CONSTITUTIONAL COURT OF SOUTH AFRICA

Electronic Media Network Limited and Others v e.tv (Pty) Ltd and Others

CCT 140/16
141/16
145/16
Date of hearing: 21 February 2017

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today, the Constitutional Court handed down judgment in three consolidated applications for leave to appeal against a judgment of the Supreme Court of Appeal (SCA), which held that a clause of an amendment (Amendment) to the Broadcasting Digital Migration Policy (Policy) adopted by the Minister of Communications (Minister) was invalid and therefore unlawful.

South Africa will undergo a "digital migration process" to transition broadcast television signals from analogue to digital form. However, millions of households in South Africa do not have television sets that contain a built-in device to convert digital broadcast signals. Those television sets will require set top boxes (STBs) to convert digital signals. In line with the Policy, STBs will be provided to about five million lower-income households on a subsidised basis.

At the same time, there has been ongoing debate among key stakeholders regarding whether these subsidised STBs should have the capability to decipher encrypted digital broadcast signals. The applicants contended that the subsidised STBs should not have decryption capabilities. The first respondent, e.tv (Pty) Ltd (e.tv) argued that they should. When it was adopted in 2008, the Policy provided for decryption capabilities. However, in March 2015 the Minister published the Amendment, which inserted a clause in the Policy stating that the subsidised STBs shall not have the capability to decipher encrypted broadcast signals.

After the Amendment, e.tv brought an application to the High Court to review the Minister's decision. It argued that the Minister did not have the power to effect that Amendment and that certain consultations as required by the Electronic Communications Act 36 of 2005 (ECA) had not been made. e.tv argued that the Minister was required to consult with the Independent Communications Authority of South Africa (ICASA) and the Universal Service and Access Agency of South Africa (USAASA) before adopting the Amendment. The High Court held that Minister had the power to pass the Amendment under the applicable legislation and the Constitution. The High Court also held that the Amendment satisfied the requirements of legality review, including lawfulness and rationality. Accordingly, the High Court dismissed e.tv's application with costs.

e.tv lodged an appeal against the High Court ruling to the SCA. The Minister and twelve other respondents, including South African Broadcasting Corporation SOC Limited (SABC) and Electronic Media Network Ltd (M-Net), opposed the appeal. The SCA upheld the appeal with costs.

Aggrieved by the SCA's judgment, M-Net, the Minister and SABC filed applications for leave to appeal to the Constitutional Court. These applications were consolidated. The applicants sought the judgment and order of the SCA to be set aside. The applications are opposed by e.tv and others, including S.O.S. Support Public Broadcasting Coalition (SOS) and Media Monitoring Africa (MMA).

In the majority judgment, Mogoeng CJ (Nkabinde ADCJ, Mojapelo AJ, Zondo J, concurring and Jafta J concurring in the order) held that policy-making is fundamentally a power assigned by the Constitution exclusively to the executive. Also, the majority held that consultation is markedly different from negotiation which is essentially about consensus-seeking. Consultation is about the solicitation of such views as key role-players and interested persons might have on a policy proposal.

The majority holds that the requirements for consultation had already been met fully through consultative processes embarked on by Minister Muthambi's predecessors, when she took over. There was no longer any obligation to consult with USAASA, ICASA or any other interested person. That opportunity had been availed to all, particularly when Minister Carrim published his policy proposals. Minister Muthambi was at large to solicit the views of any other person or entity she thought could be of help to her. Although she went about it in the most unfortunate way, her conduct did not create a right for e.tv which it otherwise did not have.

The majority holds that the standard of rationality contained in legality review is not some supra-constitutional entity or principle that is uncontrollable and that respects or knows no constitutional bounds. Like all other constitutional principles, it too is subject to constitutional constraints and must fit seamlessly into our constitutional order, with due regard to the requirements of the doctrine of separation of powers. It is a good

governance-facilitating, arbitrariness- and abuse-of-power-negating weapon in our constitutional armoury to be employed sensitively and cautiously.

The majority also notes that e.tv in effect accepts that foregoing decryption capabilities is a legitimate and effective cost-saving measure or strategy but contends that there is another and possibly more appropriate means of achieving the same purpose. That is the proposal, e.tv says, it would have presented to the Department of Communications (Department) had it been consulted by Minister Muthambi before she finalised the Policy. e.tv appealed to this Court to endorse its apparently more inclusive and better proposal so that the Department could consider adopting it.

In response, the majority holds that the enquiry is always whether there is a rational connection between the means and the purpose. Since the answer is yes, and e.tv together with nine other television licencees were consulted, judicial intrusion is constitutionally impermissible. It is for the executive to modify the means as many times as it wishes to achieve the relevant objective, provided it does so within the bounds of the Constitution and the law. The policy-making process was therefore procedurally and substantively rational. The majority concludes that the Minister acted well within her powers in amending the Policy. Therefore, it upholds the appeal and set the order of the SCA aside.

In a dissenting judgment (second judgment), Cameron J and Froneman J (Khampepe J and Pretorius AJ concurring) find that the Minister's Amendment is not immunised from scrutiny. In exercising her power under the ECA, the Minister was exercising a statutory power, informed by constitutional values and deriving from high constitutional authority, but not protected by any supposed constitutional policy-making immunity. The Minister's disregard of her constitutional and statutory obligations was patent. Consequently, this Court is not only entitled but obliged to intervene.

The second judgment agrees that the Minister had to act rationally, as required by the constitutional principle of legality. She sought to save costs for government by foregoing decryption capabilities from STBs. However, e.tv had tendered to cover those very costs. To the extent that e.tv's tender was unclear, rational pursuit of her objective of cost-saving by foregoing decryption capabilities required her to clarify with e.tv what its offer entailed. The Minister failed to do so, despite secretly consulting other "stakeholders" outside of the statutorily-mandated process. The means she pursued to attain the end of cost-saving was unrelated rationally to that end. The whole process the Minister followed in adopting the Amendment was therefore tainted with irrationality. Further, despite being required by the ECA to consult with ICASA and USAASA on the Amendment, the Minister failed to show that she had indeed done so. The Minister admitted that she consulted various persons and entities, but not e.tv. However, she failed to explain why she did so. She did not say who she consulted specifically. She also did not seek to explain why this does not open the door to "secret lobbying and influence-peddling". For these reasons, the second judgment would therefore grant leave to appeal but dismiss the appeal.

In a concurring judgment (third judgment), Jafta J agrees with the outcome proposed in the first judgment, but is unable to support the reasoning furnished for it. According to the third judgment, section 3(5) of the ECA must be read together with subsections (6), (7) and (8) which make it clear that a policy direction referred to in section 3(5) does not constitute an amendment. Subsections (6), (7) and (8) regulate the procedure which must be followed in amending a policy direction. It would be remarkably odd for Parliament to use the word "policy" in an expansive sense that includes amendments and the words "policy direction" in a restrictive sense that excludes amendments in the same sentence. Furthermore, the scheme of section 3, read in its entirety, suggests that the terms "policy" and "policy direction", as used in subsection (5), do not include amendments. According to the third judgment, there appears to be no discernible reason for restricting the procedure in question to policy directions only. The only reasonable explanation that presents itself is that this was an oversight on the part of Parliament not to include the amendment of a policy in the provisions of subsections (6), (7) and (8). Accordingly, the third judgment concludes that Minister Muthambi was exempted by subsection (6) from repeating the subsection (5) process, which was followed by Minister Matsepe-Casaburri, when she issued the original policy. The third judgment also rejects e. tv's procedural irrationality challenge and holds that there is a rational connection between the amendment and the stated objective of saving costs.

For the reasons given in the majority judgment, the appeal is upheld and e.tv, MMA and SOS are ordered to pay costs to M.Net, including costs of two counsel.