

IN THE COURT OF APPEAL

OF

TRINIDAD AND TOBAGO

CA P-260/2020

CA P-261/2020

[CV2020-01617]

DIGICEL TRINIDAD AND TOBAGO

APPELLANT

V

TELECOMMUNICATION SERVICES OF TRINIDAD AND TOBAGO

RESPONDENT

PROCEDURAL APPEAL HEARD
WEST COURT, HALL OF JUSTICE
(VIRTUAL COURT-COA WEST-VDI)

ON THURSDAY, 10TH DECEMBER 2020

PANEL :

JUSTICE OF APPEAL PRAKASH MOOSAI

JUSTICE OF APPEAL VASHEIST KOKARAM

APPEARANCES :

MR. J. MOOTOO and MR. C. HACKETT instructed by

MR. N. CAMPBELL who holds for MR. C. BYRNE (absent)

on behalf of DIGICEL TRINIDAD AND TOBAGO

MR. C. SIEUCHAN led by MR. M. DALY SC instructed by

MRS. S. INDARSINGH and MS L. THEODORE

on behalf of TELECOMMUNICATION SERVICES OF TRINIDAD
AND TOBAGO

TRANSCRIBED BY:
ALICIA ALEXANDER

(PROCEEDINGS COMMENCED AT 9:08:30 A.M.)

MR. SIEUCHAN: Good morning, My Lords.

MR. MOOTOO: Good morning, My Lords. As before, I, Jason Mootoo, appear for the Appellant. I apologize for the absence of Mr. Byrne this morning. Mr. Nicholas Campbell of Byrne & Byrne is holding.

MR. SIEUCHAN: And good morning, My Lord. If it should please you, I am Christopher Sieuchan. I am led this morning by Mr. Martin Daly for TSTT. We are instructed by Ms Lisa Theodore and Mrs. Sashi Indarsingh, both of M.G. Daly and Partners.

Before you, My Lords, as before, are the representatives of TSTT. We have Ms Lisa Agard, Ms Christa Leith, Mr. Justin Junkere --

JUSTICE MOOSAI: Yes?

MR. SIEUCHAN: And My Lord, I believe we have Mr. Kwasi Prescott, but I am not seeing him in the waiting room.

KWASI PRESCOTT: I am here.

MR. SIEUCHAN: Thank you.

MR. DALY SC: Thank you, sir.

MR. SIEUCHAN: Those are the representatives of TSTT.

JUSTICE MOOSAI: All right.

What about Digicel? Are there any representatives there, Mr. Mootoo?

MR. MOOTOO: Yes, My Lord. Ms Rihanna Jaleel is here this morning.

JUSTICE MOOSAI: Can we get the surname?

MR. MOOTOO: Jaleel, L-E-E-L.

JUSTICE MOOSAI: Yes. All right.

Counsel, okay. We are grateful for the submissions; we have an oral decision this morning for the parties. I imagine that you can get the transcript at some point in time. If it becomes necessary to reduce it to a fuller, written judgment, we will do so at the appropriate time.

The decision will be given by My Brother, Mr. Justice Kokaram.

JUSTICE KOKARAM: Right. There we go. Right. Are you hearing me clearly now? All right. If at any time you all are not hearing me, just raise your hand and feel free to interrupt me. All right?

Number portability enables customers to retain their unique and personal telephone numbers on changing telephone service providers. Number portability is one of the critical elements or aspects of an open, competitive telecommunication market where customers enjoy the convenience of this service, realizing equal access between telecommunication operators through the interconnected

1 networks.

2 The operation of this system of number portability
3 lies at the heart of the appeals before this panel in
4 relation to two main competitors in the open
5 telecommunications market in this jurisdiction, Digicel the
6 Appellant and TSTT the Respondent.

7 The genesis of the appeals arose from a dispute
8 between the parties concerning TSTT's rejection of porting
9 requests by its customers to port with Digicel. Digicel
10 claimed that TSTT, wrongfully and in breach of contract set
11 out in the customer procedures, suspended or ceased porting
12 activity or refused porting requests on certain rejection
13 codes where there was no basis to do so.

14 Digicel claimed that these activities of facilitating
15 or -- failing to facilitate, or rejecting porting requests,
16 constitute a dishonest practice and an act of unfair
17 competition contrary to Sections 4, 1 and 6 of the
18 Protection Against Unfair Competition Act and a breach of
19 contract.

20 The Learned Judge, on 14th September 2020, dismissed
21 Digicel's application for various injunctive relief against
22 TSTT and ordered that the claim by Digicel, against TSTT,
23 for damages for breach of contract and for breach of the
24 Protection Against Unfair Competition Act (PAUCA), be
25 stayed pending such time as the Telecommunications
26 Authority of Trinidad and Tobago who are referred to as
27 "TATT" or the "Regulator" interchangeably in this oral
28 decision, has exhausted its dispute resolution process
29 under The Telecommunications (Interconnection) Regulations.

30 There was before the Learned Judge, two applications,
31 Digicel's application for an interim injunction against
32 TSTT to restrain it from, among other things, rejecting
33 porting requests, except in certain cases in accordance
34 with certain procedures. This was met by TSTT's
35 application to stay the proceedings, based on its challenge
36 to the Court's jurisdiction and/or for the Court to decline
37 to exercise its jurisdiction. And that application was
38 made pursuant to Rule 9.7(1) of the CPR before TSTT had
39 filed its defence in the proceedings.

40 The Learned Judge, in dismissing the injunction and
41 staying the proceedings, held principally, that while TSTT
42 may have been operating contrary to honest practices with
43 respect to number portability, she declined to conduct an
44 analysis as to whether the conduct amounted to an act of
45 unfair competition contrary to PAUCA. The Learned Judge
46 found that the draft supplier contract and consumers
47 procedure, defined the parties' contractual rights, but
48 held that any interpretation of the contract may impact
49 other concessionaires or operators who were not party to
50 the dispute.

1 With respect to the application for injunctive relief,
2 while damages may not have been an adequate remedy, the
3 judge identified TATT as the ideal entity to ensure
4 compliance with the concessions under the Act. The greater
5 risk of injustice lie therefore, according to the Learned
6 Judge, in granting the injunction without referring the
7 dispute for resolution to TATT.

8 The Court, therefore, essentially declined
9 jurisdiction and stayed the proceedings for the following
10 reasons:

- 11 1. Number portability is not distinguishable from
12 interconnection and therefore, falling within the
13 remit of TATT jurisdiction.
- 14 2. Section 82(1) of the Telecommunications Act does not
15 oust the Court's jurisdiction, but imposes a
16 statutory obligation to develop dispute resolution
17 processes to deal with disputes, inclusive of number
18 portability such as this one.
- 19 3. TATT, with its wide powers, is a more suited entity
20 to deal with this dispute, inclusive of granting
21 interim remedies. And she placed reliance on the
22 authorities of **Solomon Gabriel v 91.9 Trini Bashment**
23 **Limited** and she distinguished the authorities of
24 **Digicel (St Lucia) Ltd v Cable and Wireless** and
25 **Digicel Trinidad and Tobago Ltd v TSTT [2007]**, a
26 judgment of Justice Bereaux.

27
28 Before this panel, is Digicel's procedural appeal
29 against the grant of the stay and what I will call the
30 substantive appeal against the dismissal of the application
31 for the injunction. There was no objection by the parties
32 for this panel, as it's constituted, to hear both the
33 procedural and substantive appeals together.

34 In reviewing the Learned Judge's exercise of her
35 discretion on both applications, Digicel must show that the
36 Learned Judge was plainly wrong. We have read the parties'
37 written submissions and considered their oral arguments and
38 are grateful for the invaluable contributions and creative
39 thinking of Senior Counsel and Counsel.

40 There are two main planks in Digicel's arguments in
41 support of its appeal, one on the question of jurisdiction
42 and second, on the question of the exercise of discretion.

43 The first is that TATT does not have any jurisdiction
44 to hear and determine any dispute in relation to a breach
45 of contract or the PAUCA claim.

46 The second is that even if it does, the Court was
47 plainly wrong to have exercised its discretion to stay the
48 proceedings, and worse, to dismiss the application.

49 With regard to the first limb or the first plank,
50 there are three main elements of the argument that TATT has

1 no jurisdiction over this dispute.

2 First, that number portability is not an aspect of
3 interconnection; therefore, TATT does not have jurisdiction
4 under Section 25(2)(h) to deal with a dispute in relation
5 to portability.

6 Second, that regardless of whether number portability
7 is an aspect of interconnection, a proper construction of
8 Section 25(2)(h) demonstrates that there is no justiciable
9 issue as it were, for TATT, that is, no complaints of a
10 failure by Digicel to comply with its terms and conditions
11 of the concession. And this was Mr. Mootoo's skillfully
12 raised novel point which was not argued below, that TATT
13 had no jurisdiction at all to resolve any dispute in
14 relation to number portability, as no breach of any
15 obligation in Digicel's concession arose for TATT's
16 resolution.

17 The third string in the bow on the question of
18 jurisdiction is that, the Trial Judge failed to grasp the
19 main complaint was an act of unfair competition which
20 affords to the party, relief under PAUCA and the
21 Telecommunications Act does not refer to nor provide for
22 dispute resolution in relation to Protection Against Unfair
23 Competition Act claims. A reliance was placed on the well-
24 known case of **UNISON**, and Digicel should not be deprived
25 their constitutional right to access the court.

26 With respect to the exercise of the discretion, which
27 is the second main plank and concurrent jurisdiction, the
28 argument is that the Trial Judge erred in the exercise of
29 her discretion to grant a stay, where the sole reason is
30 that there is an alternative tribunal with concurrent
31 jurisdiction capable of determining the issues, where the
32 Judge was satisfied that there was a *prima facie* case of
33 breach, and that damages was not adequate remedy and that
34 TATT could not, under Section 82, grant any injunctive
35 relief. And finally, public interest considerations
36 merited the grant of an injunction and for the Court to
37 seize jurisdiction over the proceedings.

38 Finally, it was argued that it was open to the Learned
39 Judge, even if it was to refer the matter to TATT, to have
40 granted an injunction in aid of the stay, similar to the
41 type of jurisdiction of the Court to grant an injunction
42 that is in aid of arbitral proceedings.

43 The starting point is to acknowledge that it's now
44 common ground that the Court's jurisdiction to determine
45 Digicel's claim, was not ousted by Section 82 of the
46 Telecommunications Act, and I will come to that in a
47 moment. There has been, quite correctly, no cross-appeal
48 against that finding. The grant of the stay in this case
49 was purely an exercise of a case management discretion, to
50 stay the proceedings where it is just to do so, and to give

1 effect to the overriding objective.

2 The Supreme Court of Judicature Act confers on the
3 Court, the wide powers to grant a stay where it thinks fit
4 to do so. The Court, no doubt, has the inherent
5 jurisdiction to stay its own proceedings. The authority
6 for that (indiscernible 9:21:10 a.m.) found in **Texan**
7 **Management Ltd & Others v Pacific Electric Wire and Cable**
8 **Company Ltd** and the well-known authority of **Channel Tunnel**
9 **Group Ltd v Balfour Beatty Construction Ltd**, the latter
10 being the authority for the proposition that the Court has
11 the power, pursuant to its own inherent jurisdiction, to
12 grant a stay of a claim brought before it, in breach of an
13 agreed method of resolving disputes by some other method.

14 It is the widest possible discretion and this Court
15 should not interfere with the exercise of that wide
16 discretion, unless there was an error of legal principle,
17 or from the reasons proffered by the Trial Judge, her
18 decision was plainly wrong. It is not a matter whether we
19 should have exercised our discretion differently.

20 All the circumstances relevant to the balance of
21 justice in the case, must be properly weighed in the
22 scales. Further, the Court has the case management power
23 under Rule 26.1(f) of the CPR to grant a stay, and in doing
24 so, it gives effect to the overriding objective. It must
25 then finely balance, matters of the economy, equality,
26 proportionality and fairness.

27 And while the Court may have a number of factors in a
28 given case to weigh in the balance, to give effect to the
29 overriding objective, the key to the exercise of that
30 discretion is the analysis of the relevant context in which
31 the discretion is exercised. The context usually provides
32 a clear point to the factor or factors that should carry
33 more weight than any other in steering the right direction.

34 So that one of the factors in this case on which heavy
35 emphasis was placed by the Learned Judge, was the expertise
36 of TATT and the regulatory framework. Rivalling factors
37 which Digicel complains of, which were ignored was TATT's
38 jurisdiction, public interest considerations and the
39 limited or non-existent injunctive or interim powers of
40 TATT.

41 The exercise of the discretion then, must be
42 understood entirely as a matter of context and
43 understanding the nature of this dispute, the duties of the
44 parties and the powers and responsibilities of the
45 Regulator, and more importantly, the relationship between
46 the parties with each other and with the Regulator.

47 Section 82 of the Telecommunications Act specifically,
48 and the legislative framework of the Telecommunications Act
49 and the Regulations generally, form the main back loft to
50 the decision granting a stay of the proceedings. Section

1 82 provides that, TATT '...shall establish a dispute
2 resolution process to be utilized in the event of a
3 complaint or dispute arising between parties in respect of
4 any matter relating to Section 18(1)(m), or 25(2)(h), or
5 where a negotiated settlement under 26 cannot be achieved,
6 or in the wide discretion of the Authority, any matter that
7 the Authority considers appropriate for dispute
8 resolution'.

9 There is no issue by the parties that TATT has since
10 established a dispute resolution process pursuant to its
11 proceedings, for the resolution of disputes in the
12 telecommunications sector. And paragraph 2.4(1) of that
13 procedure states, 'that any party may, on its own
14 initiative at any time, refer any dispute in respect of any
15 matter arising under the Act, any regulations made under
16 the Act or any concession or licence under the Act, to the
17 Authority as a dispute'.

18 Section 18(1)(m) makes it plain that one of the
19 functions and powers of TATT include investigating
20 complaints made by operators of the telecoms market and
21 providers of telecom services, arising out of the operation
22 of a public telecommunications network, or the provision of
23 a telecommunications service in relation to services
24 provided generally and to facilitate relief where
25 necessary.

26 With Section 25(2)(h), specifically in relation to
27 concessions or a licence granted to telecom operators, it
28 requires them to submit to the Authority for prompt
29 resolution, any dispute that may arise between
30 concessionaires relating to any aspect of interconnection,
31 including disputes as to any terms and conditions for any
32 element of interconnection.

33 Regulation 31 makes provision for dispute resolution,
34 for disputes with respect to or regarding interconnection.
35 But these dispute resolution provisions must be understood
36 in the context of the structure of the Telecommunications
37 Act and its purpose in liberalizing the telecommunications
38 markets.

39 And so, very briefly, for the purposes of this oral
40 decision, by way of quick analysis of the legislative
41 scheme and again by context, it reveals the following:

- 42 1. The Act is one which regulates telecommunications in
43 this jurisdiction, establishing a comprehensive
44 legal framework for an open telecommunications
45 sector that promotes fair competition between
46 providers of telecom services.
- 47 2. TATT was established with transparent regulatory
48 processes to guide the transformation to a
49 competitive environment and to prevent anti-
50 competitive practices.

- 1 3. Major functions of the Regulator include not only to
- 2 establish the national telecommunications industry
- 3 standards, but to implement and enforce the
- 4 provisions of the Act and the policies and
- 5 regulations. And importantly, to investigate
- 6 complaints by operators and providers of telecom
- 7 services in respect of services provided generally.
- 8 4. It issues concessions, or loosely, licences, to
- 9 these parties which include detailed requirements
- 10 and obligations with respect to the development of
- 11 their service, their network, issues in relation to
- 12 interconnection and access to facilities.
- 13 5. Failure to comply with the provisions of the Act,
- 14 the Regulations, or terms of the concession, may
- 15 result in the suspension or termination of the
- 16 concession and breaches may carry a penalty.

17
18 These concessions enjoin the parties with the
19 Regulator in a relationship which bring the concessionaires
20 under the Regulator's close purview and regulation.

21 In short, TATT, as the Regulator, is not an interloper
22 in issues that arise in the working out of disputes between
23 concessionaires, which gives effect to an open
24 telecommunication competitive market; but it is intimately
25 involved in it.

26 In furthering the objectives of the legislation, TATT
27 postponed the issue of portability, consulted the
28 concessionaires in the telecoms market, drafted an
29 implementation plan for number portability, sourced a
30 neutral central administrator to administer porting
31 requests and facilitated the execution of the PortingXS
32 contract.

33 Also, fittingly, by way of context, the concessions
34 themselves, provide very important obligations mirrored in
35 the Act and Regulations and specifically, I refer to A1,
36 A2, A3, A21, A23, A25, A39, A42, A49, A48, B17, B18, C16,
37 C17 and Schedule H to the concessions.

38 And finally, in reviewing the Statement of Case with
39 the Board pleadings with respect to damages to Digicel's
40 goodwill, it appears that the main focus has been on the
41 processing of the porting requests of its new customers.

42 On examination of these concessions, the obligations
43 that are imposed on the parties, the determination of TATT
44 in attempting to resolve past disputes on the issue of
45 portability, and specifically, TATT's establishment of
46 policies in relation to interconnection and portability,
47 show the close involvement of the Regulator in implementing
48 and enforcing policies and the provisions of the Act and
49 Regulations.

50 There is no surprise therefore, that the Act, in

1 establishing this special regime and the status of the
2 Regulator, made provision for a dispute resolution system
3 set out in 18(1), 25(2)(h), and 82 and in the Regulations
4 and Policy document.

5 So in determining these appeals against this back
6 loft, there are two broad questions that arise. The first
7 as I said, with respect to the jurisdiction of TATT, and
8 second, with regard to the discretion to be exercised by
9 the Court, in staying proceedings where there is a body of
10 concurrent jurisdiction which can determine the dispute.

11 The first is loosely called a "broad threshold of
12 preliminary question" which can be subdivided into three
13 main issues, which must be determined before examining the
14 context in which the Court exercises its powers to stay
15 these proceedings in preference to the AR process
16 established by the Regulator.

17 Those issues are: whether number portability is an
18 aspect of interconnection; second, whether the Court has
19 exclusive jurisdiction to determine claims under PAUCA; and
20 third, the rider, whether TATT has any jurisdiction over
21 disputes arising from the concessions generally.

22 If these issues are determined in favour of Digicel,
23 there is no need to determine whether discretion was
24 properly exercised, as the Regulator would not have the
25 power to deal with the dispute. If not, then the question
26 of whether the stay was appropriate, having regard to the
27 concurrent jurisdiction of TATT, falls to be determined.

28 With respect to the main or preliminary issue or the
29 question of jurisdiction, we are of the opinion that TATT
30 has the jurisdiction to resolve this dispute. Number
31 portability, properly construed, is an aspect or element of
32 interconnection under the Telecommunications Act.

33 While PAUCA creates a statutory remedy, access to the
34 court is not impeded by another suitable body providing
35 effective relief for an act of unfair competition, which
36 forms the basis of any allegation of breaches of PAUCA.

37 There is no impediment to TATT to deal with
38 allegations of unfair competition in the context of the
39 regulatory framework. The factual substratum of the
40 dispute to be resolved by TATT, has in fact, the potential
41 of resolving any claims under PAUCA and breach of contract.

42 The dispute over number portability fairly arises as a
43 dispute over terms and conditions of carriers' concessions,
44 making it justiciable, so-called, or subject to the dispute
45 resolution process before TATT. And it is just, in all of
46 the circumstances, to stay the entire proceedings; even the
47 determination of the application for an injunction.

48 Now, we say this for the following reasons:

49 First, number portability is an aspect or element of
50 interconnection. We have examined the term in its relevant

1 context and structure of the Telecommunications Act. We
2 have examined the actual language and structure of the term
3 "portability" and "interconnection", used in the statute to
4 ascertain its meaning, looking at the statute as a whole,
5 considering its structure, context and the impact of
6 different parts of the statute on the provisions that
7 (indiscernible 9:35:03 a.m.) to be determined.

8 A concession is the authority to operate a
9 telecommunications network and is subject to conditions for
10 that service, established under Part 3 which deals with
11 concessions in the Act. There are general rights for a
12 concessionaire, general conditions, specific conditions for
13 telecommunications operators and general obligations of
14 concessionaires.

15 Insofar as conditions are concerned for
16 telecommunications operators, there are the general
17 conditions of Section 22, the specific conditions of 24,
18 conditions in relation to interconnection in 25 and access
19 to facilities in 26.

20 In Section 25, the concession shall include conditions
21 obligating concessionaires to provide for direct or
22 indirect interconnection, and transmitting and routing of
23 services or of other concessionaires. Section 25(2) and
24 (j) are in respect of the concessionaires' obligations to
25 provide direct or indirect interconnection and services.
26 The authorities shall require a concessionaire to provide
27 number portability.

28 Importantly, 25(2)(j) lays the conditions for number
29 portability. Section 9 -- Regulation 9 of the
30 Telecommunications (Interconnection) Regulations obliges
31 the concessionaire to configure its network to facilitate
32 number portability between similar networks. We will
33 examine condition A42 which mirrors the obligations under
34 the Act and Regulations and TATT's implementation plan on
35 number portability.

36 Importantly, with regard to the evidence, it reveals
37 that the ability of routing the calls can only be achieved
38 through interconnectivity. And adapting a purposive and
39 contextual approach to the construction of the statute in
40 relation to interconnection, number portability is an
41 important aspect of interconnection. And the inevitable
42 connection between portability and interconnection is also
43 borne out in the evidence contained in the Statement of
44 Case.

45 Secondly, Section 25(2)(h) is broad in its remit,
46 requiring any dispute that may arise between dispute [sic]
47 and TSTT as concessionaires relating to any aspect of
48 interconnection, to be referred to the Regulator. Disputes
49 as to other terms and conditions, or elements of
50 interconnection are also included.

1 Also, viewing the underlying purpose of
2 interconnection in facilitating an open and liberalized
3 market and freedom of choice, free access to networks that
4 demonstrates the relevance of number portability in the
5 linking of networks to allow users to access to services
6 provided by other providers.

7 Turning to the PAUCA claim on the question of
8 jurisdiction, claims under the PAUCA do not deprive the
9 Regulator from dealing with the substantive dispute of
10 portability between the concessionaires.

11 We have examined the **Digicel (St Lucia)** authority
12 which recognized PAUCA's special cause of action but it did
13 not deal with the question or the issue of the jurisdiction
14 of the Regulator to resolve disputes arising from the
15 concessions, or whether the Regulator can seize
16 jurisdiction of a dispute which can give rise to a PAUCA
17 claim.

18 What it determined was that the elements of the cause
19 of action -- it determined the elements of the cause of
20 action of Section 4 of PAUCA and it did not consider the
21 rights and obligations arising from the statutory,
22 regulatory framework or the concessions.

23 With regard to Justice Bereaux's decision, Justice
24 Bereaux in **Digicel v TSTT** quite rightly observed that
25 alleged breaches of a concession in Sections 26(1) and (2)
26 of the Act, Regulation 5, are matters for the Authority and
27 raise no cause of action of their own. A breach of
28 Regulation 5(1) can be met by criminal sanctions. There
29 was, according to Justice Bereaux in that case, and could
30 be, no triable issue for an implied contract or breach of
31 concessions.

32 And notably at paragraph 29 of his judgment, a broad
33 statement was made in relation to the provisions of Section
34 25 which relates to interconnection. He said the
35 provisions of interconnection under Section 25, set out
36 requirements as between the Authority and concessionaires
37 as between concessionaires themselves. Breaches of the
38 concession and provisions of Section 25 appeared first
39 blush, therefore, to be matters for the Authority to
40 address and may not, by themselves, raise a cause of
41 action.

42 Admittedly, the question of whether portability is an
43 element of interconnection was not raised before him, but
44 the placement and the position of portability in Section 25
45 makes the answer to us, fairly obvious.

46 The Learned Judge also explained the special character
47 of the cause of action of unfair competition under PAUCA;
48 however, it appears that there was no argument with regard
49 to a stay in those proceedings.

50 In contrast, Justice Jones in the **Solomon Gabriel**

1 case, had the issue of jurisdiction squarely before her and
2 she granted a stay of the entire proceedings, including the
3 application for an injunction, to allow the Claimant to
4 comply with the terms of the Act and his concession; that
5 is, firstly, all disputes under Section 82 are to be dealt
6 with under the dispute resolution proceedings set up by
7 Section 82. And secondly, by the terms of the very
8 concession themselves, the Court is bound to refer the
9 dispute of matters relating to the concession for
10 determination by TATT (see pages 11 - 13 of that judgment).

11 In relation to Justice Gobin's decision, which was
12 brought to our attention at the end of the submissions,
13 that decision also confirmed the jurisdiction of TATT to
14 resolve disputes arising under the Act and concession.

15 (Break in audio 9:42:38 - 9:43:10 a.m.) which deals
16 specifically with anti-competitive behavior in the
17 telecommunications industry. This is especially so, given
18 the context of the special legislative framework to
19 facilitate an open market, to eliminate anti-competitive
20 practices and the need -- the Regulator -- there is no
21 difficulty with a regulator dealing with a dispute which
22 may have elements of a PAUCA claim.

23 Essentially, Digicel's complaint is for TSTT to abide
24 by its obligations to facilitate number portability arising
25 under its concession and regulators and there is no reason
26 why the Regulator itself cannot provide urgent, final and
27 interim relief.

28 Finally, with regard to the rider that TATT has no
29 jurisdiction at all over the dispute, as there is no
30 complaint of the Digicel's breach of its concession,
31 Mr. Mootoo deftly argued that disputes in relation to
32 Section 22(3)(f,) refers to disputes arising out of the
33 concessionaires exercise of its rights and obligations
34 under the concession and not any dispute at large. He
35 contends these disputes do not engage Digicel's rights and
36 obligations, as there is no complaint that Digicel was not
37 facilitating portability.

38 Similarly, Section 25(2)(h) only pertains to disputes
39 between TSTT and Digicel in circumstances where there has
40 been a dispute about a failure of a concessionaire to
41 observe its own rights under the concession, and he relies
42 on Justice Morgan's judgment.

43 I have to confess that the argument is a bit circular.
44 First, I cannot conceive of a situation where a
45 concessionaire will readily refer to TATT for resolution, a
46 dispute over its own breach or failure to observe its
47 concession.

48 Secondly, it seems that the argument allows for a
49 third party to make a claim against Digicel or TSTT about a
50 breach of its obligations under the concession. But

1 similarly, the concessionaires themselves cannot complain
2 about each other's breach of their obligations under the
3 concessions.

4 Thirdly, Justice Morgan made no such pronouncement.
5 He pointed out that there could be no cause of action for
6 breach of statute. The direct source of a concessionaire's
7 obligation in relation to interconnection, is the terms of
8 the concession and guidelines and the Regulations and
9 requirements of TATT, one material term of which is that,
10 the parties must refer disputes in relation to these
11 requirements of the concessions to TATT for resolution.

12 In any event, Section 82 is wide in its ambit,
13 conferring on TATT, jurisdiction over any other matter it
14 considers fit for dispute resolution.

15 To therefore adopt Mr. Mootoo's submission, would be
16 to think, too restricted a view of the dispute resolution
17 mechanism and would strip it of any efficacy or value in
18 the context of the overriding obligation of the Regulator's
19 enforcement, monitoring, compliance and resolving functions
20 under the Act.

21 With respect then, to the exercise of the discretion
22 to stay the proceedings, we are of the view that the Trial
23 Judge was not plainly wrong. She had, as I have explained
24 earlier in the judgment, an undoubtedly wide discretion to
25 stay the proceedings and she was entitled to take into
26 account the following matters:

- 27 1. (Break in audio 9:47:32 a.m.)
- 28 2. Section 25(2)(h) compels TATT to require
29 concessionaires to submit to the Regulator for
30 prompt resolution, any dispute that may arise
31 relating to any aspect of interconnection.
- 32 3. Condition A48.
- 33 4. Regulation 32.
- 34 5. Sections 3, 2, 29(2)(c) of the Telecommunications
35 Act, A25 and A26 in the concessions and Sections 83,
36 80 and 81. And notwithstanding Section 82, there is
37 a mandatory requirement to refer the dispute to the
38 Regulator.

39
40 And finally, there were other special and unique
41 features of special brand of justice in the
42 telecommunications market, being, confidentiality and
43 forbearance, under Sections 81 and 18.

44 And finally, the unique feature of the dispute
45 resolution process set out in Part 7 of the Regulations,
46 clearly provide certain mechanisms which include a request
47 for consultation and guidance. Secondly, the referral of a
48 dispute in accordance with dispute resolution procedures,
49 and importantly, for the purposes of the exercise of the
50 discretion of the Judge to determine whether the matter

1 should be referred to TATT as the appropriate body,
2 Regulations 33 which provides for interim arrangements.

3 A note in Regulation 34 provides that a final
4 resolution of a dispute in respect of which an interim
5 arrangement was implemented, shall include provisions for
6 compensation to any party that has suffered any loss or
7 damage as a result of the arrangement.

8 There were also strong public interest considerations
9 for the Regulator to seize the dispute. TATT was
10 intimately familiar with the implementation plan for number
11 portability. There is no issue of the deprivation of a
12 litigant's constitutional right to access the court. The
13 Court has appropriately managed the dispute and so,
14 therefore, the Trial Judge was not plainly wrong when she
15 stayed these proceedings.

16 However, we are troubled by her analysis on the claim
17 for injunctive relief and the application of the principles
18 of **Jetpak** and (indiscernible 9:50:32 a.m.). There appeared
19 to be no proper evaluation of the risk of injustice or
20 irreparable harm.

21 It would not have been consistent, in our view, having
22 read her reasons, to dismiss the application for an
23 injunction, before the matter was dealt with by the more
24 competent body in the circumstances. And we don't think
25 that she had intended to do that. It would have been
26 premature to grant any interim relief or seek to
27 predetermine the matter in the face of TATT's own ability
28 to provide interim and final relief.

29 It would have been a proper and lawful exercise of her
30 discretion, and we think that she had meant to do that, was
31 to sustain the application as well, for the same reasons
32 she had advanced. What shape the litigation can take if
33 any application is made to the court to lift the stay after
34 the determination by TATT, is entirely a different matter.

35 Now, for these reasons -- and as the President has
36 indicated, if it is reduced into writing, we will reserve
37 to ourselves, the ability to amplify these reasons -- the
38 appeals are dismissed and the order in relation to the
39 injunction is varied to the extent that the application --
40 the entire proceedings are stayed to enable the Claimant to
41 have its complaint and disputes referred to and determined
42 by TATT, pursuant to the Act, the Regulations and it's
43 concessions.

44 I'll turn it over to you, Mr. President.

45 Sorry. You are still muted.

46 JUSTICE MOOSAI: Yes. I apologize.

47 That is the unanimous decision of the Court and what
48 we are left with is, to address the issue of costs with
49 Mr. Mootoo and Mr. Daly.

50 Mr. Mootoo, is there any reason why costs should not

1 follow the event in this matter?

2 MR. MOOTOO: No, My Lord.

3 JUSTICE MOOSAI: Sorry. I didn't hear
4 you?

5 MR. MOOTOO: I said, no, My Lord.

6 JUSTICE MOOSAI: All right.

7 MR. MOOTOO: Should have costs, My Lord.
8 Might I just indicate that in the Court below, no
9 assessment has been made as to the costs in the matter yet.
10 So, I just raise that in the context of the order which
11 Your Lordship wishes to make on the question of
12 (indiscernible 9:53:15 a.m.).

13 JUSTICE MOOSAI: All right. Well, the
14 usual practice in the Court of Appeal is to award two
15 thirds of the costs assessed in the High Court.

16 MR. MOOTOO: I accept that, My Lord.

17 JUSTICE MOOSAI: Yes. All right.
18 So therefore, the appeals are dismissed; costs of the
19 applications are to be paid by the Appellant to the
20 Respondent, assessed at two thirds of the costs assessed in
21 the High Court in default of agreement and (indiscernible
22 9:53:49 a.m.) for Senior and Junior Counsel.

23 Yes? Is that clear, Mr. Mootoo?

24 MR. MOOTOO: It is, My Lord.

25 MR. DALY SC: Yes. Thank you, My Lord.
26 Thank you, very much.

27 JUSTICE MOOSAI: Yes.

28 And as we repeatedly said, we have been grateful to
29 the parties for their insight into the construction of the
30 legislation. It assisted us greatly in delivering an oral
31 decision tenuously. So we thank the parties.

32 MR. DALY SC: Thank you, My Lord.

33 JUSTICE MOOSAI: Yes. Thank you,
34 gentlemen.

35
36 **(PROCEEDINGS CONCLUDED AT 9:54:31 A.M.)**

DECLARATION VERIFYING TRANSCRIPT

I, **ALICIA ALEXANDER**, of **COURT REPORTING SERVICES UNIT, JUDICIARY OF TRINIDAD AND TOBAGO**, do solemnly and sincerely declare that having been required to furnish a transcript relating to the trial or proceedings, namely:

Case Caption: **DIGICEL TRINIDAD AND TOBAGO**

APPELLANT

V

TELECOMMUNICATION SERVICES OF TRINIDAD & TOBAGO

RESPONDENT

Case Number: CA P-260/2020
CA P-261/2020
[CV2020-01617]

Date of Proceedings: **THURSDAY, 10TH DECEMBER 2020**

from the audio recording made of such trial or other proceedings, I certify that the preceding transcript, consisting of **15** pages, is a correct and complete transcript thereof in pursuance of the said requirement.

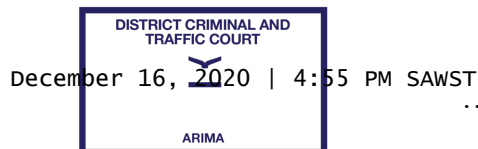
And I make this declaration conscientiously believing the same to be true and according to the Statutory Declarations Act, and I am aware that if there is any statement in this declaration which is false in fact, which I know or believe to be false, I am liable to fine and imprisonment.

Affirmed before me by video conference)

From Sangre Grande, Trinidad,)
To Trinidad North District- Arima Court (Location of commissioner),)

On this 16th day of December, 2020)

Alexander



Joezel Williams
.....
Commissioner of Affidavits

