SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC 278
CS 26/2019

In the matter between:

CABLE AND WIRELESS (SEYCHELLES) LIMITED **Plaintiff**
(rep. by F Elizabeth)

and

SEYCHELLES LICENSING AUTHORITY **Defendants**
(rep. by J Chinassamy)

Neutral Citation: *Cable and Wireless (Seychelles) Ltd v Seychelles Licensing Authority* [2020] SCSC 278 CS 26/ 2019
Before: Govinden J
Summary: Petition dismissed for failure to consider alternative remedies; condition for the application of this principle.
Heard: 5 February 2020
Delivered: 15th May 2020

ORDER

The Petition is dismissed on the 1st Preliminary Objection as the Petitioner has failed to consider alternative statutory remedy of appeal to the Appeal Board of the Respondent under section 17 of the Licenses Act 2010.

JUDGMENT

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[1] This is a Petition whereby the Petitioner is seeking a Judicial Review Order of the Seychelles Licensing Authority ("SLA", or "the Authority") as established under the provisions of section 3 of the Licences Act 2010, herein after referred to as "the Licences Act". The Petition is filed pursuant to Article 125 of the Constitution of the Republic of Seychelles as read with the Supreme Court (Supervisory Jurisdiction over Subordinate

Courts, Tribunals and Adjudicating Authorities) Rules 1995, herein after referred to as "the Rules".

[2] The Petitioner is a service provider in the Seychelles telecommunication industry. It has been conferred a Third Generation (3G) Mobile Services License by the Authority pursuant to the provisions of section 9 of the Licences Act and the provisions of the Broadcasting and Telecommunication Act 2010, herein after referred to as the "Telecommunication Act" which is valid and operational.

[3] Intelvision (Seychelles) Ltd, hereinafter referred to as "Intelvision", is another provider of telecommunication services. According to the Authority, it has issued a Third Generation (3G) Mobile Services License to Intelvision. A copy of the said Licence was made available to the Petitioner by the Authority and it is annexed to the Petition and Affidavit in this case. The Petitioner avers that the Licence issued by the Authority to Intelvision is materially different from that of the Petitioner in many respects. The Petitioner accordingly submits that, as a result, the Licence is deficient on its face which causes doubts as to whether the said Licence can be determined to be lawful or validly issued. The Petitioner referred to many instances of the alleged defects and prayed to this Court to order a writ of certiorari quashing the decision of the Respondent to grant Intelvision the Licence and make a further order revoking and cancelling the said Licence.

[4] The Petitioner was granted leave to seek leave to proceed in accordance with its Petition under Rule 5 and 6 of the Rules. Rule 7(1) allows a Respondent, if leave to proceed is granted, to object to the application at any time before the time fixed for the filing of objections and thereafter for the Supreme Court to make such orders on the objections as it deems fit. The Respondent has taken the opportunity to file seven preliminary objections under this provision.

[5] The Rules establish a two-stage process for judicial review applications. In *Island Development Company v Marine Accident Investigation Board* (MA90/2019, arising in MC19/2019) [2020] SCSC 37), Vidot J noted: "An application for judicial review undergoes a process comprising 2 stages: the leave stage and the merits stage. …

Therefore, it is a requirement that the court filters the application to satisfy itself that prima facie reasons exist in order to grant leave."

[6] In light of this, I turn to consider the preliminary objections in relation to the Petitioner's application for judicial review.

[7] The 1st such objections is couched as follows: "The Petitioner has not exhausted the statutory remedies available before approaching this Honourable Court for Judicial Review. The Licences Act Cap 113 provides in Section 17 that a person aggrieved by any decision of the Authority may submit a notice of appeal in writing to the Appeals Board. The Petitioner has to exhaust this remedy first which he failed [to do]". The parties were invited to make written submissions on these objections, which they have done very comprehensively.

[8] In response to this Preliminary Objection, the Petitioner submits that the objection is misconceived as it is not the Petitioner which applies for and was refused the Licence but Intelvision. And that it stands to reason and logic that only a person or company which applies for a licence to the Respondent and is refused, would have recourse to the appeal procedure pursuant to section 17 of the Licences Act Cap 117. According to the Petitioner that is why section 17 refers to "person aggrieved". The Petitioner does not fall within the category of *"person aggrieved by any decision of the Authority… [to] submit a notice of appeal in writing to the Appeals Board"*.

[9] Therefore, the issue that this Court is called to determine in this Preliminary Objection is whether there was an alternative remedy to judicial review available to the Petitioner that it should have seized before it chose to file this Petition.

[10] The need for a Petitioner to exhaust all available remedies before it institutes a judicial review action is well settled in law. In the case of *R v Rent Board* SLR 353, the Rent Board refused to adjudicate on cases entered by the Crown for the ejectment of tenants on the ground that the Crown was not and did not wish to be bound by the Control of Rent and Tenancy Agreement Ordinance (now Act) CAP 166. The Attorney General on behalf of the Crown sought an order of mandamus to compel the Board to hear its cases.

Justice Sauzier, upon hearing arguments held that: *"It is a well settled principle that the court will, as a general rule, and in the exercise of its discretion, refuse an order of mandamus, when there is an alternative remedy at law which is not less convenient, beneficial and effective" (Halsbury Laws of England, 3rd Edition, Vol.11, paragraph 200).*

[11] After scrutinising the provisions of the Ordinance, the Court found that section 22(1) provided an alternative remedy and if the Crown had appealed to the Supreme Court under that provision in all of the aforesaid cases the Crown could, were it successful in the appeals, have obtained the same remedy as it is sought under the application. On this basis the Learned Judge refused to grant an order of mandamus.

[12] The case of *Yves Bossy v Republic of Seychelles* (1980) SLR 40 and a many later pronouncements have maintained this principle in our law. The case of *Bossy* 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. Similarly, in *Sony Labrosse v The Chairperson of the Employment Tribunal* (Civil Side No.146 of 2010) [2012] SCSC 49, the Court refused the application for judicial review as the legislature had provided a more suitable channel to challenge decision. The relevant statute stipulates that decisions of the Tribunal can be appealed to the Supreme Court. The Court thus found that: 'as the law has provided for a right of appeal against the decision of the Employment Tribunal, the petitioner should have availed himself of the said remedy within the prescribed time if aggrieved by the decision of the learned Chairperson and having not done so is now precluded from making an application for Judicial Review.' The recent case of *Cable and Wireless (Seychelles) Ltd v Department of Information Communications and Technology* (CS 58 & 59/2019) [2020] SCSC 254 (09 April 2020) thus confirmed: '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.'

[13] It is therefore a firmly established legal principle that: "Where Parliament has provided by statute appeal procedures, as in the taxing statutes, it will only be very rarely that the

courts will allow the collateral process of judicial review to be used to attack an appealable decision": *In re Preston* [1985] 1 AC 835, 852D per Lord Scarman; see also p. 862B-F per Lord Templeman, with whom the other members of the appellate committee agreed, where he stated: "Judicial review process should not be allowed to supplant the normal statutory appeal procedure"; unless the circumstances are exceptional and involve an abuse of power of a serious character (as explained at pp. 864F-H and 866G-867C).

[14] In a recent English High Court case of *Glencore Energy UK Limited v Commissioners of HRMC [2017] EWHC 1476,* the Court emphasized the following principles;

> *That judicial review is a remedy of last resort alternative remedies should be exhausted first unless, exceptionally, such alternatives are ineffective or inappropriate to address the substance of complaints at issue; Where grounds of judicial review as formally drafted cannot be advanced in the alternative forum, this is not by itself conclusive: the focus is on substance over form.*
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> *Where the alternative remedy exists by virtue of statute, construction of that statute is important. Non-judicial alternatives can suffice as adequate and effective remedies. Although the relative time and expense of an alternative remedy compared to judicial review can be relevant, this consideration will not hold sway, particularly where the judicial review would not obviate the need for the alternative procedure. The court however ruled that this rule is not invariable and where an alternative remedy is nonetheless ineffective or inappropriate to address the complaints being properly advanced the Judicial Review may still lie.*

[15] The alternative remedy that the Respondent argues should have been made used by the Petitioner is found in the provisions of Section 17 and 18 Licences Act. For the sake of clarity, this Court will refer in extenso to those provisions:

> *"17. A person aggrieved by any decision of the Authority may submit a notice of appeal in writing to the Appeals Board.*
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> *Appeals Board*
> *18. (1) There shall be an Appeals Board to hear and determine appeals against the decisions of the Authority.*
> *(2) The Appeals Board shall consist of the following members appointed by the*

President —

(a) a chairperson;

(b) a representative of the Attorney General;

(c) a representative of the Fair Trading Commission;

(d) a representative of a non-governmental organisation that represents the interests of the private sector.

(3) A person appointed as a member of the Appeals Board shall have experience in legal, administrative, economic or financial matters.

(4) A member of the Appeals Board shall be appointed on such terms and conditions as the President may determine.

(5) The Chairperson and other members of the Appeals Board shall hold office for three years and shall be eligible for reappointment.

(6) The President shall at any time terminate the appointment of a member who has been found guilty of —

(a) any misconduct, default or breach of trust in the discharge of that member's duties; or

(b) an offence of such nature as renders it desirable that the member's appointment be terminated.

(7) The Appeals Board may regulate its own proceedings.

Decision on appeal

19. The Appeal Board may, where it entertains a notice of appeal, decide the appeal by —

(a) confirming the decision of the Authority;

(b) varying the decision;

(c) quashing the decision;

(d) ordering the Authority to reconsider the Authority's decision as directed by the Appeals Board

[16] I have carefully considered the 1st Preliminary Objection of the Respondent and the submissions made thereon. I have further scrutinized the facts of the case to the extent that they are relevant to this objection and the applicable legal principles. This Court has done this exercise in order to find out whether there was an alternative remedy at all. And secondly whether that alternative is convenient, effective and appropriate as a judicial review before this Court.

[17] Having carried out this exercise this Court finds that there was an alternative remedy of a statutory appeal to the Licensing Appeals Board (the LAB). The LAB is a creature of

statute. It is given its appellate powers by virtue of Section 17 of the Act and created by Section 18 and it hears appeals from decision of the Authority.

[18] As to the quasi-judicial nature of the functions of the LAB, which would make it amenable to judicial review pursuant to Article 125 of the Constitution, I find this clearly established. The case of *Rohoboth Builders vs Seychelles Licensing Authority (CS 29 of 2013)* [2014] SCSC 230 (04 July 2014); supports this finding, in which his Lordship Renaud J held:

> *"Section 18(2) of the Licences Act 2010 establishes an Appeals Board (hereinafter "the Board") to hear and determine appeals against the decisions of the Seychelles Licensing Authority (hereinafter "the Authority"). The Board is empowered to regulate its own proceedings. Where the Board entertains a notice of appeal, it may decide the appeal by confirming the decision, varying the decision and quashing the decision of the Authority. It may also order the Authority to reconsider its decision as it directs the Authority to do.*
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> *It is evident that the Board after hearing an appellant has the power to decide on the fate of the appellant by upholding or varying the decisions made by the Authority and may also make new decision and issue its own orders including directing the Authority to take the action that it may directs the Authority to do. Any Authority endowed with such powers cannot be less than an adjudicating authority envisaged by law.*
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> *It is my considered view that in the light of the above position of law it is reasonable to conclude that the legislature has envisaged that the complainant concerned to be noticed and be heard and the opinion formed to be the result of an equitable decision. The order of the Board followed that same procedure and that necessarily affects the rights of the aggrieved party, therefore brings the Board within the description of an authority exercising quasi-judicial functions."*

[19] However, this Court needs to go further. In order to do justice I have to carefully analyse the statutory language of the two sections in light of the pith and substance of the grounds raised in the Petition in order to find out whether the process of appeal would offer a remedy that would be as convenient, effective and appropriate as the process that the Petitioner has attempted before this Court. As part of the process, the Court has to do a comparative analysis of the hearings and the remedy to be granted.

[20] The case of the Petitioner is that the Licence granted by the Authority was not lawfully valid on its face due to material deficiencies and was granted without consultation of other service providers, including the Petitioner, and hence was issued unfairly and irregularly. The Licence was granted by the Authority, through a decision of the Authority. The Authority thereafter took several other decisions regarding the validity of this Licence, including writing a letter dated the 8th of October 2018 to Counsel for the Petitioner and attaching a copy of the said Licence for the information of the Petitioner. The letter's closing paragraph being: *"This office hopes that the attached licence is to your client's satisfaction"*.

[21] These decisions of the Authority could have been validly appealed to the LAB by the Petitioner. The appeal process would have to my mind been more convenient, effective and appropriate. The LAB is an Appeal Board that hears and determines appeals from the decision of the Authority. Its jurisdiction is statutory. Though this statutory body has no judicial review function and no inherent jurisdiction similar to this Court, nonetheless, it has an appellate jurisdiction, which would effectively consist of a rehearing and a reconsideration of the decision of the Authority to issue the Licence on the merits as compared to the decision making process of the Authority. The grounds of the Petition could therefore have been properly argued before the Authority.

[22] The issue of a lack of *locus standi* as raised by the Petitioner before the LAB, to my mind, is misconceived. In law there arises an appeal to the Appeal Board of the Authority in respect of a decision of the Authority. It is a right of appeal against that decision. In this case the Petitioner was prosecuting a claim against the Respondent regarding the validity of appeal of a 3rd party. The Respondent gave a decision on this claim. That decision became appealable once given. The reference in section 17 to a "person aggrieved by any decision of the Authority" is thus not limited to a Licensee or a potential Licensee in respect of its Licence. That would be too narrow an interpretation, given the very broad language of Section 17.

[23] As to the ground relating to the fact that the Petitioner and other stake holders were not properly consulted, this would have been a question of interpretation and application of

the provisions of the Broadcasting and Licences Act and its Regulations in the greater context of fairness. It is a public law question that the LAB can consider in the exercise of its quasi-judicial powers. A court or tribunal that has no express judicial review jurisdiction may occasionally have to decide questions of public law when it is exercising its statutory jurisdiction. In *Oxfam v Revenue and Customs EWHC 2009* at [68] (England and Wales High Court of Chancery) Sales J gave as examples county courts, magistrates courts and employment tribunals, none of which have a judicial review jurisdiction. In *HMRC v HOK Ltd* [2012] UKUT 363 (TCC) at [52] the Upper Tribunal (Immigration and Asylum Chamber) accepted that in certain cases where there was an issue as to whether a public body's actions had had the effect for which it argued – such as whether rent had been validly increased (*Wandsworth London Borough Council v Winder* [1985] AC 461), or whether a compulsory purchase order had been vitiated (*Rhondda Cynon Taff Borough Council v Watkins* [2003] 1 WLR 1864) – such issues could give rise to questions of public law for which judicial review was not the only remedy. In *HRMC v Noor* [2013] UKUT 071 (TCC), the Upper Tribunal, similarly constituted, accepted that the tribunal (formerly the VAT Tribunal, now the F-T) would sometimes have to apply public law concepts, but characterised the cases that Sales J had referred to as those where a court had to determine a public law point either in the context of an issue which fell within its jurisdiction and had to be decided before that jurisdiction could be properly exercised, or in the context of whether it had jurisdiction in the first place.

[24] For these reasons, this Court upholds the 1st Preliminary Objection of the Respondent and dismisses the Petition. There would accordingly be no reason to make any determination on the other grounds raised in the Preliminary Objections.

Signed, dated and delivered at Ile du Port on this 15th of May 2020.

R Govinden

Judge of the Supreme Court