000 STBs per month would not meet the need to have all 469,000 indigent households installed prior to 31 December 2024.
22. As stated, MMA and SOS are guided by the provisions of the Constitution in achieving their objectives. In particular, they are concerned that ASO, should it occur on 31 December 2024, leaves millions of the most vulnerable without access to free-to-air television. This will unlawfully limit their rights, including the right of individuals to receive information, in terms of section 16 of the Constitution.


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23. SOS, in view of its support of the public broadcaster is concerned that the impact of ASO, should it occur on 31 December 2024, will threaten the SABC's continued viability - this, at a time when it is already financially distressed. The financial impact of premature ASO on the SABC has been made clear by the negative impact of switching off analogue transmitters in the Free State, Mpumalanga, Limpopo, North West and the Northern Cape. This premature ASO saw the SABC suffer a marked decline in its viewership and, hence, associated advertising revenue.
24. Importantly, the majority of those who watch community television as opposed to the commercial free-to-air channels, rely on the provision of free-to-air signals in order to do so.
25. MMA and SOS took comfort from the Minister's statements to Parliament on 19 November 2024, which was a clear and unequivocal indication that ASO was unlikely to take place on 31 December 2024 and the Minister was against ASO occurring on this date. Notwithstanding this, MMA and SOS understand that on 28 November 2024, at a meeting between the Minister and e.tv, the SABC and Sentech (but not with MMA, SOS or any of the community broadcasters), the Minister surprisingly communicated that Cabinet had made a decision that ASO would proceed on 31 December 2024.
26. For the reasons set out above, MMA and SOS implore the President and the Minister to suspend the final ASO date until such time as those millions who solely rely on analogue free-to-air television, have access to free-to-air television through an STB or other means.
27. Should the date not be extended, MMA and SOS intend reviewing the latest decision taken by Cabinet, amongst others, which will need to be done in the form of an urgent application given the looming date of 31 December 2024. Clearly a decision will need to be made by the relevant Court prior to 31 December 2024 unless all parties agree on the suspension of the final ASO date of 31 December 2024. This would benefit the Court and the parties, who would be able to fully and properly ventilate the necessary Court application to review the aforesaid decision. Such extension will ensure that the parties are able to put all relevant facts before the Court hearing the matter rather than having to prepare papers in a rush, thereby denying the Court access to full and proper information required for purposes of making a decision. A delay would also allow the Court to properly consider the complex facts and rights at play, and come to a considered decision.
28. Should the Honourable President and Minister be disinclined to suspend the final ASO date, the parties will need to agree on an expedited timetable for the exchange of pleadings in the review proceedings to be brought to ensure that the hearing can take place with sufficient time for the Court seized with the matter to make a decision prior to 31 December 2024. The above will need to take into account the Christmas holiday period. To ensure that the matter can be heard in a timely manner this year, should ASO not be suspended on the basis set out above, our clients will join e.tv in launching the necessary application this week.
29. In all of the above circumstances, please will you advise us by close of business on Tuesday 3 December 2024, whether Cabinet is willing to agree to an Order suspending the implementation of the gazetted ASO date of 31 December 2024 pending urgent review proceedings with dates to be agreed between the parties, but in any event for the matter to be heard as soon as possible after the first Court term of 2025 commences.



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30. MMA and SOS agree with e.tv that once agreement is reached, the parties approach the Judge President for the Order to be taken as soon as possible and that the agreed upon timetable is made an Order of Court.
31. Please urgently acknowledge receipt of this letter which is written to you with prejudice.
32. We look forward to receiving your urgent response prior to close of business tomorrow, 3 December 2024.

Yours sincerely

Dan Rosengarten
Rosengarten & Feinberg
[unsigned digital letter]

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"WBZ"

ROSENGARTEN & FEINBERG

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Address

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South Africa

To: Minister of Communications

16 August 2023

Attn: Honourable Minister Gungubele

Our reference:

Dan Rosengarten

danr@rf-law.co.za

Email: NNqaba@dcdt.gov.za

Daniel Basckin

danielb@rf-law.co.za

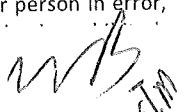
Dear Sir

RE: ANALOGUE SWITCH OFF / MEDIA MONITORING AFRICA / SOS SUPPORT PUBLIC BROADCASTING COALITION

1. As you are aware, we act on behalf of MMA and SOS.
2. On 9 March 2023, shortly after your appointment, we wrote to you concerning issues pertaining to analogue switch-off. For ease of reference, a copy of our letter is attached ("our letter").
3. To date, we have not received a substantive response from you to our letter. However:
 - 3.1. In response to our letter dated 9 March 2023, we received an email from Sybil Lyons-Grootboom on the same day, in which she advised us that she intended bringing our letter to your attention; and
 - 3.2. As we had not received a reply to our letter, on 20 March 2023, we again wrote to Ms Lyons-Grootboom enquiring when we could expect to receive a substantive reply to our letter.
4. In response to the 20 March 2023 email, and on 22 March 2023, Ms Lyons-Grootboom wrote to us and apologised for the delay stating that she would "follow-up and revert later".
5. Subsequent to the undertaking given by Ms Lyons-Grootboom that she would "follow up and revert later" we have had heard nothing further from either her or from you.
6. We understand that the ASO date has been promulgated into stages, the first stage having taken place at the end of July 2023. We place on record that our clients were not consulted in relation to your determining the date for ASO. In this regard, as you are aware, a judgment was handed down by the Constitutional Court on 28 June 2022 concerning a challenge to the declaration of the ASO date by your predecessor as being 31 March 2022. A copy of the judgment was attached to our previous letter to you dated 9 March 2023, but should you still require a copy, we will make it available to you.
7. We hold the view that, in view of the import of the judgement, you were required to consult our clients before deciding to promulgate the dates for ASO.

Partners Dan Rosengarten & David Feinberg Senior Associate Daniel Basckin

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8. We addressed various issues arising from the Constitutional Court judgment as well as the action taken by your predecessor in our letter to you dated 9 March 2023. We refer you in this regard to paragraphs 6, 7, 8 and 9 of the letter and request that you consider those paragraphs together with the contents of this letter.
9. Of course, ASO did not occur on 31 March 2023 as previously determined by your predecessor. Given that when you were appointed, no ASO date had been promulgated, and as stated in paragraph 9 of our letter, you were tasked with assessing where the digital migration process stood when you were appointed so that you could fully and properly deal with the question of ASO, the ASO date and all related matters. This included issues pertaining to the previous cut off date promulgated by your predecessor relating to when the indigent needed to register for STBs and when the STBs would be supplied and installed.
10. As previously pointed out to you, at paragraph 40 of its judgment, the Constitutional Court held regarding the issue of consultation prior to the declaration of ASO as follows:

*"[40] ... for example, critical queries raised in consultations before the analogue switch off date would have sought to determine the number of persons **who qualify to receive STBs** who would like to register for STB's before the analogue switch off date and how long it would take, at the current rate of installation, for all the households that wish to register to receive STBs to be supplied with such."*
11. Insofar as issues pertaining to the registration of STBs is concerned, the Constitutional Court's discussion on the issue prevailing at the time and pertaining to the application before it, is set out from paragraph 58 onwards. Once again, we request that you consider the passages dealing with the registration process.
12. To date, and notwithstanding correspondence and our clients making various submissions in relation to the absolute cut off for registrations (after which no STB registrations would be permitted) imposed by your predecessor following the Constitutional Court judgment, you have not dealt either with our clients' previous submissions in this regard or the issue of registrations generally.
13. There has been no rational explanation made by you or your predecessor as to why the cut off date was imposed and, more importantly, why registrations would not be accepted after that. The obvious impact of this is that those who had not registered by the cut off date will not receive a subsidised STB. You will appreciate that there are a substantial number of people who either did not or, more importantly, could not register and will not have access to FTA television after final ASO.
14. The problems associated with the registration process are detailed in the application and argument presented in the matter which was ultimately decided by the Constitutional Court.
15. Some of the problems already identified by our clients include the following:
 - 15.1. Access to post offices for purposes of registration was and remains difficult and costly if not impossible. This has been exacerbated by the fact that a substantial number of post offices have closed down;
 - 15.2. Given the cost and difficulty of accessing certain post offices, for example in rural areas, those who were requested to provide further information, simply could not afford to do so again; and
 - 15.3. Access to STBs was limited.
16. These problems have been compounded by poor installations of STBs.
17. Concerning the above, our client requests the following information urgently:

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- 17.1. The total number of people who registered before the cut off date for registration; and
 - 17.2. How many STBs still need to be installed;
 - 17.3. What quality assurance processes are in place to ensure that STBs were installed correctly, receive signal, and provide an accessible signal to a person's television set; and
 - 17.4. What plans the Department intends making regarding those who were unable to register for whatsoever reason in regard to their continuing to access FTA television following ASO.
18. Irrespective of the position concerning registration by those requiring subsidised STBs, it is important to recognise that the Constitutional Court judgment recognised that your predecessor's decision not to give notice and take account of representations received regarding the ASO date with the public or affected parties was unlawful. Moreover, the Constitutional Court held in this regard that:
- "[52] The decision concerning the analogue switch-off date is not a mechanical determination as the facts of this case show. Important interests are at stake. Following Albutt it was not procedurally rational for the Minister to set the analogue switch-off date without **notice to the industry and affected parties like MMA and SOS to obtain their views on the matter.**"*
19. In these circumstances, our client holds the view that prior to announcing the two ASO dates, you were obliged to obtain the views of all affected parties, including our clients. You did not do so. For the reasons set out herein and in the Constitutional Court judgment, by failing to consult with our clients prior to taking your final decision, your decision remains procedurally irrational and unlawful.
 20. Had you given our clients the opportunity to make their views known during the consultation process preceding the declaration of the ASO dates, they would have spent some time dealing with the interconnection between ASO, the registration process, the need to ensure that all those requiring subsidised STBs received them and that, even those who did not qualify for subsidised STBs were unable to purchase STBs from the retail market given the shortages of STBs in the market. Declaring a date for ASO without considering these matters could deprive millions of people reliant on FTA television, access to such television after ASO.
 21. In these circumstances, our clients maintain that without further consultations with them and dealing fully and properly with the registration process and your predecessor's position, the date of 31 December 2024 for final ASO cannot be sustained. However, our client is cognisant of the importance of ASO and the need for digital migration and does not want to become embroiled in any dispute with you or anyone else concerning the date of ASO thereby delaying it further. To this end, our client believes that issues pertaining to registration for STBs and distribution of STBs to all those who may need them, is still possible before ASO. We accordingly request that a meeting be held with our clients for purposes of discussing the issues contained herein read together with our client's previous submissions as soon as possible.
 22. It goes without saying that all our clients rights regarding the matters set out herein are reserved.
 23. We look forward to receiving your urgent response.

Kind regards,



Dan Rosengarten
Rosengarten & Feinberg



"WBS"

ROSENGARTEN & FEINBERG

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Contact

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Address

To: Minister of Communications

28 November 2023

Le Val, Ground Floor

Attn: Honourable Minister Gungubele

Our reference:

North Block, South Wing

Email: NNgaba@dcdt.gov.za

Dan Rosengarten

45 Jan Smuts Avenue

danr@rf-law.co.za

Westcliff, Johannesburg, 2193

South Africa

Daniel Basckin

danielb@rf-law.co.za

EXTREMELY URGENT WITH PREJUDICE

Dear Sir

RE: ANALOGUE SWITCH OFF / MEDIA MONITORING AFRICA / SOS SUPPORT PUBLIC BROADCASTING COALITION

1. We refer to our correspondence sent to you on behalf of Media Monitoring Africa and SOS Support Public Broadcasting, dated 9 March 2023 and 16 August 2023 ("our letters"). Copies of our letters are attached for ease of reference.
2. Despite a lapse of many months, we have not received a substantive reply to either letter.
3. Our clients are concerned by this given that the correspondence deals with a matter of national interest and importance. Analogue switch off has already been the subject of lengthy litigation and a Constitutional Court decision. By communicating with you, our clients are hoping to avoid any further litigation. We remind you that the Constitutional Court had the following to say about your consulting with our clients regarding analogue switch off:

"[52] The decision concerning the analogue switch-off date is not a mechanical determination as the facts of this case show. Important interests are at stake. Following Albutt it was not procedurally rational for the Minister to set the analogue switch-off date without notice to the industry and affected parties like MMA and SOS to obtain their views on the matter."

4. In all these circumstances, in order to avoid the possibility of further litigation relating to ASO, we require a substantive and meaningful response to our letters by no later than close of business on 6 December 2023. It is crucial that the issue of availability and installation of set-top-boxes are dealt with urgently. We further repeat our clients' request for an urgent meeting to discuss our clients' letters and the issues set out therein.
5. In the event that we do not receive a full, proper and meaningful response to our letters, we will assume that you do not intend dealing with any of the aspects raised in our correspondence and our clients reserve the right to take whatever steps may be necessary in the circumstances.

Partners Dan Rosengarten & David Feinberg Senior Associate Daniel Basckin

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6. To the extent that this results in litigation, we intend relying on all the letters sent by us to you.
7. We look forward to your urgent response.
8. Please acknowledge receipt of this letter.

Yours faithfully,



Dan Rosengarten
Rosengarten & Feinberg



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Our Ref	HM Chaane / R Seepane/M00388
Your Ref	

20 December 2023

ROSENGARTEN & FEINBERG ATTORNEYS
LE VAL, GROUND FLOOR
NORTH BLOCK, SOUTH WING
45 JAN SMUTS AVENUE
WESTCLIFF, JOHANNESBURG, 2193

PER ELECTRONIC MAIL: danr@rf-law.co.za; and
danielb@rf-law.co.za

Dear Sir,

RE: ANALOGUE SWITCH OFF/ MEDIA MONITORING AFRICA/ SOS SUPPORT PUBLIC BROADCASTING COALITION

1. As you should by now be aware, we act for the Department for Communications and Digital Technologies ("the Department or our client")
2. Your letter marked without prejudice dated 28 November 2023, directed to the Honourable Minister Gungubele MP has been brought to our attention for an apposite reply.
3. At the outset, please note that our instructions are not to deal with each, and every allegation or contention contained in your letter under reply. Our client's failure and/or election to deal with such allegations or contentions must not be construed as an admission of the correctness of the contents thereof or acquiescence therewith. Our client reserves the right to deal with each allegation, contention and/or innuendo contained therein at a later stage, in the appropriate forum and should the need therefore arise.
4. That being so, we note from the contents of your letter that ~
 - 4.1. Your client is concerned that it directed correspondence to our client regarding a matter of national interest apropos the Analogue Switch off ("the ASO");
 - 4.2. The ASO has already been a subject of lengthy litigation and a constitutional decision;

Managing Director: Hope Chaane (LLB, CPFL)
Director: Rebokilwe Seepane (BA (Law), LLB, LLM: Labour Law)
Consultant: Thato Manala (LLB)
Candidate Attorney: Matipa Tswai BA (Law), LLB
Candidate Attorney: Khensani Mawai: (LLB)
Office Manager: Kholo Mokaba



WB
J.M

- 4.3. Your client directed correspondence to our client in order to avoid further litigation regarding the ASO owing to the Judgement of the Constitutional Court;
- 4.4. It is crucial that the issue of availability and installation of set-to boxes are dealt with urgently;
- 4.5. Your client request for a further urgent meeting to discuss your client's letters and issues raised in those letters; and
- 4.6. Our client is directed to reply to your letter under reply by no later than 06 December 2023.
5. Our client is at a loss in an attempt to comprehend what your client's letter under-reply is intending to convey except for a threat of litigation in the event our client fails to meet with your client or react to this letter adequately.
6. That being said, as far back as 06 March 2023, our client directed a letter to your client addressing the very same issues which your client is raising in the letter under-reply, a copy of our client's letter is attached hereto for your ease of reference.
7. On 16 June 2023, our client issued a media advisory memorandum, on the very same issues. The media briefing was held on Tuesday, 20 June 2023.12. As you will note from the attached report of June 2023, our client has already consulted extensively on the ASO.
8. As a norm, our client's rights are reserved.
9. Be so advised.

Your faithfully,

R Seepane

ELECTRONICALLY TRANSMITTED WITHOUT SIGNATURE

Director

Rseapane@hmchaane.co.za

Managing Director: Hope Chaane (LLB, CPFL)
Director: Rebokilwe Seepane (BA (Law), LLB, LLM: Labour Law)
Consultant: Thato Manala (LLB)
Candidate Attorney: Matipa Tswai BA (Law), LLB
Candidate Attorney: Khensani Mawai: (LLB)



W/B

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"WBS"

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ATTORNEYS

Address

To: **The Honourable President of the Republic of South Africa** **2 December 2024**

**The Honourable Minister Malatsi,
Minister of Communications and
Digital Technologies**

Our reference:

Dan Rosengarten
danr@rf-law.co.za

Le Val, Ground Floor
North Block, South Wing
45 Jan Smuts Avenue
Westcliff, Johannesburg, 2193
South Africa

c.c. Ms Gwen Ngwenya

Daniel Basckin

danielb@rf-law.co.za

c.c. Mr Mpho Matwane

By email

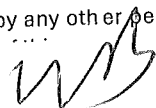
Dear President Ramaphosa and Minister Malatsi

RE: SCHEDULED ANALOGUE SWITCH-OFF FOR 31 DECEMBER 2024

1. We act on behalf of Media Monitoring Africa ("MMA") and SOS Support Public Broadcasting ("SOS").
2. MMA is a non-profit organisation that implements successful media strategies for change and actively promotes principles of democracy and respect for human rights. MMA's objectives are to promote the development of a free, fair, ethical and critical media culture in South Africa and the rest of the continent. The three key areas that MMA seeks to address through a human rights-based approach are media ethics, media quality and media freedom. In doing so, it acts for, amongst others, members of the public. One of its central areas of focus is media freedom of expression.
3. SOS is a civil society coalition that represents a broad spectrum of civil society stakeholders committed to the broadcasting industry which is aligned with the objectives of the Constitution and the Electronic Communications Act, 2005. SOS was established to, amongst others, drive public interest broadcasting and engage in the advancement and protection of community broadcast media in South Africa. It is made up of a broad range of civil society organisations, trade unions and their federations and individuals.
4. Both MMA and SOS have a strong and demonstrable history of acting in the public interest on key issues affecting the media and broadcasting services. This has been recognised by the Constitutional Court. They have been involved in prior litigation around the digital migration policy and analogue switch off ("ASO").

Partners Dan Rosengarten & David Feinberg Senior Associate Daniel Basckin

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5. Recently, MMA and SOS intervened in the matter of *e.tv (Pty) Ltd v Minister of Communications and Digital Technology and others* dealing with issues pertaining to ASO. It did so both in the High Court and subsequently in the Constitutional Court.
6. It was as a result of the aforesaid Constitutional Court decision that the ASO date was postponed. The Constitutional Court decision was reported as *e.tv (Pty) Limited and Others v Minister of Communication and Digital Technologies and 11 Others*, CCT89/22 & CCT92/22.
7. Our clients understand that eMedia and its subsidiary, e.tv, have communicated to you regarding the ASO date currently scheduled for 31 December 2024. This letter is written in support of what is contained in that letter dated 1 December 2024 and seeks the same relief as set out in that letter which is detailed more fully below.
8. The Constitutional Court held that the Minister had a duty to consult with MMA and SOS and that any decision regarding ASO would be procedurally irrational should the Minister fail to do so:

*“[52] The decision concerning the analogue switch-off date is not a mechanical determination as the facts of this case show. Important interests are at stake. Following Albutt it was not procedurally rational for the Minister to set the analogue switch-off date without **notice to the industry and affected parties** like MMA and SOS to obtain their views on the matter.”*

9. On 9 December 2022, the previous Minister, Ms Ntshaveni, published a notice by way of Government Gazette which set out her intention to determine the date for final switch-off of the analogue signal and the end of dual illumination, as 31 March 2023. The previous Minister called for written submissions on or before 27 January 2023.
10. In response to the call for written submissions, MMA and SOS prepared and delivered submissions dated 27 January 2023, which are made available under cover of this letter marked “A”. The submissions are 24 pages long. To assist the President and the Minister, a very high level summary of the submissions is set out below:

- 10.1. The submissions pointed out that the new deadline for registering for Set Top Boxes (“STBs”) by 30 September 2022 was unlawful and procedurally irrational for reasons including that (i) the new deadline was a ‘hard’ deadline, with no further assistance offered to the indigent after this deadline, (ii) no reason for the imposition of a hard registration deadline of 30 September 2022 was given; (iii) no study was undertaken by the Minister in order to determine, inter alia, how many households would be affected by ASO; (iv) public communication regarding the new deadline was ineffective and near non-existent; (v) the period of 12 weeks afforded to the remaining households to register (which was recorded in the judgement as being at least 2.5 million households) was wholly insufficient. The Constitutional Court had this to say regarding STB registration:

*“[63] It is not up to this Court, in terms of rationality, to second guess the method utilised by the Minister. The method chosen to gather the necessary information to make an informed decision on the analogue switch-off date was, according to the Minister, the STB registration process. **However, what this Court must consider is whether the “means***

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selected are rationally related to the objective sought to be achieved". Therefore, can it be said that the STB registration process and the deadline, in the manner in which it was conducted, is rationally related to the objective sought to be achieved, being the transition to digital television, without causing millions of persons to lose access to television on the analogue switch-off date?

[64] Requiring registration for STBs is an entirely permissible requirement, provided that people are properly informed and given reasonable opportunity to register. ...

- 10.2. The submissions substantially dealt with the ASO date of 31 March 2023, and set out myriad reasons why this date was unachievable. These reasons include that:
- 10.2.1. Over a third of the South African population watch free-to-air television via analogue means. The ASO date of 31 March 2023 would mean that these tens of millions of South African citizens would lose access to a vital source of free news, education, public service announcements, and entertainment.
- 10.2.2. ASO cannot be determined unless all qualifying households have been fully and properly informed of the need to register and the consequences of not registering, have been canvassed as to their reasons for not registering and have, after duly registering, been provided with a functional STB. In any event, SOS and MMA are of the view that no ASO date can be determined for so long as analogue terrestrial television reliance continues to run at approximately one third of the population.
11. As it would happen, 31 March 2023 was **not** declared the ASO date.
12. Mr Gungubele was appointed the Minister of Communications on 6 March 2023. Following his appointment, the Minister declared 31 December 2024 as the final ASO date ("**final ASO date**"). He did so by consulting only with the broadcasters, but not MMA and SOS.
13. Minister Gungubele, throughout the process leading up to the promulgation of the final ASO date of 31 December 2024 as well as thereafter, failed to consult with either MMA or SOS concerning ASO and how the promulgation of the final ASO date would affect the interests of the parties MMA and SOS represent. These parties include, amongst others, the most vulnerable members of society, being the indigent who are unable to afford the necessary equipment to enable them to watch free-to-air television following ASO. This section of the population will, after ASO, be left "*in the dark*" and will be unable to watch free-to-air television which, for most of them, is the only source of news and current affairs, and source of obtaining public service announcements and a means of accessing both sports and entertainment.
14. The failure to consult was exacerbated by the fact that MMA and SOS communicated with the Honourable Minister Malatsi's predecessor requesting that the Minister consult with each of them concerning ASO. Copies of the relevant communications sent to the erstwhile Minister are attached under cover of this letter marked "**B**". MMA and SOS received no substantive response to these letters beyond perfunctory correspondence from the State Attorney's office.
15. Notwithstanding that MMA and SOS (as well as community broadcasters) were not consulted regarding the final ASO date, MMA and SOS understand that the Minister did consult with

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broadcasters. MMA and SOS understand that the final ASO date was based on an agreement with the broadcasters that ASO only takes place as and when the necessary STB installation target was reached, and there were sufficient STBs in the market for persons needing to acquire one to access FTA television.

16. These goals have not been achieved. There have been significant delays in installing subsidised STBs. Most critically, there has been an extremely depressed uptake of STBs, to the effect that over 28% of the television viewing population **solely access television through analogue means**. These persons will be entirely without access to any television content at all from the final ASO date.
17. MMA and SOS understand that there have been numerous meetings of the Broadcast Digital Migration Committee (“**BDM**”) from which both MMA and SOS have, inexplicably, been excluded. It is during these meetings that poor STB registration and uptake were discussed.
18. Regarding the above, and the current status of the matter, it is important to recognise that as at 30 June 2024 there were **approximately 4.3 million houses (equating to more than 14 million South Africans) who still accessed free-to-air television solely by means of analogue broadcasts** and who stand to lose all access on the final ASO date. Much like e.tv, the information available to MMA and SOS indicates that there has been very little STB installation progress in households who qualified for subsidised STBs and that uptake remains critically low.
19. MMA and SOS understand from e.tv, who were part of the BDM meetings, that there are at least 469,000 indigent households who have registered for a government sponsored STB but have not yet been provided with one. This represents a substantial number of people. Given that ASO is little more than four weeks away, there is no hope that these indigent households will receive an STB before 31 December 2024 and they will therefore be without access to free-to-air television during the holiday period, and thereafter, should ASO proceed as envisaged on 31 December 2024.
20. This much was recognised by the Minister when, on 19 November 2024, he stated in Parliament that the broadcasting regulator, ICASA, had come to his office *“expressing their concern with the looming deadline and the implications that it can have”*. This position adopted by ICASA is a substantial about-turn from its earlier position when, in the previous litigation, it supported the earlier ASO dates prescribed by the Minister. Moreover, the irrationality of the ASO date of 31 December 2024 has been acknowledged by the Minister who said in Parliament, on the same date, that :

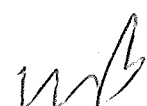
“No rational individual would argue against the fact that everything points out that the soil is fertile for extension”.
21. No doubt the Minister recognised that the paltry installation rate of little more than an average of 3,000 STBs per month would not meet the need to have all 469,000 indigent households installed prior to 31 December 2024.
22. As stated, MMA and SOS are guided by the provisions of the Constitution in achieving their objectives. In particular, they are concerned that ASO, should it occur on 31 December 2024, leaves millions of the most vulnerable without access to free-to-air television. This will unlawfully limit their rights, including the right of individuals to receive information, in terms of section 16 of the Constitution.

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23. SOS, in view of its support of the public broadcaster is concerned that the impact of ASO, should it occur on 31 December 2024, will threaten the SABC's continued viability - this, at a time when it is already financially distressed. The financial impact of premature ASO on the SABC has been made clear by the negative impact of switching off analogue transmitters in the Free State, Mpumalanga, Limpopo, North West and the Northern Cape. This premature ASO saw the SABC suffer a marked decline in its viewership and, hence, associated advertising revenue.
24. Importantly, the majority of those who watch community television as opposed to the commercial free-to-air channels, rely on the provision of free-to-air signals in order to do so.
25. MMA and SOS took comfort from the Minister's statements to Parliament on 19 November 2024, which was a clear and unequivocal indication that ASO was unlikely to take place on 31 December 2024 and the Minister was against ASO occurring on this date. Notwithstanding this, MMA and SOS understand that on 28 November 2024, at a meeting between the Minister and e.tv, the SABC and Sentech (but not with MMA, SOS or any of the community broadcasters), the Minister surprisingly communicated that Cabinet had made a decision that ASO would proceed on 31 December 2024.
26. For the reasons set out above, MMA and SOS implore the President and the Minister to suspend the final ASO date until such time as those millions who solely rely on analogue free-to-air television, have access to free-to-air television through an STB or other means.
27. Should the date not be extended, MMA and SOS intend reviewing the latest decision taken by Cabinet, amongst others, which will need to be done in the form of an urgent application given the looming date of 31 December 2024. Clearly a decision will need to be made by the relevant Court prior to 31 December 2024 unless all parties agree on the suspension of the final ASO date of 31 December 2024. This would benefit the Court and the parties, who would be able to fully and properly ventilate the necessary Court application to review the aforesaid decision. Such extension will ensure that the parties are able to put all relevant facts before the Court hearing the matter rather than having to prepare papers in a rush, thereby denying the Court access to full and proper information required for purposes of making a decision. A delay would also allow the Court to properly consider the complex facts and rights at play, and come to a considered decision.
28. Should the Honourable President and Minister be disinclined to suspend the final ASO date, the parties will need to agree on an expedited timetable for the exchange of pleadings in the review proceedings to be brought to ensure that the hearing can take place with sufficient time for the Court seized with the matter to make a decision prior to 31 December 2024. The above will need to take into account the Christmas holiday period. To ensure that the matter can be heard in a timely manner this year, should ASO not be suspended on the basis set out above, our clients will join e.tv in launching the necessary application this week.
29. In all of the above circumstances, please will you advise us by close of business on Tuesday 3 December 2024, whether Cabinet is willing to agree to an Order suspending the implementation of the gazetted ASO date of 31 December 2024 pending urgent review proceedings with dates to be agreed between the parties, but in any event for the matter to be heard as soon as possible after the first Court term of 2025 commences.


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30. MMA and SOS agree with e.tv that once agreement is reached, the parties approach the Judge President for the Order to be taken as soon as possible and that the agreed upon timetable is made an Order of Court.
31. Please urgently acknowledge receipt of this letter which is written to you with prejudice.
32. We look forward to receiving your urgent response prior to close of business tomorrow, 3 December 2024.

Yours sincerely

Dan Rosengarten
Rosengarten & Feinberg
[unsigned digital letter]

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MINISTRY
COMMUNICATIONS AND DIGITAL TECHNOLOGIES
REPUBLIC OF SOUTH AFRICA

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Enquiries: Mpho Matiwane/ Ananda Nel

Tel: 0733011987/ 083 456 9709

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Dan Rosengarten
Rosengarten & Feinberg
Le Val, Ground Floor
North Block, South Wing
45 Jan Smuts Avenue
Westcliffe, Johannesburg
2193

02 December 2024

Email: danr@rf-law.co.za
danielb@rf-law.co.za

Dear Mr. Rosengarten

RE: ANALOGUE SWITCH OFF (ASO)

This is to acknowledge receipt of your letter dated 2 December 2024.

It is impractical to agree to your request for "...an Order suspending the implementation of the gazetted ASO date of 31 December 2024 pending urgent review proceedings with dates to be agreed between the parties..." by the end of business on Tuesday, 03 December 2024.

This is mainly due to the fact that the earliest opportunity that Cabinet will possibly deliberate on the matter again is at its next meeting on Wednesday, 04 December 2024, which will be beyond your deadline.

In light of this, we will only be able to consider any proposal you're putting on the table after the said Cabinet meeting.

Kind regards

Solly Malatsi, MP

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JM

"WB7"

Daniel Basckin

From: Ananda Nel <ANel@dcdt.gov.za>
Sent: Thursday, 05 December 2024 06:54
To: Dan Rosengarten
Cc: Tshegofatso Kgarabjang; Mpho Matiwane; Daniel Basckin; Ipeleng Motuba
Subject: RE: URGENT: Analogue Switch Off / Media Monitoring Africa / SOS Support Public Broadcasting

Good morning Mr Rosengarten
Cabinet concluded around 4pm yesterday (4 December 2024).
Minister Malatsi has requested a virtual meeting with the broadcasters, at 13:30 today to provide feedback.
Kindly provide me with the email/contact details of your client and I will ensure that they are invited to the meeting.
Kind regards
Ananda

Ms Ananda Nel | Chief of Staff: Office of the Minister
Department of Communications and Digital Technologies

+27 83 456 9709 | e-mail: anel@dcdt.gov.za
First Floor | Block D | iParoli Office Park | 1166 Park Street | Halfeld | Pretoria



**communications &
digital technologies**

Department:
Communications & Digital Technologies
REPUBLIC OF SOUTH AFRICA

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From: Dan Rosengarten <danr@rf-law.co.za>
Sent: Thursday, 05 December 2024 05:41
To: Mpho Matiwane <MMatiwane@dcdt.gov.za>; presidentrsa@presidency.gov.za; malebo@presidency.gov.za; Daniel Basckin <danielb@rf-law.co.za>; Ipeleng Motuba <ipelengm@rf-law.co.za>
Cc: Ananda Nel <ANel@dcdt.gov.za>; Tshegofatso Kgarabjang <TKgarabjang@dcdt.gov.za>
Subject: Re: URGENT: Analogue Switch Off / Media Monitoring Africa / SOS Support Public Broadcasting

Dear Minister Malatsi

Unfortunately, in the absence of receiving any indication as to what decision cabinet took yesterday concerning the ASO date of 31 December 2024 and our clients' application, we have no option but to institute proceedings which will be served shortly. Please provide us with details of all the persons on whom we should serve the application.

Your sincerely

Dan Rosengarten

Rosengarten and Feinberg.

From: Mpho Matiwane <MMatiwane@dcdt.gov.za>
Sent: Monday, December 2, 2024 11:20 AM
To: Dan Rosengarten <danr@rf-law.co.za>; presidentrsa@presidency.gov.za <presidentrsa@presidency.gov.za>; malebo@presidency.gov.za <malebo@presidency.gov.za>; Daniel Basckin <danielb@rf-law.co.za>; Ipeleng Motuba <ipelengm@rf-law.co.za>
Cc: Ananda Nel <ANel@dcdt.gov.za>; Tshegofatso Kgarabjang <TKgarabjang@dcdt.gov.za>
Subject: RE: URGENT: Analogue Switch Off / Media Monitoring Africa / SOS Support Public Broadcasting

Greetings

I wish to acknowledge receipt of your letter which will be brought to the attention of the Minister.

Regards

Ms. Mpho Matiwane | Private & Appointment Secretary: Office of Minister Malatsi

Department of Communications and Digital Technologies

+27 12 427 8295 OR 073 301 1987 | e-mail: mmatiwane@dcdt.gov.za

First Floor | Block D | iParioli Office Park | 1166 Park Street | Hatfield | Pretoria



**communications &
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Department:
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A handwritten signature in black ink, appearing to be 'MB' with 'J.M.' written below it.

From: Dan Rosengarten <danr@rf-law.co.za>

Sent: Monday, 02 December 2024 10:53

To: presidentrsa@presidency.gov.za ; malebo@presidency.gov.za ; Mpho Matiwane <MMatiwane@dcdt.gov.za> ; Daniel Basckin <danielb@rf-law.co.za> ; Ipeleng Motuba <ipelengm@rf-law.co.za>

Subject: FW: URGENT: Analogue Switch Off / Media Monitoring Africa / SOS Support Public Broadcasting

Importance: High

Dear Ms Ngwenya and Mr Matwane,

We refer to the above matter.

We respectfully request that the attached correspondence be brought to the attention of His Excellency the President, and Honourable Minister Malatsi as a matter of urgency.

Please would you acknowledge receipt of this email and the attachments.

Yours sincerely,

Dan Rosengarten

ROSENGARTEN & FEINBERG

Tel. +27 (0) 11 486 0242

Web. www.rf-law.co.za

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ATTORNEYS

Address
Le Val, Ground Floor
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45 Jan Smuts Avenue
Westcliff, Johannesburg, 2193
South Africa

To: **Mr Hlengiwe Mahlangu**
HM Chaane attorneys

22 January 2025

Email: hlengiwe@hmchaane.co.za

Our reference:
Dan Rosengarten
danr@rf-law.co.za

Daniel Basckin
danielb@rf-law.co.za

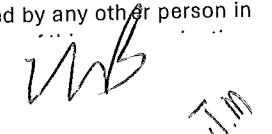
Dear Mr Mahlangu

RE: ANALOGUE SWITCH OFF: MEDIA MONITORING AFRICA AND SOS SUPPORT PUBLIC BROADCASTING COALITION

1. We act for Media Monitoring Africa ("**MMA**") and SOS Support Public Broadcasting Coalition ("**SOS**").
2. This letter is written to you as we understand that you represent the Minister of Communications and Digital Technologies ("**the Minister**") in engagement on the Analogue Switch Off ("**ASO**") date. ASO is currently scheduled to take place on 31 March 2025.
3. MMA is a non-profit organisation which has been monitoring the media in South Africa since 1993. MMA promotes principles of democracy and respect for human rights and values and upholds the principles set out in the Constitution. MMA's focuses include media freedom, and MMA has been working on public broadcasting issues for over 30 years.
4. SOS is a non-profit civil society coalition representing a broad spectrum of civil society stakeholders committed to the broadcasting industry, particularly the SABC. It too aligns itself with the objectives of the Constitution. SOS is also involved in the advancement of community broadcasters in South Africa.
5. MMA and SOS have a strong and demonstrable history of acting in the public interest on key issues affecting the media and broadcasting services.
6. We are aware of the exchange of correspondence between you/the minister and Nortons Inc, who represent e.tv concerning the ASO date. Certain of those letters were also sent on behalf of our clients. While our clients are aligned with the demands and issues raised by e.tv in the aforesaid correspondence, they have various issues which are separate to those raised by e.tv and which are set out below.

Partners Dan Rosengarten & David Feinberg Senior Associate Daniel Basckin

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7. The ASO date of 31 March 2025 (much like the previous ASO dates, including that of 31 December 2024) was unilaterally imposed without the necessary and required consultations taking place with our clients as well as community broadcasters.
8. Our clients previously intervened in the proceedings instituted by *e.tv (Pty) Ltd v the Minister of Communications and Digital Technologies and others* in the High Court. These were urgent proceedings brought against the Minister. Two primary arms of relief were sought: an order compelling the Minister to undertake a process of consultation prior to determining the ASO date, and an order that the determination of 31 March 2022 as the ASO date be declared unlawful.
9. It is well known that *e.tv* and our clients appealed against the High Court judgment to the Constitutional Court under Case No. CCT89/22 and CCT92/22. The Constitutional Court held, *inter alia*, that the ASO date of 31 March 2022 as the final switch off date of the analogue signal and the end of dual illumination as promulgated by the Minister was unconstitutional and invalid, and set it aside.
10. The Constitutional Court held, *inter alia*, as follows:

"[48] ... consultations to determine the analogue switch-off date would involve different aspects than consultations in preparation of the BDM Policy. For example, critical questions raised in consultations before the analogue switch off date would have sought to determine the number of persons who qualify to receive STBs, who would like to register for STBs before the analogue switch-off date and how long it would take, at the current rate of installation, for all the households that wish to register to receive STBs to be supplied with such."

and

"[51] ... digital migration policy discussions must include an opportunity where the affected parties are given notice and afforded an opportunity to make representations on the analogue switch off date."

and

"[52] The decision concerning the analogue switch-off date is not a mechanical determination as the facts of this case show. Important interests are at stake. ... it was not procedurally rational for the Minister to set the analogue switch off date without notice to the industry and affected parties, like MMA and SOS, to obtain their views on the matter."

(emphasis added)

11. Pursuant to the judgment, we sent various letters to the previous Minister recording, amongst others, that our clients were not consulted on the 31 December 2024 ASO date.
12. The only response sent by the previous Minister was that the Minister believed that sufficient consultation had taken place and no further consultations with MMA and SOS would occur. This is an acknowledgment by the Minister that there was an obligation to consult with our clients on the ASO date. Despite this, and despite the judgment of the Constitutional court, our clients were, once again not consulted on the 31 December date, nor the new ASO date of 31 March 2025.

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13. Rather than consulting with our clients, our clients were invited to attend a meeting with the Minister (on short notice and without an agenda) on 5 December 2024. At the meeting, in respect of which there were time constraints, our clients were merely informed *a fait accompli* that the ASO date had been moved to 31 March 2025. This does not consist of consultation as the ASO date had already been determined by that time. Our clients raised the concern in the meeting with the Minister that they had not been consulted and were informed that the decision to set the new ASO date as 31 March 2025 had been taken by Cabinet. Our clients expressed grave concern that the new date with no consultation and with no regular updates even to the Parliamentary Portfolio Committee on Communications and Digital Technologies for over a year on installations seemed to be setting the Department up for failure.
14. A further meeting to discuss ASO was held 20 December 2024. This was called on short notice. No agenda was provided. At this meeting, a presentation was made dealing with, *inter alia*, the installation plan for remaining subsidised set top boxes. There was no discussion concerning the 'new' 31 March 2025 ASO date. Again, our clients contend that this does not constitute the requisite consultation, and our clients again raised this as a concern during the meeting. All the meeting appeared to be, was an information session setting out how the Minister and the Department of Communications and Digital Technologies aimed to ensure that there were sufficient installations to enable ASO to take place on 31 March 2025. It was impossible to interrogate this plan with the Minister or the Department as it was not made available to those present at the meeting.
15. At the 20 December 2024 meeting, our clients requested a copy of the presentation. This presentation was only made available to it (following further requests) over a month later, on 21 January 2025. Our clients also requested a copy of the minutes of the 5 December 2024 meeting. As of the date of this letter, the minutes have not been made available to our clients.
16. Receiving the presentation on 21 January 2025 was the first time that our clients were able to fully assess how the Minister and Department justified unilaterally setting the ASO date as of 31 March 2025. This was based on what now emerges to be a flawed installation plan, which on its own terms does not meet the Minister's own admitted goals concerning when ASO can take place. The plan, in fact, shows that the ASO date of 31 March 2025 is premature and reveals that after 31 March 2025, millions of South Africans reliant on free-to-air television ("FTAT") will be left in the dark with no access to television on which they rely for news, current affairs, public service announcements and entertainment.
17. Had the Minister consulted our clients before meeting with Cabinet and prior to the 31 March 2025 ASO date being imposed, our clients would have been able to address numerous issues which needed to be addressed prior to the ASO date being promulgated. This would have included, for example, why it was necessary to roll out STBs not only to those in the provinces of Gauteng, Western Cape, Eastern Cape and KwaZulu-Natal, but in all other provinces before the ASO date could be determined. Our clients could have, for example, pointed out that even though transmitters were switched off by the SABC in the remaining provinces, this has had a dire effect on the SABC and members of the public solely reliant on free-to-air television. Our clients could have also addressed what has become known as the "missing middle" and the problems faced by

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them in that retail STBs are simply not available at the scale required. Our clients could have addressed major concerns being faced not only by members of the public, but community broadcasters as well.

18. Now that the plan presented at the meeting has been sent to our clients (over one month after the meeting), our clients are deeply concerned about the plan and the fact that this plan, dealing with how set-top-boxes would be installed for the indigent who had registered to receive one, is the plan on which Cabinet likely made its decision to set ASO as 31 March 2025. The plan is fundamentally flawed and any decision to determine ASO as 31 March 2025 based on this plan, or the information contained in the plan, is irrational, and seems set up for failure.
19. Had our clients had the plan in advance of the ASO date being set, they would have been in a position to analyse the figures presented and request certain information referenced in the presentation. They could have engaged the Minister on their concerns and the patent irrationalities in the plan. In other words, a process of consultation ought to have been followed.
20. The plan reveals that the roll out of STBs will not achieve the governments stated goal of ensuring 90% coverage before ASO. This, apart from the fact that the history of installations since 2015 and the fact that the roll out plan presented by the Minister during the previous litigation has failed dismally, reveals that the current plan is unrealistic and cannot be achieved.
21. Even if one accepts that the information contained in the plan is correct, and that there are 447,815 registered households who need STBs to be installed prior to ASO, the plan on its own terms is premised on the fact that this number of installations cannot be achieved.
22. There is no rational reason why the STB roll out should only be in the four primary provinces identified. This is so as in the remaining provinces, where the SABC has switched off its analogue transmitters, there are millions of people with no access to the SABC channels. These people will be without access to television at all should ASO proceed on 31 March 2025. These people, including not only those who have registered to have STBs installed, but also the missing millions, are as entitled to access free television as are those in the identified four primary provinces. These people are being unlawfully and arbitrarily discriminated against.
23. Further, the plan reveals that even in the so-called priority provinces, there will be a substantial shortfall of installations by 31 March 2025.
24. Bearing in mind that the number of households in the priority provinces requiring STBs total 244,848, this will mean that when ASO takes place, the remaining approximately 203,000 households who have registered for government subsidised STBs, will lose access to free-to-air television.
25. In terms of the plan, by 31 March 2025, the installations in the primary provinces would not have reached the 90% target which, by the Minister's own admission, is the required target for purposes of ASO. More than 76,000 of the 244,848 registered households will not have STBs installed. Accordingly, the installations reached as of 31 March 2025 will be less than 70% - way short of the 90% target. In this regard we refer you to page 11 of the presentation.

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26. Further, taken across all provinces, as of 31 March 2025, 319,675 registered households will not have received STBs. In other words, of those who have already registered (being 447,815), only 128,140 would have received them, being 28% of the total remaining STBs to be installed.
27. In setting the ASO date, the government's policy is to leave 'no one behind'. The ASO date of 31 March 2025 does exactly that. The determination of 31 March 2025 as ASO is patently irrational.
28. Our clients are also concerned about the system for beneficiaries to check their registration status (page 20 of the presentation). To do so will require beneficiaries not only to fully understand the process, but to have a device capable of registering their profile in the system.
29. In relation to the plan, we urgently require you to advise us how many STBs have been installed (whether in the primary provinces or otherwise) since 5 December 2024. Additionally, please will you advise us how many STBs are currently available (whether at Sentech or otherwise) for installation. **We request that this information be provided no later than 12h00 on Friday 24 January 2025.**
30. For the record, we understand from your correspondence to e.tv, that the Minister is not prepared to provide e.tv and, by extension, our clients, with all relevant documents considered by the Department and Cabinet prior to reaching the decision to extend ASO until 31 March 2025. We hold the view that not only for purposes of transparency, but by reason of the provisions of PAIA, your clients are obliged to provide these documents, and we accordingly once again request them.
31. Further, we are aware that e.tv, in separate correspondence to you, has demanded that the Minister postpone ASO, and this demand must be met by no later than 16h30 today.
32. Given what is set out above, our clients hereby demand that the Minister postpones the ASO date of 31 March 2025 indefinitely, pending proper consultation with our clients and other affected parties, and the achievement of 90% migration of analogue viewers to digital. **We require written confirmation that the Minister will comply with our clients' demand by no later than 12h00 on Friday 24 January 2025.**
33. You will have seen previous correspondence sent to the Minister that should our and e.tv's demands concerning the ASO date not be met, we intend joining e.tv as applicants for purposes of instituting appropriate legal proceedings against the Minister.
34. Accordingly, failing such confirmation, our clients will be compelled to institute legal proceedings to ensure that its demands set out above are met.
35. We look forward to receiving your urgent response.

Yours faithfully

Dan Rosengarten
Rosengarten & Feinberg
[unsigned digital letter]



Our Ref	HM Chaane / R Seepane/M00388
Your Ref	

23 January 2025

ROSENGARTEN & FEINBERG ATTORNEYS
LE VAL, GROUND FLOOR
NORTH BLOCK, SOUTH WING
45 JAN SMUTS AVENUE
WESTCLIFF, JOHANNESBURG, 2193

PER ELECTRONIC MAIL: danr@rf-law.co.za; and
danielb@rf-law.co.za

Dear Sir,

RE: ANALOGUE SWITCH OFF/ MEDIA MONITORING AFRICA/ SOS SUPPORT PUBLIC BROADCASTING COALITION

1. We refer to the above matter and to your letter dated 22 January 2025.
2. We have noted the contents of your letter. We also note that our client is required to provide a response to the letter by 24 January 2025. However, please note that the Minister is out of the country and as a result we will only be able to consult with him next week.
3. In view of the above, we hereby request your indulgence in respect of the deadline to provide a response to your letter by end of next week.
4. We trust the above is in order and await to hear from you.

Your faithfully,

R Seepane

ELECTRONICALLY TRANSMITTED WITHOUT SIGNATURE

R. Seepane
Managing Director
Email: Rebokilwe@hmchaane.co.za

Managing Director: Rebokilwe Seepane (BA (Law), LLB, LLM: Labour Law)

"WB10"

Daniel Basckin

From: Dan Rosengarten
Sent: Thursday, 23 January 2025 09:16
To: Matipa Tswai [HM Chaane Attorneys]
Cc: Daniel Basckin; Ipeleng Motuba; Rebokilwe Seepane [HM Chaane Attorneys]; Hlengiwe Mahlangu [HM Chaane Attorneys]; Khensani Mawai [HM Chaane Attorneys]; Fumani Mtungwa [HM Chaane Attorneys]
Subject: RE: URGENT: ANALOGUE SWITCH OFF: MEDIA MONITORING AFRICA AND SOS SUPPORT PUBLIC BROADCASTING COALITION

Dear Sir,

Thank you for your letter sent a short while ago.

Unfortunately, given the urgency of the matter and the proximity of the ASO date of 31 March 2025, our clients cannot give you the requested indulgence. In any event, we are certain that even being overseas the Minister is contactable by phone or e mail. There is little difference between being overseas or in another city (such as when he is in Cape Town when parliament is in session or cabinet meets). Further, as we are both aware, e.tv equally gave your client a deadline concerning revoking the ASO date advising you that should there be no undertakings in this regard, it would be compelled to launch urgent proceedings. That deadline has passed. For the record, we will be joining e.tv as applicants in any urgent proceedings instituted against the Minister in relation to the ASO date. Perhaps, in the interim, you can advise us what the Minister's position is in relation to e.tv's demand? Of course, even after proceedings are instituted, should the Minister be persuaded to concede that the ASO date is premature, the parties to the litigation can meet to discuss and agree a way forward.

We look forward to hearing from you.

Yours faithfully

Dan Rosengarten

ROSENGARTEN & FEINBERG

Tel. +27 (0) 11 486 0242

Web. www.rf-law.co.za

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From: Matipa Tswai [HM Chaane Attorneys] <Matipa@hmchaane.co.za>
Sent: Thursday, January 23, 2025 8:50 AM
To: Dan Rosengarten <danr@rf-law.co.za>
Cc: Daniel Basckin <danielb@rf-law.co.za>; Ipeleng Motuba <ipelengm@rf-law.co.za>; Rebokilwe Seepane [HM Chaane Attorneys] <Rebokilwe@hmchaane.co.za>; Hlengiwe Mahlangu [HM Chaane Attorneys] <Hlengiwe@hmchaane.co.za>; Khensani Mawai [HM Chaane Attorneys] <Khensani@hmchaane.co.za>; Fumani Mtungwa [HM Chaane Attorneys] <Fumani@hmchaane.co.za>
Subject: RE: URGENT: ANALOGUE SWITCH OFF: MEDIA MONITORING AFRICA AND SOS SUPPORT PUBLIC BROADCASTING COALITION

WB
J.M

Dear Sirs,

Please find the attached letter for your kind attention.

Kind Regards,



www.hmchaane.co.za

Matipa Tswai
Candidate Attorney
Irene Link Office Park
Building E, Ground Floor
5 Impala Avenue
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From: Matipa Tswai [HM Chaane Attorneys]

Sent: Wednesday, 22 January 2025 15:46

To: danr@rf-law.co.za

Cc: danielb@rf-law.co.za; ipelengm@rf-law.co.za; Rebokilwe Seepane [HM Chaane Attorneys]

<Rebokilwe@hmchaane.co.za>; Hlengiwe Mahlangu [HM Chaane Attorneys] <Hlengiwe@hmchaane.co.za>; Khensani Mawai [HM Chaane Attorneys] <Khensani@hmchaane.co.za>; Fumani Mtungwa [HM Chaane Attorneys] <Fumani@hmchaane.co.za>

Subject: RE: URGENT: ANALOGUE SWITCH OFF: MEDIA MONITORING AFRICA AND SOS SUPPORT PUBLIC BROADCASTING COALITION

Dear Sirs,

We acknowledge receipt of the attached letter. We will consult with our client and revert.

Kind Regards,



www.hmchaane.co.za

Matipa Tswai
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Handwritten signature: MB
Handwritten initials: JMA

From: Dan Rosengarten <danr@rf-law.co.za>

Sent: Wednesday, January 22, 2025 1:26:06 PM

To: Hlengiwe Mahlangu [HM Chaane Attorneys] <Hlengiwe@hmchaane.co.za>; Daniel Basckin <danielb@rf-law.co.za>;
Ipeleng Motuba <ipelengm@rf-law.co.za>

Subject: URGENT: ANALOGUE SWITCH OFF: MEDIA MONITORING AFRICA AND SOS SUPPORT PUBLIC BROADCASTING COALITION

Dear Sirs

We refer to the above matter and attach **urgent** correspondence for your attention.

Please acknowledge receipt.

Yours faithfully

Dan Rosengarten

ROSENGARTEN & FEINBERG

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"WB11"



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ANNUAL REPORT 2024



WB
T.P.

TABLE: Summarised Financial Performance (R'000)

	2022	2023	2024	3 YEAR GRAPH	PY CHANGE R'M	PY CHANGE %
Advertising and Sponsorship Revenue	3 732 591	3 326 125	3 658 098		261 668	8%
Licence Fees	815 055	741 218	686 535		(54 683)	-7%
Other	520 240	599 144	739 574		217 485	36%
Total Revenue	5 067 886	4 666 487	5 084 207		424 470	9%
Amort. and Imp. Prog. Film and Sports Rights	(1 358 737)	(1 347 534)	(1 186 133)		154 651	-11%
Signal Distribution and Linking Costs	(725 568)	(682 530)	(685 973)		(3 442)	1%
Employee Compensation and Benefit Expenses	(2 009 380)	(2 000 958)	(1 913 501)		87 457	-4%
Other	(1 232 543)	(1 462 068)	(1 490 954)		(28 886)	2%
Total Operating Expenses	(5 326 228)	(5 493 090)	5 276 561		209 779	-4%
Operating Profit/(Loss) before interest and tax	(258 342)	(826 603)	(192 354)		634 249	-77%

*Note: The figures reported in FY2023 were restated. The loss reported changed from R1.2 bn to R826m. The net impact on operational performance prior to restatement is R1 bn (84%). The below highlights are based on restatement figures.

Operational Performance Review

The public broadcaster reported a net operating loss for the year of R192m compared to a loss of R826m in the previous year. This represents a significantly improved performance of R634m (77%). Factors contributing to the improved performance are:

- Advertising revenue outperformed the previous financial year by 6 per cent, as audiences remained stable throughout the year. Sponsorship revenue continued to grow by 15 per cent due to the number of major international sporting events held. The market's sensitisation about the SABC offering through the client connects and roadshows appear to have borne fruit.
- The successful implementation of initiatives like revised sales-trading models and the renewal of a major contract.
- The proceeds from the disposal of non-core properties.
- The positive impact of new content on S3.
- Digital revenue increased by R13.2m (66%) after re-sourcing gaps were addressed.
- The current economic climate has, however, continued to adversely affect the collection of TV licences. Customers failed to honour their promises to pay, as households had less disposable income.
- Total operating expenses decreased by 4 per cent when compared to the prior year. The persistent financial challenges faced by the Corporation required continued implementation of cost-containment practices. Investment in content further needed to be contained. While limited, investment in new properties has displayed positive performance with one of the properties occupying a Top 20 spot.
- Employee costs yielded a 4 per cent year-on-year saving, as vacancies remained unfilled, excluding the impact of year-end employee-related valuations.
- Movements in the actuarial valuations of employee benefits in response to market trends.

Financial Sustainability

As of 31 March 2024, the Corporation was still executing its mandate diligently in spite of doubts about its ability to continue operating in the twelve months following 31 March 2023 on the back of its own resources and with the support from its service providers, although strategic choices were required. It was, however, not possible to invest in infrastructure and technology, and investment in new content was limited while innovative alternative funding models were being developed and partnerships formalised in this regard.

The financial sustainability of the Corporation has remained an area of focus throughout the year. The reality is that, given that the government grant allocation does not fully cover the funding of the mandate, the continued decline in traditional advertising and licence-fee revenues poses a significant risk to the sustainability of our business. The funding for capital is insufficient for the demands, resulting in the continued necessity to reprioritise key projects and project timelines within the available budget or the necessity to maintain existing infrastructure beyond their reasonable lifespan and at increasing cost. Prioritised projects relate to the infrastructure projects to align with new consumer patterns and are anticipated to improve the revenue generated as benefits are expected to be realised. Revenue improvement strategies were revised and implemented. Commercial revenues reported the highest performance. The Corporation is in the process of reconfiguring its sales-execution process to improve the ease with which it trades with customers. Operational efficiencies and austerity measures will persist with the aim of further reducing reported losses, while also continuously leveraging new strategic partnerships.

The Corporation further continues its efforts to explore funding support options via various other avenues and particularly for its Capital Investment Plan.

Amidst the financial sustainability challenge, and the underfunded delivery of public mandate, Radio and Video Entertainment divisions were able to be profitable and improve at a gross profit level compared to the previous financial year. The graph below depicts the profitability of the two core divisions.