

IN THE COURT OF APPEAL OF SEYCHELLES

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**Reportable/ Not Reportable / Redact**

[2020] SCCA 18 December 2020

SCA 24/2018

(Appeal from MC 42/2017)

**CABLE & WIRELESS SEYCHELLES  
LIMITED**

*(rep. by Mr. Frank Elizabeth)*

**Appellant**

and

**MINISTRY OF BROADCASTING &  
TELECOMMUNICATION  
GOVERNMENT OF SEYCHELLES**

*(rep. by Mr. George Thachett)*

**Respondents**

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**Neutral Citation:** *Cable & Wireless Seychelles Limited v Ministry of Broadcasting & Telecommunication and Anor* (SCA 24/2018) [2020] SCCA - (18 December 2020).

**Before:** Robinson JA, Tibatemwa-Ekirikubinza JA, Dingake JA

**Summary:** Judicial Review – Minister’s Order – Whether Appellant afforded a hearing before taking the decision sought to be impugned – held – application of the principles of natural justice depends on the circumstances of each case – in this case they were not breached.

**Heard:** 3 December 2020

**Delivered:** 18 December 2020

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**ORDER**

The appeal is dismissed with costs.

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**JUDGMENT**

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**DINGAKE JA**

## **INTRODUCTION**

- [1] The issue before us rotates around whether in the circumstances of this case the decision of the Minister sought to be quashed was arrived at in breach of the principles of natural justice and or the *audi alteram partem* rule. The Appellant, Cable & Wireless (Seychelles) Ltd (the Petitioner in the Supreme Court), prays that this court sets aside the Judgment of the Supreme Court and issue a writ of certiorari against Ministerial Order quashing the said Order for want of compliance with the principles of natural justice.. The 1<sup>st</sup> Respondent is Minister of Broadcasting and Telecommunication and the 2<sup>nd</sup> Respondent is the Government of Seychelles.

## **BACKGROUND**

- [2] The undisputed facts of this matter are that Intelvision lodged a complaint against the Appellant with the Department of Information and Communication Technology (the “DICT”) stating that it had been experiencing issues with incoming international calls being blocked on the Appellant’s network. Intelvision alleged further that it had made numerous attempts to rectify and resolve the issue with the Appellant but minimal progress had been made.
- [3] The DICT also sent several letters to the Appellant requesting a response and advising that a technical meeting with the Intelvision be held. It would seem that the Appellant did not respond to the letters. Subsequently, a meeting took place between the service operators and following the meeting a decision was made that the operators need to ensure that fully functional termination of incoming international telephone service via the interconnect is re-established to its proper working condition.
- [4] The Appellant has not complied with the decision and has replied to the DICT through its Attorney raising several issues and or arguments. Eventually, after almost a year since the decision was taken, Ministerial Order was made directing the Appellant to re-establish and restore interconnection to all licensed operators. On the evidence we have perused we have not seen any evidence of any prejudice that would befall the Appellant if it were to comply with the Order of the Minister, as such compliance is in fact required by law.

- [5] The Appellant applied for judicial review and a writ of certiorari quashing the Order of the 1<sup>st</sup> Respondent. Leave to apply was granted, however, the Petition was later dismissed by the Supreme Court in April 2018, hence this appeal.

### **GROUND OF APPEAL**

*Ground 1 – The Learned Chief Justice erred when she gave judgment in favour of the Respondents on the basis that the Ministerial Order was made after substantial correspondence and meetings with the Appellant and that given the provisions of the Agreement, the licence and the Act, that the Minister did not behave unreasonably, irrationally or improperly in issuing of the Order.*

*Ground 2 – the learned Chief Justice failed to consider and address the issue and concept of audi alterem partem and the rules of natural justice sufficiently, properly or at all in her judgment.*

*Ground 3 – The Learned Chief Justice failed to address the manner in which the decision was taken by the Minister and to pronounce herself on the issue as to whether it was proper, sufficient and in accordance with the rules and principles of natural justice and fair hearing.*

- [6] Before discussing the grounds of appeal, and since the Appellant has come to this court complaining of breach of natural justice, more particularly, the *audi alteram partem* rule, it may be necessary to define the concept of natural justice although in real life cases definitions tend to have limited utility. Essentially the rules of natural justice have two main categories: the first is the rule against bias (*memo judex in causa sua*) and second is, hear the other side (*audi alteram partem*) or fair hearing.

- [7] Generally speaking the rules of natural justice require that the decision - maker must conduct the decision –making process with fairness. What is fair in a particular case may differ. Lord Steyn in *Lloyd v McMahon* (1987) AC 625 said that the “ the rules of natural justice are not engraved on tablets of stone”. Their application depends on the circumstances of each case. And since I cannot express the idea better, I will let Lord

Tucker to do so. In the case of *Russell v Duke of Norfolk* (1949) 1 ALL ER 109, at p.118, he stated the position as follows:

*“The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case”*

[8] It is now settled that there is a duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affects rights, interests, legitimate expectations, save where a statute expressly provides otherwise. ( *Raihl v Ministry of National Development* (SCA 6/20090 [2010] SCCA 3 ( 20 May 2010)

[9] In the case cited above, this court endorsed the view that perhaps the better term to use instead of natural justice is “ the duty to act fairly”. The court quoted with approval a passage from the locus classicus case of *Council of Civil Service Unions v Minister of Civil Service* (1985) AC 374, to the effect that:

*“ ...Principles of “ natural justice ” is a term now hallowed by time, through over use by judicial and other repetition. It is a phrase often widely misunderstood and therefore as often misused. The phrase perhaps might now be allowed to find a permanent resting place and better replaced by another term such as “ a duty to act fairly ”*

[10] I am in total agreement with the above sentiments. It also seems to me that when all is said and done the authorities are clear that whether or not the principles of natural justice have been breached is a matter of the circumstances of each case, which includes the context of the matter, the nature and character of the decision maker. Whilst the courts insist on the need to follow the principles of natural justice including affording a party likely to be adversely affected by a decision a hearing, they do not expect the processes of administrative and or public bodies to be as painstakingly thorough and studious like those of the courts.

[11] In the cases of *Stuart v Haughley Church Council* (1935) Ch. 452 and *Local Government Board v Arlidge* [1945] AC 120 the court held that a “hearing” need not always be “oral” and that a consideration of written submissions and evidence was sufficient. Both cases were cited with approval in the case of *Amalgamated Tobacco Company (Sey) Ltd v The Minister of Employment and Others* 1996 The Seychelles Law Reports.

[12] The above principles shall shape and give direction to this matter based on the specifics of this case such as the nature of the parties, the dispute, the issues in question, and the public purposes that the decision making process is fulfilling.

[13] The leading Canadian case of *Baker v Canada (Minister of Citizenship and Immigration)* 2 S.C.R (817 (1999) at para 21 made it clear that this context based approach to fairness means that practices that do not meet the standard of administrative fairness in one decision-making context may be adequate in another. In order to assist with this determination, the court set out five factors to be considered:

- The nature of the decision,
- The nature of the statutory scheme,
- The importance of the decision to the individual affected,
- The legitimate expectations of the parties, and
- The choice of procedure made by the decision-maker.

[14] With the above authorities and principles in mind, I now turn to the grounds of appeal in this matter.

[15] With regard to Ground 1 of the Appeal, learned Counsel for the Appellant submits in the Skeleton Arguments that, “*there was no evidence . . . that decision of the Minister was taken after substantial correspondence and meetings with the Appellant*”. The Appellant submits that “*no such meetings and substantial correspondence took place*” prior to the Minister taking the decision he did.

- [16] With regard to Ground 2 the Appellant submits, among other things, that the learned Chief Justice failed to consider the issue of *audi alterem partem* and the rules of natural justice; that the 1<sup>st</sup> Respondent failed to give reasons or adequate reasons for the Order; that the learned Chief Justice failed to consider whether or not the Appellant (then Petitioner) was afforded a right to be heard before the decision was taken; that the learned Chief Justice erroneously summarised the case of the Appellant at paragraph 44-47 of the Judgment and erred in her conclusion that the Appellant failed to show that actions of the Respondent in issuing the order were unreasonable, irrational or procedurally improper given the terms of the agreement and the licence.
- [17] With regard to Ground 3 the Appellant submits that all three grounds are intertwined and that arguments raised above will be raised regarding Ground 3.
- [18] It is important to have regard to the correspondence between the parties hereto and the Appellant in order to gain insight on the issue of whether the process leading to the Order of the Minister sought to be impugned was fair or not.

### **Correspondence and Meeting**

- [19] Below is the correspondence that was produced:

#### Dates

14 April 2016	The DICT informed Appellant about complaint against them made by Intelvision asking for response not later than 19 <sup>th</sup> April.
22 April 2016	Letter from the DICT reminding the Appellant about complaint, referring to email correspondence between the Appellant and Intelvision; advising that “ <i>interconnection agreements make provision for technical review meeting</i> ” to address the issue and that Intelvision has attempted to organize a meeting with the Appellant to no avail. The letter also indicated that interconnection is mandated under law and that while there is no urgency in the Appellant’s part to resolve the problem their reply that they will “revert in due course” may be “ <i>construed as an uncooperative behavior or an abusive conduct as a major/dominant operator in Seychelles</i> ”. The letter directed the Appellant to undertake to resolve the problem and have a technical review meeting with Intelvision in accordance with the interconnection agreement; reminded the Appellant to respond

to the first letter dated 14<sup>th</sup> April 2016 and to provide update on agreed action after technical review meeting, not later than 26<sup>th</sup> April 2016.

23 May 2016

The DICT informed the Appellant regarding meeting scheduled for 25 May 2016, objective of which was to resolve the problem relating to termination of incoming international call service over the interconnection; the Appellant was asked to confirm attendance.

24 May 2016

The DICT acknowledged email and phone conversation with the Appellant and took notice that the Appellant would be represented at the meeting.

25 May 2016

Letter from the DICT referencing the meeting that took place, informing that due to difficulties regarding termination of incoming international telephone service via interconnect, the Government has taken decision that the operators need to resolve any problems with regards to interconnection and all operators need to ensure proper functional service by the 03 June 2016.

08 June 2016

Letter from the Appellant's Counsel addressed to the DICT referring to the letter from the DICT dated 25 May 2016 informing that, *"it is the obligation of all local operators to make their own call termination arrangements with overseas providers"*; that, the Appellant is of the view that, *"providing such a facility, would entail maintenance of additional and unnecessary technical facility at substantial cost and expense and with no significant benefits"* to the Appellant or its customers; that Intelvision sent the Appellant *"on a wild goose chase"* when the issue was at Intelvision; based on this arguments the Counsel stated that, *"I do not see why my Client should expand its resources when its traffic is coming directly to it and additionally as I have been advised by it that there have been no customer complaints"*. The letter further states that *"imposition to continue the allowance of calls via a 'local transit operator'"* has no logical bearing, that, *"the market is mature enough to allow operators to get their own traffic directly, and not still have unnecessary structures . . . to protect other operators"*, at the expense of the Appellant. Therefore, the obligation to maintain the technical facility on the Appellant has become redundant and entail unnecessary cost. The Counsel also stated that issue that the DICT requires the Appellant to comply with should not fall within the authority of the DICT.

22 September 2016 Letter from President's Office, Department of Legal Affairs, Assistant Principal Legal Draftsperson for Attorney General addressed to Director General (Communication) enclosing modified draft Ministerial order directing the Appellant to restore interconnection with other licenced operators.

13 June 2017 Letter from the DICT enclosing Ministerial order relating to interconnection pursuant to Section 33(3) of the Broadcast and Telecommunication Act 2000 (the "BTA"), Order dated 1 June 2017

[20] On the basis of the above correspondence, I find that it is difficult to agree with the Appellant's submissions that no substantial correspondence took place.

[21] A perusal of the record suggests that the Appellant was periodically informed about the complaints and attended joint meeting in this regard with all the stakeholders herein. Furthermore the record seems to suggest that during the meeting of 25 May 2016, all telecommunication operators were given the opportunity to voice out their concern on the interconnection issue.

[22] It is also a matter of record that during the meeting of the 25<sup>th</sup> May 2016 a decision was taken that all telecommunication service providers should allow interconnection of all types of calls and that the service providers should take necessary measures to resolve any problems with regard to the termination of incoming international telephone calls via interconnection.

[23] I have gone through the record with a fine comb and I failed to see any evidence that tends to suggest that the Appellant complied with the decision or with the directions issued by the department. In my mind it is plain that the Order issued under section 33 of the BTA was taken in consideration of the persistent refusal of the Appellant to comply with their statutory, licence and interconnection agreement obligations and decisions and directions issued by the department.

[24] It is not clear to me on what basis the Appellant is arguing that there was no correspondence, when it was produced to the court; and that there was no meeting, when the Appellant did not expressly deny attending a meeting on the 25 May 2016.

[25] Having regard to Ground one alone I do not see in what way the decision of the Minister sought to be impugned was unfair, unreasonable, irrational or improper.

**Legality, Rationality (Reasonableness) and Propriety**

[26] Three main grounds on which a decision can be subject to judicial review established by the UK and our case law are 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).

[27] In the case of *Jivan vs Seychelles International Business Authority* (MC 15/2013) [2016] SCSC 108 the court correctly 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’*.

[28] The Appellant submitted extensive case law with regards to these concepts and in particular regarding “Wednesbury test” or “Wednesbury unreasonableness” (pages F10-F17) in the Supreme Court.

[29] Lord Diplock explained irrationality in *Council of Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935 as follows:

*“By ‘irrationality’ I mean what can now be succinctly referred to as ‘Wednesbury unreasonableness’... It applies to a decision which is outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”*

[30] The Court in *Servina v Seychelles International Business Authority* (487) [2016] SCSC 487) stated that in determining rationality or reasonableness one should examine whether the decision-maker took into account *‘factors that ought to be taken into account’* and did not take into account *‘factors that ought not to be taken into account’* and, furthermore, that the decision must not be so unreasonable *‘that no reasonable authority would ever*

*consider imposing it (Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223)*'. The court also stated that in applying the test, the Court needs to keep in mind that Judicial Review is concerned with the manner in which decision was made and not the merits of that decision. Thus the decision can be unreasonable if the decision maker considers irrelevant facts and ignores the relevant ones.

- [31] The Appellant's contention, that the Respondent either failed to take into account relevant considerations or took into account irrelevant considerations and that the decision was outright preposterous; that the Respondent failed to avail the Appellant the opportunity to be heard violating *audi alterem partem*; and that the Respondent was favouring Intelvision does not seem to be grounded on any cogent evidence and is plainly without merit.
- [32] The letter containing the Order of the Minister sought to be impugned, contains the necessary background and information that sheds light on the long road taken that culminated in the Order. It is therefore appropriate at this juncture to turn my attention to the reasons of the Order and the factors that motivated the decision under challenge.

### **Reasons for the Order & Considered Factors**

- [33] The Order lists the events that had happened (complaint, letters, meeting), notes the points that were raised by the Appellant's Counsel Letter and concludes at page 2 of the order (B29) that:
- “upon consideration of the points raised by the Attorney-At-Law of CWS and other correspondences, the DICT considers that CWS has not been acting in good faith to resolve the issues of terminating (failure to terminate) of incoming international calls into its network transiting through Intervision's network;”*
- [34] The Order goes on to state that the Appellant has an obligation to provide interconnection services as per paragraph 8 of their licence, under section 30 of the BTA and interconnection agreements. Therefore, the order does give reasons for issuing it: statutory, licence, agreement obligations as well as upon consideration of the points raised by the Appellant's Counsel, the DICT considered that Appellant was not acting in good faith.
- [35] As I pointed out earlier, the Respondent confirms that the Order under section 33 of the BTA was taken in consideration of the persistent refusal of the Appellant to comply with

their statutory, licence and interconnection agreement obligations and decisions and directions issued by the department. It is also the view of the Respondent that the order is a “*speaking order and that the reasons for the decision are clearly stated in the order*”.

- [36] In this case fairness requires that this matter be assessed in the context of not only the correspondence that ensued between the parties, including of course the letter from the Appellant’s attorney that preceded the decision, but also within the applicable statutory framework that has a bearing on the decision taken by the Minister. It is to the essence of the statutory framework and license obligations that I now turn.

### **Statutory, Agreement and Licence Obligations**

- [37] I must make it clear that I have read all the statutory provisions that were cited in the Supreme Court and the Minister in his Order. I do not propose to reproduce all the sections of the law relied upon by the parties, as that is unduly cumbersome.

- [38] In my mind the statutory scheme governing this matter and the concomitant license obligations require the Appellant to cooperate with officials of the Respondent and or the Minister to ensure that all the issues that arise in the sector are resolved. In this case there is evidence that the Appellant did not always cooperate. For instance, the letter from DICT notified and reminded the CEO of the Appellant regarding complaint lodged, asked to respond and advised to have a technical meeting with Intelvision. The Appellant seems to have neither replied nor arranged separate technical meeting with Intelvision.

### **Audi Alterem Partem and the Rules of Natural Justice**

- [39] The Appellant submits that the learned Chief Justice failed to consider whether or not the Appellant was afforded a right to be heard before the decision was taken; failed to consider *audi alterem partem* and the rules of natural justice; that the Appellant was not given the opportunity to be heard, and that the learned Chief Justice failed to deal with the issue as to whether the decision of the minister was proper, sufficient and in accordance with the rules and principles of natural justice and fair hearing.

- [40] The learned Chief Justice considered the abovementioned issue at paragraph 46 and concluded that the Order was made after substantial correspondence and meetings with the Appellant and that, therefore, it cannot be said that the Appellant's fair hearing right were breached.
- [41] The Appellant was notified about the complaint, asked to respond and advised to arrange meeting with the Intelvision as per their agreement to resolve the issue. Appellant failed to do so. The DICT had meeting with all the service providers and the Appellant failed to raise their concerns at the meeting. The Appellant was notified regarding the decision of the DICT that the interconnection should be re-established. The Appellant has failed to comply with the deadline and has instructed their Attorney to send a letter to the DICT raising points which were noted in the Order. .
- [42] In the case of Amalgamated Tobacco Company (Sey) Ltd, cited, supra, it was held that fairness does not necessarily require an oral hearing. This is one such case. The Appellant engagement with the Respondent and other stakeholders was prolonged. The Appellant knew the concerns of the Respondent and other stakeholders. It was afforded an opportunity to state its side of the story. Its Attorney wrote a letter to the Minister to put its side of the story and the Minister responded to the position of the Appellant in his letter containing the order sought to be impugned. In the circumstances of this case the Appellant was afforded a hearing before the Minister took the decision sought to be impugned.
- [43] In the Zimbabwe case of *H v St John's College 2013 (2) ZLR 621 (H)* the applicant had breached school rules and disciplinary measures were taken by the school by barring him from attending the school leavers dance. Before barring the student, the school had called for an explanation. This had been ignored by the applicant. The school had then taken measures to try to get a response. It was held that the *audi alteram partem* was not breached and student had spurned the opportunity afforded by the school to explain breach of school rules by him.
- [44] The Appellant's Counsel submitted that there was no investigation by the DICT/Respondent regarding what caused the issue of interconnection, however, they also do not deny that they are not happy to provide the said service and according to them it is

not their obligation, but obligation of each of the providers. This is, however, contrary to the agreement and licence that they have. The Appellant argued that the Respondent favours the Intelvision, however, they decided not to explain reasons for such averments.

[46] Having regard to the circumstances of this case, that includes the importance of complying with the law and the Orders of the Minister to other stakeholders, the communication exchanged between the Appellant and the Minister, the obligations imposed on the Minister by the law, the issuance to the Appellant of the notices of complaint, lost opportunity to raise concerns at meeting, demonstrates quite clearly that the decision of the Minister was arrived at after following a fair process.

[47] In the result, having regard to all the above, this appeal is without merit and is liable to be dismissed with costs as I hereby do.

Signed, dated and delivered at Palais de Justice, Ile du Port on 18 December 2020

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Dingake JA

I concur

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Robinson JA



I concur

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Tibatema-Ekirikubinza