

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: MC 42/2017

[2018] SCSC 348

CABLE AND WIRELESS SEYCHELLES LTD

Applicant

versus

**1. MINISTER OF BROADCASTING AND TELECOMMUNICATION
2. GOVERNMENT OF SEYCHELLES**

Respondent

Heard: 7 February 2018

Counsel: Mr. Frank Elizabeth for plaintiff
Mr. George Thatchett for defendant

Delivered: 9 April 2018

Judgment

M. TWOMEY, CJ

[1] The Petitioner invokes the supervisory jurisdiction of the Court under Article 125(1) c of the Constitution for judicial review of the First Respondent's decision taken on 1 June 2017 and for a writ certiorari quashing the same.

[2] Leave to proceed with the instant suit was granted without the court delving into any great depth about the bona fides and standing of the Petitioner, having been generally

satisfied ex facie of its sufficient interest and having expressed caution about the application so to permit the adjudication of the grave matters raised.

[3] The decision impugned concerned an order made by the First Respondent in which it required the Petitioner to re-establish and restore interconnection to all licenced telecommunication operators on or before the 23rd June 2017 so as to ensure proper and fully functional termination of incoming international calls through the interconnection.

[4] It must be noted at this stage that on 2 March 2006 an Agreement was signed by Intelvision Ltd and Cable and Wireless Seychelles Limited for the parties to interconnect with each other with regard to telecommunication services to the public in Seychelles. It was inter alia a term of the Agreement that the Petitioner would provide Intelvision with a fixed terminating access service providing conveyance of calls to agreed number ranges.

[5] It must also be noted that the First Respondent obtains his powers from section 12 of the Broadcasting and Telecommunication Act (the Act) which provides in relevant part that:

“12. (1) The Minister shall be responsible for the general superintendence and supervision of all matters relating to broadcasting and telecommunication and shall carry the provisions of this Act into execution.

(2) The Minister, in exercising the powers conferred by this Act, shall -

(a) take all reasonable measures to provide throughout Seychelles, such broadcasting and telecommunication will satisfy all reasonable demand for such services, including emergency services, public pay phone services and directory information services;

(b) promote the interests of consumers, purchasers and other users of broadcasting and telecommunication services in respect of the prices charged for, and the quality and variety of, such services and equipment supplied in connection with such services;

(c) promote and maintain competition among persons engaged in commercial activities for, or in connection with, the provision of broadcasting and telecommunication services and promote efficiency and economy on the part of such persons; and

(d) promote the goals of universal service.”

[6] The events leading to this petition are that Intelvision on 18 March 2016 made a complaint regarding interconnection problems it was encountering, specifically the blocking of international calls by the Petitioner. A direction was issued by the Department of Information and Communications Technology in the First Respondent’s Ministry to resolve the interconnection problem and a meeting organised on 25 May 2016 with all telecommunication operators to resolve the issue. This meeting was attended by the Petitioner who did not raise issues about the restoration of interconnection difficulties. It was subsequently informed that the Second Respondent intended to take all necessary measures to ensure the reestablishment of interconnection to its proper working order, specifically to ensure that all telecommunication service providers take necessary measures to resolve any problems with regard to the termination of incoming international phone calls via interconnection. It was also directed to provide the Department with confirmation of the fulfilment of this obligation by 6 June 2016.

[7] The Petitioner did not comply with these directions but chose instead to resist them and to further inform the Ministry that it did not consider it commercially viable to continue with the service of termination of incoming international phone calls via interconnection as it involved additional expense and that the direction issued did not fall within the remit of the Ministry’s powers.

[8] Thereafter, the First Respondent issued an Order dated 1 June 2017 pursuant to section 33(3) of the Act in which the Petitioner was directed “to re-establish and restore interconnection to all licensed operators on or before 22 June 2017 to ensure proper and fully functional termination of incoming international telephone calls through the interconnection” failing which it would have penalties imposed upon it.

[9] The provision relied on for the ministerial order states:

“33. (1) Telecommunication services shall, as far as practicable, be provided in accordance with the principle of free and fair competition.

(2) Any of the following practices shall be a contravention of subsection (1) -

(a) collusion between persons who are potential operators of telecommunication services in applying for, or exploiting, a licence for such service;

(b) restraining access by any operator or user of a telecommunication service in applying for, or exploiting, a licence for such service;

(c) charging tariffs which are not in accordance with the applicable tariff structure; or -

(d) the use of a dominant position in the market to restrict, prevent or deter the entry of another person into the market, or to oust a person from the market.

(3) Where the Minister is satisfied that a person is engaged in a practice in contravention of subsection(1), he may in writing, order such person to do, or refrain from doing any act within such time as may be specified in the order.”

[10] I presume that the Minister in the execution of his Order has relied on section 33 (2) (b) and (d) of the Act as this is not specified in his Order apart from a reliance on section 33 generally.

[11] In its petition seeking administrative review of the First Respondent’s decision, the Petitioner raises several issues relating to the cost of providing the service it was directed to provide. It also submits that the Ministerial Order was not in line with best international practice in terms of efficiency, financial benefits to the government. I shall return to these issues later in the judgment.

[12] The Petitioner further submits that the Ministerial Order was grossly unreasonable, irrational and amounts to an abuse of power with no sufficient reasons for the decision being given and, with the Petitioner not have had an opportunity to be heard.

[13] In his response to the Petitioner, Counsel for the Respondents has submitted that the Petitioner is bound to provide the services above mentioned as provided by section 30 of the Act, as per paragraph 8 of its license and as per its agreement with Intelvision. It has further submitted that the First Respondent has acted legally, rationally and properly while exercising its statutory obligations under the Act. It further submits that the

Petitioner has open to it all legal avenues for modifying or amending its contract or renegotiating its licence, which avenues it has failed to explore.

- [14] The Petitioner has in respect of its petition relied on the supervisory jurisdiction of the Supreme Court vested in it by Article 125 (c) of the Constitution which provides in relevant part:

Article 125 (1) There shall be a Supreme Court which shall, in addition to the jurisdiction and powers conferred by this Constitution, have –

...

(c) supervisory jurisdiction over subordinate courts, tribunals and adjudicating authority and, in this connection, shall have power to issue injunctions, directions, orders or writs including writs or orders in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto as may be appropriate for the purpose of enforcing or securing the enforcement of its supervisory jurisdiction; ...

- [15] In respect of these provisions, the Petitioner submits that the Minister was exercising a public law function, making a discretionary quasi-judicial decision, and that therefore his decision is subject to judicial review. Conversely, at paragraph 17 of its petition the Petitioner avers that “the decision of the First Respondent is administrative in nature.”

- [16] Furthermore, the Petitioner submits that where an Act of Parliament confers the power to make a decision on a Minister, or any other public authority, and that decision if when taken, adversely affects a citizen or a corporate entity, the person or company affected by the decision has the right to challenge the decision by way of judicial review and the Court has the power to investigate the nature of the decision and the manner in which it was taken. For example, if it was arbitrary, capricious, made in bad faith, unfair, unreasonable, and unjust; or took into consideration extraneous matters or was simply an abuse of power.

[17] It is the contention of the Petitioner that the manner in which the decision was taken has to be seen to be transparent and be able to stand up to judicial scrutiny. To construe the Act and the power it conveys differently would lead to absurdity as it would place the person or public authority taking the quasi-judicial decision above the law and the decision taken not subject to judicial investigation. In the present case, the manner in which the decision was taken is admittedly a mere “perusal of the records” by the First Respondent. This can hardly be said to be a proper way for a Minister to take a decision which adversely affected the Petitioner and the Court should not condone this arbitrary practice as it does not meet the standard of a proper and adequate manner to take such decisions.

[18] In contrast, the Respondents contend that the decision sought to be challenged is not that of an adjudicating authority for the purpose of Article 125 (1) (c) of the Constitution. In this respect the Respondents rely on the case of *Cable & Wireless (Seychelles) LTS v Ministry of Finance and Communications & Anor* (unreported, CS 377/1997) where the Supreme Court held that a Minister is not an authority established by law to perform a judicial or quasi-judicial function in terms of the Constitution of Seychelles.

[19] The Petitioner contends that this position seeks to impose a very narrow interpretation of person or authority whose decisions are subject to judicial review by the courts. The Petitioner further submits that the First Respondent’s decision cannot be without reproach and not subject to judicial intervention.

[20] The Petitioner also contends that the fact that the First Respondent’s decision is accompanied by a threat of sanction if not complied with by the deadline, suggests that the decision is of a quasi-judicial nature, if not judicial, and it is therefore erroneous to apply a restrictive interpretation to the definition of adjudicating authority.

[21] The first issue to be resolved by this court therefore is whether Article 125 (c) extends the courts’ jurisdiction to the review of ministerial decisions. Judicial review broadly speaking is about the function or capacity of the court to provide remedies to people adversely affected by unlawful government action. Michael Fordham QC states that:

“Judicial review is the Courts’ way of enforcing the rule of law: ensuring that public authorities’ functions are undertaken according to law and that they are accountable to law. Ensuring, in other words, that public bodies are not “above the law”” (Judicial Review Handbook (6th edition; Hart Publishing) at page 7).

- [22] In *R v Tower Hamlets London Borough Council, ex p Chetnik Developments Ltd* [1988] AC 858, 872B-F, Lord Bridge stated:

“Unreviewable administrative action is just as much a contradiction in terms as is unfettered discretion, at any rate in the case of statutory powers.”

- [23] Even as far back as *Roberts v Gwyrfai District Council* [1899] 2 Ch 608, 614 Lord Lindley MR stated:

“I know of no duty of the Court which it is more important to observe, and no power of the Court which it is more important to enforce, than its power of keeping public bodies within their rights.”

- [24] In the same vein, Lord Pearce in *McEldowney v Forde* [1971] AC 632, 653-D stated:

“The duty of surveillance entrusted to courts for the protection of the citizen” means the Court “cannot take the easy course of ‘passing by the other side’ when it seems clear to it that the Minister is using a power in a way which Parliament, who gave him that power, did not intend...The fact that this is not an easy line to draw is no reason why the courts should give up the task and abandon their duty to the citizen.”

- [25] The Seychelles Constitution provides for a presidential system of government, with its decisions executed by the President and his Ministers. There is therefore no concept of parliamentary sovereignty and the relevance of English administrative case law has therefore to be qualified in this respect. In any case, Mr. Elizabeth for the Petitioner has only invoked the powers of the Supreme Court under Article 125 of the Constitution of Seychelles and not the inherent powers of the Court to review decisions of administrative bodies by virtue of sections 4 and 5 of the Courts Act.

[26] Nevertheless, the distinction between ministerial conduct which is of an administrative nature and that which is of an executive nature is important insofar as some of the decisions in the two different contexts are subject to administrative review by the courts and some are not. Moreover, the exercise of discretionary power by the executive creates the undesirable task for the courts to consider whether to interfere or not to interfere with such decisions. It is a task rendered even more difficult given the fact that while the Constitution provides that the Constitution is the supreme law of Seychelles (Article 5) and that the Supreme Court has supervisory jurisdiction over adjudicating authorities (Article 125(1) (c)) there is no specific entrenchment of administrative law or justice in its provisions.

[27] Notwithstanding, as the Court of Appeal has stated before, it is necessary to have procedural and substantive safeguards in place to control the boundaries of judicial authority so as to avoid “the direct withering fire on the executive by the judiciary” (*Michel & ors v Dhanjee & ors* (2012) SLR 258).

[28] These safeguards have been established incrementally by case law which has evolved over the past two decades and have distinguished between those ministerial decisions which are reviewable and those which are not. Initially, the pre-constitution case of *R v Superintendent of Excise and Anor ex parte Confait* [1947] SLR 154 which established that decisions were not reviewable was followed. In that case it was held that it is a matter of interpretation whether a discretion given to an administrative official or body is, on the one hand, an executive or administrative discretion or, on the other hand, a judicial or quasi-judicial discretion. Woodman CJ stated that:

“When a legislative enactment such as an Act of parliament or an ordinance confers upon an administrative official or body a discretion to do or not to do something which affects the right of the subject such as his liberty or his right to dispose of his property as he pleases, that discretion may be either what has been called an executive or administrative discretion, or it may what has been called a judicial or quasi-judicial discretion. In the former case it is not liable to be controlled by the courts by Certiorari, in the latter case it is liable, on certain

grounds, to be so controlled. The question of whether the discretion conferred is administrative or judicial is in every case a matter of interpretation of the legislative enactment which confers the discretion.”

[29] Ultimately, Woodman CJ held that the fact that a decision might affect the rights of a person was not enough; there had additionally to be a duty on the competent authority to act judicially for certiorari to lie.

[30] This distinction seems to have been preserved by the Constitution in its definition of adjudicating authority in Article 125 (7) which designates an “adjudicating authority” as including a body or authority established by law which performs a judicial or quasi-judicial function.

[31] In the United Kingdom, the landmark case of *Ridge v Baldwin* [1964] AC 40 had abolished the distinction and extended the court’s powers of review to executive decisions determining matters which affect citizens where natural justice (in this context meaning *audi alteram partem* (adequate notice and adequate hearing) and *nemo iudex in causa sua* (unbiasness of the adjudicator) had been breached.

[32] In Seychelles, the tension between section 4 and 5 of the Courts Act and our Constitution has not been dealt with satisfactorily. Notwithstanding, in *Bresson v Ministry of Administration and Manpower* ((unreported) CA 36/1996) Ayoola JA pointed out that although the distinction between judicial and administrative functions had been discarded since the case of *Ridge v Baldwin* (*supra*) and, it would seem at first glance to have been preserved in Seychelles by Article 127 (7) of the Constitution:

“...it cannot be presumed that when the Constitution defined ‘adjudicating authority’ in terms of exercise of judicial and quasi-judicial functions, it was intended that the definition should be extended to include body or authority performing only administrative function”.

[33] He preferred instead to adopt a “*rough and ready test ...to ask what function ... the body or authority [was] performing at the time the impugned decision was taken.*” In this respect if the decision maker was performing a purely administrative function,

involving no resolution of disputes but largely exercising a managerial discretion, when the decisions were taken, then the jurisdiction of the court could not be invoked.

[34] Similarly, in *Platte Island Resort and Villas Ltd v Minister Peter Sinon & Island Development Corporation & Government of Seychelles* SCA 1 of 2012, the Court held that:

“The Minister was not discharging the function of an adjudicator in the matter. He was simply executing a policy of government with regard to management issues in a public contract of major importance to the State under a legislation dedicated for the purpose. In taking his decision, he was applying project management principles and principles of the law of contract as he saw them. It cannot be said, in the circumstances, that the facts and circumstances fell under the purview of article 125 of the Constitution.”

[35] In the same vein, the case of *Cable & Wireless (Seychelles) LTS v Ministry of Finance and Communications & Anor (supra)* relied on by the First Respondent to oust the jurisdiction of this Court concerned specific duties by the Minister giving directions of a general character which were not of a judicial or quasi-judicial nature.

[36] Seychelles has, subsequently, in a number of cases adopted the international jurisprudence’s widened interpretation of the duty to act judicially. A court may issue a writ of certiorari to review all acts by those making determinations affecting the rights of citizens. The concept of “acting judicially” includes determinations or decisions by legal authorities which determine questions affecting the “common law or statutory rights” of others (*O’Reilly v Mackman* (1983) 2 A.C. 309 as adopted in *Joanneau v SIBA* ([2011] SLR 262. See also *Timonina v Government of Seychelles and anor* (2008 - 2009) SCAR 21).

[37] In *Trajter v Morgan* (2013) SLR 329, the Court of Appeal held that:

“The jurisdiction conferred by this process determines the legality, as distinct from the substantive merits of the decision of the adjudicating authority, in this case that of the Minister. Judicial review is a means by which the courts necessarily ensure

that administrative bodies act within their powers as laid down by law rather than according to a whim or a fancy.”

[38] The emphasis seems to be no longer in the distinction between an adjudicator acting in an administrative as opposed to in a judicial capacity(since even in administrative roles, the decision maker can affect the right of citizens) but rather whether the decision taken was judicious and not arbitrary, capricious, in bad faith, abusive or by the consideration of extraneous matters (*Michel & ors v Dhanjee & ors supra*)

[39] This concept of judicial review is not incompatible with the provisions of way Article 125(1) (c) or 125(7) of the Constitution and it is the concept of judicial review which I wish to adopt to determine the present case.

[40] The Ministerial Order by Minister Vincent Meriton was made under section 33 (3) of the Act (Cap 19). This section provides that:

“Where the Minister is satisfied that a person is engaged in a practice in contravention of subsection (1), he may in writing, order such person to do, or refrain from doing any act within such time as may be specified in the order.”

[41] The Minister’s discretion under the provisions above is not an absolute discretion. He could only order a person to do, or refrain from doing, any act only if he was satisfied that the person has fallen foul of the requirements of section 33. As his discretion was curtailed by the provisions of section 33, he was in any case under an obligation to act judicially.

[42] Further, even using the old distinction, although the Minister might not be an authority established by law to perform a judicial or quasi-function, his decision is reviewable because in the exercise of his powers as outlined in the provision above, he was performing a quasi-judicial function, as opposed to a purely executive or administrative function at the time the impugned decision was taken. In other words, he was discharging the function of an adjudicator in the matter. His decision is clearly reviewable by the Court.

- [43] The impugned decision by the Minister was taken following the complaint received from Intelvision and directions by the Minister to the Petitioner and the other telecommunication operators to resolve the issue. After a meeting with the operators in which the Petitioner chose not to raise the issues it presently raises, it was informed that Government intended to take all necessary measures to ensure that interconnection was re-established. It was further directed to provide the Department with confirmation of the fulfilment of this obligation by 6 June 2016. The Petitioner never met any of the deadlines imposed upon it nor responded to the issues raised by the other operators, prompting the First Respondent to issue the Order under Section 33 of the Act, which consisted of a threat of sanctions under the Act in the event of non-compliance.
- [44] As I have stated earlier in this decision, Counsel for the Petitioner has gone to great lengths to explain the financial implications and added burden caused by new technology and its impact on the contract signed by the Petitioner. He has also submitted an interpretation of the agreement the Petitioner signed indicating that the interconnection obligations it had under the agreement with Intelvision or even under its licence was limited to local calls and not for incoming international calls.
- [45] This court cannot entertain the merits of these submissions. It appears that what is being sought by the Petitioner is a rescission of the contract as a result of frustration by supervening circumstances. Such an avenue was and is open to it under Articles 1147 and 1148 of the Civil Code of Seychelles and in the event of such a suit being filed, the Court may well find that it has become impossible for the Petitioner to honour its obligations under the agreement with Intelvision and/or its licence. Additionally, if it seeks to interpret the agreement by limiting its service to local and not international interconnection services, the same has to be litigated.
- [46] The Ministerial Order was made after substantial correspondence and meetings with the Petitioner. In this respect, it cannot be said that the Petitioner's fair hearing rights were breached in any way. Nor can it be said that given the provisions of the Agreement, the licence and the Act that the Minister behaved unreasonably, irrationally or improperly in the issuing of the Order.

[47] Ultimately, the Petitioner has failed to show that the Respondents' actions in issuing the Order were in any way unreasonable, irrational or procedurally improper given the terms of the Agreement and the licence.

[48] For these reasons the Petition is dismissed with costs.

Signed, dated and delivered at Ile du Port on 9 April 2018.

M. TWOMEY
Chief Justice