

SUPREME COURT OF SEYCHELLES

Reportable

[2020] SCSC 254

CS 58 & 59/2019

In the matter between

CABLE AND WIRELESS (SEYCHELLES) LTD

represented by CEO Mr. Charles Hammond
(rep. by Mr. Frank Elizabeth)

Petitioner

And

**DEPARTMENT OF INFORMATION COMMUNICATIONS
AND TECHNOLOGY**

represented by Minister Vincent Meriton
(rep by Mr. J Chinnasamy and A. Subramaniam)

Respondent

Neutral Citation: *Cable and Wireless (Seychelles) Ltd v Department Of Information Communications and Technology (CS 58 & 59/2019) SCSC 254 (9 April 2020)*

Before: Burhan J

Summary: Judicial Review - Writ of Certiorari - sections 30 and 32 of the Broadcasting and Telecommunications Act 2000

Heard: 20 February 2020

Delivered: 9 April 2020

ORDER

1. Case CS 58/2019 and CS59/2019 are consolidated,
 2. The application for judicial review seeking a writ of certiorari is dismissed with costs.
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JUDGMENT

BURHAN J

- [1] The Petitioner, Cable & Wireless (Seychelles) Ltd (CWS), a company incorporated in Seychelles and providing telecommunication services has filed two cases 58 of 2019 and 59 of 2019 against the Respondent namely the Department of Information and Communication Technology (DICT), a statutory regulatory body which regulates all telecommunication operators in the Seychelles. Case 58/2019, is an application seeking leave to proceed by way of Judicial Review against the Respondent whilst case 59/2019 is the Judicial Review application filed, seeking a writ of certiorari to quash the decision of the Respondent taken on 9th of July 2019, in respect of the determination of interconnection rates for fixed and mobile networks and services.
- [2] In case 58/2019, a further miscellaneous application was filed seeking a prohibitive injunction against the Respondent. However, on the 8th of November 2019, the Petitioner's Attorney Mr. Frank Elizabeth in case 58/2019 stated that he was no longer pursuing the Prohibitive Injunction and leave to proceed in the Judicial Review application was granted on the same date thereby concluding case 58/2019. It appears that inadvertently at this stage, both cases 58/2019 and 59/2019 had been considered as two independent and separate Judicial Review applications by the same parties. However, it is clear that the order of 8th November 2019, granting the Petitioner leave to proceed by way of Judicial Review, formally concludes case 58/2019 and miscellaneous application 236/2019 contained therein. Further the withdrawal of the Petitioner of his miscellaneous application for Prohibitive Injunction also formally concludes the miscellaneous application 237/2019 filed in case 58/2019. Therefore, no further order need be made in case 58/2019.
- [3] Both cases for the purpose of this judgment are consolidated and reference will be made to documents filed in both cases by parties.

The Petitioner's Case

- [4] This Court will next proceed to deal with the merits contained in the Judicial Review application 59/2019. According to the petition filed the background facts of the case are

that in September 2018, the Respondent proposed to review the interconnection rates charged by the licensed telecommunication service operators. In January 2019, the Respondent informed the operators that the external consultancy firm Network Strategies Ltd of New Zealand had been awarded the contract to revise the rates. From September 2018 up to June 2019, there were numerous correspondence, meetings and workshops to consult, discuss and review the proposed new rate models with the service operators, including the Petitioner.

- [5] On the 6th of June 2019, the Petitioner wrote to the Respondent challenging the legality of the Respondent imposing implementation of the rates resulting from the consultations. Para 3 of the said letter states:

“We have reviewed applicable sections of the Broadcasting and Telecommunications Act 2000 (BTA), in particular sections 30, 32 and 33. We do not find these or any other provisions via which the DICT will require CWS to implement interconnection charges resulting from this exercise.”

- [6] However on the 9th of July 2019, the Respondent sent the letter providing new interconnection rates and directing the service operators to apply and implement the stated rates. Three service operators, namely Airtel, Intelvision and Kokonet, have replied to the Respondent consenting to the rates.

- [7] Thereafter, on the 12th of July 2019, the Respondent in reply to the letter of 6th June 2019 referred to in paragraph 4 herein, referred to the requests made by the Petitioner CWS to the DICT to revise the interconnection rates. The Respondent queries from the Petitioner in the said letter under what provisions of law were such requests made by the Petitioner CWS to DICT. The Respondent also asks the Petitioner in the said letter, whether it has changed its position that the interconnection rates should be revised and whether the Petitioner CWS has changed its opinion on the implementation of new interconnection rates. It also queries from the Petitioner whether it is of the opinion that the interconnection fee for fixed and mobile connections should not be cost based. Although clarification were called for by the Respondent on all these issues even after the

impugned letter of 9th July 2019 was sent, no reply was sent by the Petitioner CWS other than a letter to DICT of its intent to take legal action, should the DICT proceed to implement the rates.

- [8] The Petitioner further in the Petition, questions the transparency and legality of the process of determining the rates. The Petitioner avers that the Respondent does not have legal authority to determine the rates and acted illegally, ultra vires and irrationally when they decided to determine the rates instead of allowing operators to negotiate them.
- [9] The Petitioner submits in its submissions that that the BTA is a public law and not a private law and in taking the decision it did, the Respondent, acted ultra vires to the Act as the matter at hand was a private law issue, governed by the dispute resolution mechanism in the agreement between the parties (service providers) in respect of the interconnection rates and which does not provide for the intervention of the DICT. However, the Petitioner admits that DICT is made a party to the said agreement as a regulator but however states further DICT cannot intervene in the event of there being a dispute in respect of the interconnection rates and can only do so if the customers are being affected. The Petitioner further submits that the decision of the Respondent in respect of the interconnection charges on the 9th of July 2019 was an outright abuse of the power by the Respondent favouring other telecommunication operators and adversely affecting the Petitioner for reasons best known to the Respondent.
- [10] Finally, the Petitioner avers that the Respondent acted in bad faith, illegally and to the detriment of the Petitioner when they decided to determine rates without waiting for an independent regulator to be appointed. The Petitioner therefore has filed this Judicial Review application, seeking a writ of certiorari to quash the decision of the Respondent taken on the 9th of July 2019, in respect of the determination of interconnection rates for fixed and mobile networks and services.

The Case for the Respondent

- [11] The Respondent argues that the Petitioner has not annexed certified copy of the impugned decision. They relied on *Green v Seychelles Licencing Authority & Ano* (SCA

43/1997) [1998] SCCA 12 and *Sony Labrosse vs The Chairperson of the Employment Tribunal* (Civil Side No.146 of 2010) [2012] SCSC 49. The Respondent challenges the Petitioner's Review on the basis that the Petitioner did not follow the statutory procedure. The Respondent states that the Petitioner CWS has not discharged its duty under section 30 of the BTA to work out the interconnection rates with the other operators by mutual agreement and, further, has not followed the procedure under section 32 (1) (b) of the BTA, which provides that in case of non-agreement, the operator shall raise the issue with the Minister. The Respondent also submits that the Petitioner was involved in the consultation process among operators and, having agreed to the proposed rates, are now merely stalling the implementation of new rates. The Respondent also states that there is a history of dealing with determining rates between the operators and the Respondent. According to their submissions, from the time when the BTA was implemented, the operators could not agree on the rates and appealed to the Respondent/Minister to fix the rates.

- [12] The Respondent further states that bearing in mind the legal policy behind the BTA, the Respondent also has to consider the interests of consumers and international obligations of the Government which is bound by commitments made under the World Trade Organization agreements. The Respondent has to make sure that interconnection charges are cost orientated and that operators do not make profit out of interconnection rates. Therefore, it has been the practice that the Respondent suggests the rates from time to time.

The Law

- [13] Under Article 125 (1) of the Constitution the Supreme Court has supervisory jurisdiction over subordinate courts, tribunals and adjudicating authority. Judicial Review is governed by the Rules of the Supreme Court (Supervisory Jurisdiction Courts, Tribunals, Adjudicating Bodies) Rules 1995 (the "Rules").
- [14] The UK case law established three main grounds for which a decision can be subject to judicial review: illegality, irrationality and procedural impropriety (*Council of Civil Service Unions and others v Minister for the Civil Service* [1983] UKHL 6; [1984] 3 All

ER 935). This approach was followed in Seychelles courts (*Wells v Mondon and Another* (257 of 2009) [2010] SCSC 7; *Le Meredien Barbarons v Employment Tribunal* (51 of 2009) [2010] SCSC 35; *Vijay Construction (Pty) Ltd v Andre* (MC 108/2014) [2016] SCSC 21).

[15] *Jivan vs Seychelles International Business Authority* (MC 15/2013) [2016] SCSC 108 pointed out that when administrative decision or act or order is subject to judicial review, ‘the Court is concerned only with the “legality”, “rationality” (reasonableness) and “propriety” of the decision in question’.

[16] Lord Diplock stated in *Council of Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935 that illegality as a ground for judicial review concerns decision-maker’s correct understanding of the law that regulates his decision-making power (*Morin vs Ministry of Social Affairs and Employment* (Civil Suit No. 236 of 2004) [2013] SCSC 13). *Jouanneau v Seychelles International Business Authority* (Civil Side No 90 of 2010) [2011] SCSC 48 (28 July 2011) notes that in Judicial Review matters, the concern is not so much as to what decision was taken, but how the decision was reached. It is the process of the decision-making that is reviewed.

[17] The Petitioner’s main contention is that the Respondent had acted illegally and ultra vires when it decided to determine the interconnection rates as it should have allowed the service operators to determine the rates among themselves. It seeks a writ of certiorari to quash the said determination of the Respondent taken in respect of interconnection rates in its letter of 9th July 2019, on the basis that the Respondent was not empowered by law (BTA) to determine the rates in terms of section 30 and 32 of the BTA and had not followed the government policy decision of appointing an independent regulator (Para 15 & 16 of the Petition).

[18] Section 30 of the BTA prescribes statutory procedure for fixing the rates:

“30. (1) A person who desires to connect his telecommunication network, system or equipment to the network, system or equipment as the case may be, of another person, shall seek the consent of that other person to so connect the first mentioned person's network, system or equipment.

(2) Subject to section 32, a person whose consent is sought under subsection (1), may withhold such consent if the proposed interconnection would materially restrict his ability to exploit the network capacity at his disposal in his own operations.

(3) A person who has obtained the consent referred to in subsection (1) may, thereafter seek the approval of the Minister for the proposed interconnection.

(4) An interconnection referred to in this section may be made only in accordance with the preceding provisions of this section.

(5) Subject to section 32, the charges in respect of the interconnection and the use of the connected network shall be agreed upon by the persons concerned and shall be fair and reasonable having regard to the service provided by one person and the additional cost accruing to the other person as a result of the interconnection.” (emphasis added)

[19] Section 32 reads as follows:

“32. (1) Any question as to –

(a) whether a person is entitled to withhold his consent under section 30(2);

(b) whether a person is refusing to agree to fair and reasonable charges or rental under section 31(3) and whether such charges or rental should be imposed by the Minister shall be determined by the Minister upon the request of any person concerned or otherwise, and the Minister shall make an order accordingly.

(2) Any order made by the Minister under subsection (1) shall be communicated to the relevant persons and they shall comply with the order.” (emphasis added)

Analysis of the Case of the Petitioner and Respondent

[20] It is clear from the above sections that section 30 of the BTA provides service operators with statutory right/obligation to determine the interconnection rates (subsections 1 and 5). However, the Minister is given a power to approve the rates (s. 30 (3) BTA) and further power to determine the rates in cases where consent of the persons concerned is not reached (s. 32 (1) (b) BTA). Combined reading of sections 30 and 32 illustrates that the BTA does not completely exclude powers of the Minister to determine the rates,

instead it provides supervisory function to act in cases where operators cannot reach the agreement on rates.

[21] The Petitioner does not address the reasons why they have not approached the Minister before applying for Judicial Review. Furthermore, they do not specify reasons for their dissatisfaction with proposed rates, apart from claiming that the consultation process lacked transparency and they did not receive sufficient information in due time. The Minister's power to determine the rates is reserved to avoid situations where there is either deadlock or where operators agree to unfair and unreasonable terms to make a profit, which is detrimental to the consumers. It is also in the public interest that operators' rights are not unlimited and unregulated. In his submissions, the Petitioner refers to a private agreement between parties in which the DICT should not intervene and disputes should be settled as per the procedure agreed on by parties in the agreement but this stage has not yet been reached in this case. It is the view of this Court that DICT has every right to intervene to protect the interests of the service users at this stage as no agreement has yet been reached by the service providers.

[22] The Petitioner in his Petition paragraph 15 and 16 refers to a government policy of appointing an independent regulator as referred to by the Respondent in a letter dated 15th July 2019. In his opening paragraph the Petitioner admits that the "Respondent is a statutory regulatory body which regulates all telecommunication operators in Seychelles". It is the contention of the Respondent that Network Strategies Ltd of New Zealand was given the contract to revise the interconnection rates. This was the consultant appointed by the regulatory body to administer the procedure more efficiently. The Petitioner has no authority to question the terms of reference as it tried somewhat belatedly do. It appears that the Petitioner's contention of another independent regulator being appointed according to government policy is baseless and unsupported. It appears in the letter dated 10th May 2019 para (iii) that such a suggestion of appointing another regulator was made by the Petitioner and was not a part of any government policy agreed on by the parties. It should be borne in mind that the Respondent functioned as the independent regulator throughout this process and Network Strategies Ltd of New Zealand was the consultant appointed by the regulator.

[23] It is to be observed that the letter of 9th July 2019 was sent to the Petitioner determining the new interconnection rates. This letter also refers to the fact that all licensed service providers were informed of the intention of the DICT to review the interconnection rate and that all service providers were informed by the letter dated 10th January 2019, that Network Strategies Ltd of New Zealand were awarded the contract to revise the interconnection rates. Further, all operators were presented with results of the review of the interconnection rate. It is clear that the Petitioner had not voiced their objections on the said results of the review of the interconnection rates but remained silent thereby giving the inference that they were in agreement with the findings and results of the review of the interconnection rates. The letters of 12th July 2019 and 15th July 2019 (P13 attached to the leave to proceed application and petition in 58/2019) of the Respondent address some of the Petitioner's concerns set out in the letter of the Petitioner dated 6th June 2019 and 9th July 2019 (P11 in leave to proceed application and petition in 58/2019) and queries whether Petitioner has changed their opinion on the implementation of the new revised rates. The Respondent DICT, very specifically asks the Petitioner CWS in its letter of 12th July 2019 whether it has changed its position that the interconnection rates should be revised and whether the Petitioner has changed its opinion on the implementation of new interconnection rates. The letter of 15th July 2019 also queries from the Petitioner whether CWS is stating that it will not comply with the terms and conditions on which the licenses were granted.

[24] It is the view of this Court that the letters of 12th July 2019 and 15th July 2019, do open the door for further negotiation in respect of the determinations made in respect of the new rates sent by letter of 9th July 2019. Further if the Petitioner was in disagreement with the interconnection rates recommended by the DICT in its letter of 9th July 2019, CWS could have proceeded under section 32 (1) (b) and requested the intervention of the Minister. Their reasons for not applying to the Minister are unclear. The possibility of an independent regulator being appointed at this stage could be explored. It appears that the Petitioner is the one who has acted irrationally/unreasonably by ignoring that option and applying straight for the Judicial Review. From the submissions by the Respondent it does not seem that they have intended to strip the Petitioner of the option to apply to the Minister, in fact they insisted that the Petitioner should have done that first. Analyzing

the correspondence provided in the exhibits, the exact reasons of Petitioner's dissatisfaction with proposed rates are not very clear.

[25] The Petitioner challenges transparency of appointing the Consultant and working out new models. They claim that they have not received sufficient information in time, but do not expressly state how rates proposed in the letter of 9th July 2019 detriment them. There is also no documental evidence of them proposing alternative rates or communicating their concerns to other operators (with whom they have the obligation to determine the rates under s. 30 BTA). It appears from the provided evidence that the Petitioner has had a meeting with the Respondent's Consultant on the 2nd of May (Exh. P6) and attended workshop on/before 9th of May on the revision of the interconnection rates (Exh. P7). The exact matters discussed are unknown, as minutes of the meetings and details of workshop are not provided. It appears that the Petitioner could have discussed their concerns with regards to rates at these meeting and workshop, but it is unclear whether they did and what the response was. Further, this matter originated in September 2018 and the interconnection rates were informed to parties on 9th July 2019. Several meetings and correspondence were exchanged between all parties and, therefore, the Petitioner cannot complain of lack of transparency or that they had not received sufficient information on time. The Respondent in their letter dated 10th May 2019 states that operators including the Petitioner had sufficient opportunities to provide comments on the inputs and the outputs during the consultation process (para iv, Exh. P8). The Petitioner's response that due to several technical issues they did not have sufficient time to properly review the information provided to them therefore cannot be accepted.

[26] The Respondent also informed the operators that they intend to procure the services of an external consultant (September 2018) and informed the operators in January 2019 that Network Strategies Ltd of New Zealand has been awarded the contract to revise the rates. The operators were asked to provide their views and observations on such proposed plan. At this point there were no objections. Further the Respondent DICT, included the operators in the process of determining the new rates by providing them with proposed cost models and holding meetings and workshop. The Respondent produced cost models on the 2nd of April and asked the Petitioner to provide their inputs on the models by 17th

April. The disagreement seems to arise at this stage, instead of doing so, the Petitioner CWS on the 18th of April made technical inquiries in their letter to the Respondent and wished to see Terms of Reference (TOR) of the Consultant something which should have been done at the very outset. Having considered all the above steps set out in the preceding paragraphs taken by the Respondent, it cannot be said that there was a lack of transparency on the part of the Respondent in this case nor could it be said that there was an outright abuse of power by the Respondents or that the Respondent favoured other telecommunication operators over the Petitioner for reasons best known to them.

[27] The Petitioner is treating the letter of 9th July 2019 as an order against which they are seeking the Judicial Review. Learned Counsel for the Respondent has objected on the basis that the impugned order was not certified and is not a final order as envisaged by law. However, as the authenticity of the impugned order was not challenged and document has been admitted by the Respondent, the fact that it is not certified is a mere technicality and, therefore, it is the view of this Court that an uncertified order would suffice and not be fatal to the case of the Petitioner (*Tornado Trading v PUC & Anor 9* (Civil Appeal SCA 35/2018) [2018] SCCA 45). However, the letter does not constitute an actual final order (under s.32 BTA) but mere directions from the Department. In *Cable & Wireless Seychelles Ltd v Ministry of Broadcasting and Telecommunication & Anor* (MC 42/2017) [2018] SCSC 348, a Ministerial Order was accompanied by penalties for failure to comply. In the present case there were no suggestions in the letter dated 9th July 2019 sent by DICT that operators were forced to comply and that their failure would be penalized. Thus, it seems that the option of raising their concerns with the Minister was still available to the Petitioner as the letter was not a final order. Thus, it is the view of this Court that the letter of 9th July 2019 does not qualify for Judicial Review and the Petitioner should apply to the Minister first to resolve the issue.

[28] Further, the DICT appears to be exercising managerial discretion in its administrative role. When a body or authority is performing purely administrative function, exercising managerial discretion and is not involved in resolution of dispute, the jurisdiction of the court could not be invoked (*Bresson v Ministry of Administration and Manpower CA 36/1996*). Same view was supported in *Platte Island Resort and Villas Ltd v Minister*

Peter Sinon & Island Development Corporation & Government of Seychelles SCA 1 of 212 where it was stated that the Minister applied project management and law of contract principles and it did not fall under purview of Article 125 of the Constitution.

- [29] A court may issue writ of certiorari to review decisions that affect ‘*common law or statutory rights*’ of citizens (*O’Reilly v Mackman* (1983) 2 A.C. 309; *Jouanneau v Seychelles International Business Authority* [2011] SCSC 48; *Timonina v Government of Seychelles and anor* (2008-2009) SCAR 21). *Trajter v Morgan* (2013) SLR 329 have further held that judicial review is a means to ensure that administrative bodies act within their powers rather than ‘*according to a whim or a fancy*’. On a reading of the facts of this case in respect of the procedure adopted by the Respondent in this case as set out above, it cannot be said that the Respondent DICT was acting according to its whim or a fancy.
- [30] Further in *Cable & Wireless Seychelles Ltd* (supra), it was held the Ministerial Order was made after substantial correspondence and meetings with the parties. In that case too, the Petitioner chose not to raise the issues claimed in their Petition at the meeting. It was held that it couldn’t be said that the Petitioner’s fair hearing rights were breached and the Minister acted unreasonable, irrational or improper. As it appears from the facts of the present case, the Petitioner had numerous opportunities to express their concerns and provide their opinion to the Respondent. The Petitioner CWS in this case also has a statutory right to apply to the Minister regarding their concerns; therefore, having failed to do so, they cannot now complain that the rights of CWS have been breached on the basis of procedural impropriety and non-adherence to the natural justice principles.
- [31] Furthermore, several cases support the notion that when the legislation provides alternative methods of resolving the issue prior to application for Judicial Review, these methods should be followed. *Yve Bossy v Republic* (1980) SLR 40 held that where legislation provided for appeal against the decision of any government official or body, it is that method that must be followed and it is not permitted to by-pass that procedure and instead make an appeal to court.

[32] In *Sony Labrosse v The Chairperson of the Employment Tribunal* (Civil Side No.146 of 2010) [2012] SCSC 49 it was stated that Judicial Review could be refused where the legislature has provided a more suitable channel to challenge decision. In that case the Petitioner could have appealed against the decision of the Tribunal to Supreme Court instead of seeking Judicial Review. Although these cases refer to appeals, they follow the logic that when the legislation provides orderly methods or resolving issues, the order should be followed. Thus, in this case it can be suggested that the Petitioner should have applied to the Minister before pursuing application for Judicial Review

[33] For all the aforementioned reasons the application of Judicial Review seeking a writ of certiorari is dismissed with costs.

Signed, dated and delivered at Ile du Port on 9 April 2020.

Burhan J