

AFRICAN NETWORK INFORMATION CENTRE (AfrinIC) LTD v CLOUD  
INNOVATION LTD & ANOR

2024 SCJ 473

Record No. 1808

THE SUPREME COURT OF MAURITIUS  
[Court of Civil Appeal]

In the matter of: -

African Network Information Centre (AfrinIC) Ltd

Appellant

v

Cloud Innovation Ltd

Respondent

In the presence of: -

The Official Receiver

Co-respondent

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JUDGMENT

The appellant is appealing against a ruling and an oral judgment of the Commercial Division of the Supreme Court dated respectively 11 and 12 September 2023.

The respondent has taken the following preliminary objections to the hearing and determination of the appeal –

***“No Locus Standi***

1. *The Senior Attorney appearing for the Appellant had no locus standi to enter the present appeal under the name of the Appellant inasmuch as:-*
  - (i) *The Appellant has been placed in receivership by virtue of an order of the Court principally on the grounds, accepted and acknowledged in those proceedings, that (a) there was no quorate board of directors of the Applicant company and (b) after 18<sup>th</sup> September 2023, there would be no directors lawfully in office;*
  - (ii) *The purported appeal was lodged on the 28<sup>th</sup> September 2023;*

- (iii) *In virtue of the same order, only the Co-Respondent appointed by the Court is entitled to represent the Appellant in legal proceedings; and*
- (iv) *The Senior Attorney has failed to request, let alone obtain, the consent of the Co-Respondent or the sanction of the court prior to lodging the present appeal.*

### **Abuse of Process**

2. *Having correctly acknowledged and accepted before the Court that there was no quorate board of directors of the Appellant company and that there would be no directors lawfully in office after 18<sup>th</sup> September 2023, the representatives of the Appellant have acted in abuse of process of the Court in lodging the present appeal representing that they had authority to appear under the name of the Appellant inasmuch as:-*
  - (i) *The representatives of the Appellant have no lawful basis (and none is given by them) for resiling from their earlier acknowledgement.*
  - (ii) *By the mere act of lodging an appeal on a false basis, the representatives of the Appellant have knowingly and cynically taken advantage of the automatic stay imposed by the Court of Civil Appeal Act which have had the effect of:*
    - (a) *immediately displacing the Official Receiver from office and,*
    - (b) *in his place, subjecting the Appellant to individuals who have no lawful entitlement to act on its behalf,*

*pending the hearing of the appeal at an unknown time in the future.*

### **No leave of the Judge**

- 3 *The present appeal has been lodged and prosecuted in breach of Section 3(2)(c) of the Court of Civil Appeal Act 1963 inasmuch as the leave of the Judge has not been sought given that the order subject matter of the appeal is an Interlocutory Order.*

### **No Quorate Board of Directors**

4. *The purported representative of the Appellant had and has no authority to bind the Appellant with any surety or recognisance inasmuch as: -*

- (i) *The Appellant has no quorate Board of Directors or lawfully appointed director in office since 18<sup>th</sup> September 2023 and therefore the purported representative of the Appellant had no power or authority to act; and*
- (ii) *There is no basis, and none has been shown, to alter the position that the true representative of the Appellant is the Co-Respondent exclusively.”*

The co-respondent who is abiding by the decision of the Court has filed written submissions supporting the respondent’s preliminary objections.

Before we consider the validity of the preliminary objections, we find it helpful to set out the chronology of events which have led to the ruling and the oral judgment.

### **Background**

On 7 March 2023, by way of motion paper supported by affidavit, the respondent, then applicant, prayed from the Bankruptcy Division of the Supreme Court for the following interim orders pursuant to section 178 of the Companies Act–

- “(i) restraining and prohibiting the appellant (then styled as ‘Interested Party’) from relocating and/or subject itself to a takeover and/or merger and/or restructuring and/or management control in any manner whatsoever;*
- (ii) the appointment of a Receiver, in the person of the Official Receiver, for the purpose of holding the ring and ensuring that the status quo of the assets of African Network Information Centre (AfriNiC) Ltd is preserved and that the value of the business is maintained.”*

By letter dated 28 March 2023, the appellant’s legal advisers informed the Judge of first instance that, amongst other things, the application was resisted and that the respondent *“has no locus standi to initiate this application and to put AfriNIC in receivership”*.

On 25 July 2023, the parties’ respective legal advisers physically appeared before the Bankruptcy Division and it was decided that arguments would be heard on 6 September 2023 on the following three preliminary objections raised by the appellant’s legal advisers in a letter dated 24 July 2023:

- “(a) the Applicant being a foreign company not owning any immoveable property in Mauritius, must provide security for costs in the sum of USD 100,000 before being allowed to proceed with the present application;*
- (b) the Applicant has no locus standi to enter the present proceedings and/or is not entitled to any of the relief sought since it is not a member/shareholder of the Interested Party within the ambit of the Companies Act 2001; and*
- (c) the present matter constitutes an abuse of the process of the court, including by reason of the fact that the Applicant is the party having caused the present state of affairs and/or has acted in bad faith.”*

Mr A. Moollan, SC, Counsel for the appellant, appeared before the Judge of first instance and informed the Court that evidence would be adduced in support of the preliminary objections and that he would cross-examine Mr Attorney D. Ramdhur who had solemnly affirmed the affidavit in support of the respondent's application. It is also on record, as is apparent from a letter dated 5 September 2023 from the appellant's legal advisers, that no affidavit would be filed in response to the respondent's motion in view of the latter's stand to the effect that *“the Interested Party has no board”* and *“to avoid a dispute on putting in affidavits and entering into a sterile procedural wrangle”*. A list of witnesses on behalf of the appellant was filed.

The matter was not heard on the 6 September 2023 but on the 7 September on which day Mr N. Singla KC, appearing for the respondent, called Mr Attorney Ramdhur to give evidence. At 15.39 pm, after a very lengthy cross-examination, the matter was adjourned to 11 September 2023 for Mr Moollan to continue his cross-examination of Mr Ramdhur.

On 11 September, prior to Mr Moollan proceeding with the cross-examination of Mr Ramdhur, Mr Singla made a statement to the trial Judge which we reproduce verbatim: -

*“I had made it quite clear that he (Mr Moollan) does not have authority on the part of the company to be appearing for us. He has accepted there is no current board and absent of current board to act, there is no authority for him (Mr Moollan) to act as Counsel and there is no authority for Mr Mardemootoo to act as Attorney. It is deeply unfortunate Mr Mardemootoo is unavailable this week but I am going...My Lady, that after Mr Ramdhur...our patience on itself. After he's finished giving evidence I will be requiring a ruling from Your Ladyship and an opportunity to make good my case, that Mr Moollan and Mr Mardemootoo have no authority to act on behalf of Afrinic. And I must do that*

*because not only is that it is right to do it by law, and I have examined the bundle again over the weekend, and this point is being raised a long time ago and there is no shred of a letter or any evidence to put as right that there is authority. They just haven't done it."*

After a lengthy exchange between Mr Moollan and the Judge, a board resolution was put in after which the Judge invited arguments in light of the statement of Mr Singla. After hearing the arguments of both learned Senior Counsel, the learned Judge, in a written ruling filed on the same day, excluded the appellant's legal representatives from appearing and taking part in the proceedings of 11 and 12 September 2023, in light of her finding that *"it would be contrary to the elementary and basic principles of company law to allow Messrs Moollan and Mardemootoo to appear for AfriNiC Ltd based on the board resolution of 23 August 2021"*.

The learned Judge also found that-

*"Insofar that AfriNiC Ltd does not have the required quorum for the setting up of a board meeting nor has the quorum of the number of directors to do so and in the absence of a CEO, to hold on to a board resolution of 2021 will not be appropriate and in order. I therefore find and am satisfied that for all the reasons set out above, the legal practitioners have not been duly mandated by way of a board resolution to appear in the present case."*

The learned Judge ordered the case to continue on the next day *"in view of the urgency of the...application and inasmuch as the term of office of the directors [of AfriNiC] expires on 18 September 2023"*. The court record shows that on 12 September 2023, upon a query from the Court as to whether there was a representative of AfriNiC in Court, one Mr Arthur Cardinal N'Guessan, Head of Stakeholder Development, AfriNiC informed the Court that he was representing the management of AfriNiC and wanted to address the Court on behalf of the staff. The Court sought the stand of Mr Singla and informed Mr Arthur Cardinal N'Guessan that he was not duly mandated by the appellant to speak on its behalf in the absence of a board resolution allowing him to do so. Mr Nirmal Manic, Head of Finance, and Mr Kishna Dhondee, Internal Legal Advisor, summoned on behalf of the appellant, too were present but they were not asked about their stand.

After lengthy submissions from Mr Singla, the Court, in an oral judgment delivered on the same day, after being satisfied that the respondent had the necessary *locus standi* to

enter the application and that the prayers sought for were justified, reasonable and fair, made an order-

- (a) restraining and prohibiting AfrinIC from *“relocating and/or subject itself to a takeover or merger or restructuring or management control in any manner or whatsoever”*; and
- (b) appointing the official receiver for the purpose of *“holding the ring and ensuring the status quo of the assets of Afrinic Ltd is preserved and that the value of the business is maintained”*.

The Court also ordered the official receiver *“to see to it that the election process as per the Constitution of Afrinic Ltd be carried out so that a proper board could be constituted and also for the appointment of the Chief Executive Officer”* and to comply with the Eighth Schedule of the Insolvency Act. The official receiver was directed to *“proceed with the constitution of the Board within and to complete the whole process”* within a delay of six months as from the date of the oral judgment and to seek an extension of time, in the event he is unable to complete the exercise within the time frame stipulated by the Court.

It is to be noted that although, in the motion paper and supporting affidavit, the interim orders were sought *“pending the determination of Cloud Innovation’s main action which is pending before the Commercial Division of the Supreme Court bearing cause number SC/COM/PWS/000226/2022”*, the learned Judge did not restrict her orders pending the determination of the main case. Be that as it may, it is agreed that there is a main case pending before the Commercial Division of the Supreme Court.

We need to also point out that, as per the court record, on 28 September 2023, Ms G. Kissoon, attorney, replacing Mr M Mardemootoo, SA, appeared before the Ag Master and Registrar and made a statement to the effect that the appellant was appealing against the oral judgment delivered on 12 September 2023 and put in the written notice and grounds of appeal. The Ag Master and Registrar ordered the appellant *“to furnish 1 surety in the sum of Rs 25,000 or a security in the sum of Rs 25,000 cash in order to prosecute the appeal”*.

The court record also shows that on the same day, a receipt was issued in the name of Mr M. Mardemootoo, SA, witnessing payment of Rs 26,100 as security for costs of appeal. There is also a certificate from the Ag Master and Registrar of the same date, to the

effect that *“Mr A B Eshun, Director, ... the Appellant’s representative...acknowledge to owe as Costs the sum of Rupees twenty-five thousand (25,000.-) deposited in cash as per ICL 319396-SC/93128/2023 of 28.09.2023”*.

### **Submissions on behalf of the respondent**

Mr Singla referred us to the Bylaws of AfriNIC, in particular to articles 11.1 and 13.5, and to section 115 of the Companies Act and submitted in the following terms-

1. no Annual General Members’ Meeting (AGMM) as provided for in those articles and section 115 has been held since the last AGMM in June 2022. The 2023 AGMM which ought to have been held in September 2023 was not so held;
2. it is not disputed that as at the date of the receivership order, AfriNIC had only four directors and did not have the required five directors to constitute a quorum for a meeting of the board as per article 19.6 of AfriNIC’s Bylaws;
3. Mr Eshun’s mandate as director was limited to a period of three years as provided for in Article 13.5 and his directorship automatically expired on 18 September 2023, i.e., three years after his appointment as provided for in the said article;
4. as a former director of AfriNIC, Mr. Eshun did not have the necessary mandate to represent AfriNIC and cause the present appeal to be lodged on its behalf on 28 September 2023;
5. Mr Eshun could neither rely on his residual powers as a director since residual powers of directors can only be exercised by a board of directors which is in existence nor on section 140 of the Companies Act as empowering him to institute any court proceedings on behalf of the appellant; and
6. the purported appeal could not have been filed without the authority of the board of directors of AfriNIC and even less by a former director with no residual power.

On the issue of the legal representation of the appellant, Mr Singla referred to a board resolution (Document A) which was put in in the course of the sitting of 11 September 2023 before the Judge of first instance and submitted that this document purportedly authorising Messrs Moollan and Mardemootoo to represent the appellant in the proceedings before the Bankruptcy Division was unsigned and was not *“the original board paper”*. Learned Counsel added that the appellant’s Chief Executive Officer had ceased holding office in November 2022. Messrs Moollan and Mardemootoo were, therefore, unable to satisfy the Court that they were duly authorised by a proper board resolution to legally represent the appellant, be it before the learned Judge or before us.

### **Submissions on behalf of the appellant**

In reply, Mr Moollan referred to an *“extract of the minutes of the special board meeting held on 23 August 2021”* and submitted that firstly, pursuant to that document Mr Mardemootoo and himself were duly authorised by the board to represent and appear for the appellant before the Bankruptcy Division and before us. Secondly, Mr Singla did not challenge part A of the minutes of that *special board meeting* before the trial Court. Thirdly, the learned Judge was wrong not to have considered that part which remained valid for all intents and purposes.

Mr Moollan also referred us to articles 13.5 and 14 of AfriNIC’s Bylaws and submitted that as per those articles a director’s term of office expires on the *“date of the Annual General Members’ Meeting held on or around the third anniversary of the date of appointment of such Elected Director”* so that Mr Eshun’s term of office did not expire on 18 September 2023, contrary to the submissions of Mr Singla, and Mr Eshun was, therefore, duly mandated to represent the appellant, lodge and prosecute this appeal notwithstanding the fact that there was no quorate board.

According to Mr Moollan, Mr Eshun retained residual power and was fully entitled to challenge the appointment of the official receiver. He also submitted that the Court cannot condone the conduct of the respondent who is denying the appellant a fair hearing and due process under the pretence that (a) the appellant had no quorate board of directors; (b) its legal representatives were not duly authorised to represent it; and (c) Mr Eshun’s term of office had expired on 18 September 2023.



## **Analysis and conclusions**

The issues which we are called upon to decide at this stage of the appeal proceedings is (i) whether Mr Eshun, who has caused this appeal to be lodged on behalf of the appellant, is still a director of AfriNIC and retains residual powers after September 2023 and therefore has the legal capacity to do so and (ii) whether Document A is a proper authorisation by the appellant to Messrs Moollan and Mardemootoo to legally represent it and conduct the appeal.

### **(i) Whether Mr Eshun is a director of AfriNIC and retains residual powers**

Whether or not Mr Eshun remained a director of the appellant after 18 September 2023 calls for an interpretation of article 13.5 of the appellant's Bylaws which provides that-

*“Each Director elected under Articles 13.4 (i) and 13.4 (ii) of this Constitution shall hold office for a term of three years, which term of office shall expire on the date of the Annual General Members’ Meeting held on or around the third anniversary of the date of appointment of such Elected Director. Subject to Article 13.6, such Director shall be eligible for re-election on the expiry of his term of office.”*

It is not disputed that Mr Eshun was appointed as a director on 18 September 2020 for a term of three years and that the appellant's last AGMM was held in June 2022. As pointed out by learned Counsel for the respondent, by virtue of section 115(1)(c) of the Companies Act, the next AGMM should have been held not later than 15 months after the previous AGMM, i.e., in September 2023 but this was not the case. This would have coincided with the expiry of Mr Eshun's term of office, in line with article 13.5.

Mr Moollan contended that article 13.5 provides that Mr Eshun shall remain in office, even after the expiry of his mandate of three years on 18 September 2023, unless and until the next Annual General Members’ Meeting is held, and he, therefore, retains a residual power to challenge the appointment of the official receiver.

We are unable to agree with Mr Moollan's interpretation of article 13.5. Mr Eshun was elected on 18 September 2020 as a director for a term of three years. The duration of Mr Eshun's term of office (three years) was therefore expressly provided for by article 13.5 of the appellant's Bylaws. Moreover, his term of office was due to expire on the date of the AGMM held on or around the third anniversary of his date of appointment. In this respect, it

is to be noted that, by virtue of its own constitution and section 115(1)(c) of the Companies Act, the appellant must hold an AGMM every year and, in any case, not later than 15 months after the previous AGMM. However, since no such AGMM was held, we are of the view that Mr Eshun's term of office expired, by effluxion of time, on 18 September 2023. He must be deemed to have left office on the last date on which the AGMM should have been held, i.e., in September 2023. We do not agree that article 13.5 should be interpreted as meaning that a director will remain in office, even after the expiry of his mandate of three years, ad infinitum as it is, unless and until an AGMM is held.

We are comforted in our view by this extract at page 200 of the case of **Aidiniantz v The Sherlock Holmes International Society Ltd (No 2) [2017] EWCA Civ 1875** which reads “...since the articles provided for a director only to hold office until the next annual general meeting, the director must be deemed to have left office on the last possible date the meeting could lawfully have been held...”.

Sections 132 and 140 of the Companies Act, cited to us by Mr Moollan, do not find their application to the facts of the present case. Section 132 states that “[a] company shall have at least one director who shall be ordinarily resident in Mauritius”, whereas section 140(1) provides that “[w]here a company has only one director, that director shall not resign office until that director has called a meeting of shareholders to receive notice of resignation, and to appoint one or more new directors.” We are in neither situation and we need say no more. The submission that “[t]he Constitution of AfriNIC...provides that the directors remain on the board until and unless the next annual general members meeting has been held” is accordingly untenable.

We were referred to the following cases in support of Mr Moollan's contention that Mr Eshun remained a director after the expiry of his mandate, retaining residuary powers. All the cases cited to us are of no assistance to the appellant for the reasons that follow.

Mr Moollan relied on the observation of Plowman J. in **Re Union Accident Insurance Co. Ltd. [1972] 1 W.L.R. 640** in support of his proposition and in particular on that part which reads-

*“...it is common ground that notwithstanding the appointment of the provisional liquidator, **the board has some residuary powers**, for example it can unquestionably instruct solicitors and counsel to oppose the current*

*petition and, if a winding-up order is made, to appeal against that order.” (Emphasis added)*

In that case, the motion for the discharge of the appointment of a provisional liquidator and a special manager was presented by the company.

It was held-

*“...notwithstanding the appointment of a provisional liquidator on a winding up, the board of directors of a company retained the residuary power to instruct solicitors and counsel to oppose the petition and to appeal against the order, and also to act in interlocutory proceedings, including a motion to discharge the provisional liquidator.” [Underlining is ours]*

In the case of **Manhattan Coffee Investment Holding (In Liquidation) v SCF Holdings II Limited & Ors** [\[2024 SCJ 99\]](#) does not also find its application to the facts of the present case. In that case, the applicant was represented by one Mr Mwangi. One of the objections raised by the respondent was that the applicant as represented by Mr Mwangi could not lodge and/or was estopped from lodging any application on behalf of the company in liquidation as it had acquiesced to the commencement of the liquidation process. On the issue of locus standi/estoppel, it was submitted that Mr Mwangi could not have entered the application without first having obtained the consent of the liquidators or leave of the Court as laid down in section 154(1)(c)(i) of the Insolvency Act.

The Appellate Court decided that section 154 of the Insolvency Act did not find its application. Its further decision on which Mr Moollan relied and which reads “...*the cardinal principle is that a director or shareholder ceases to have authority to institute proceedings in the name of the company in liquidation. However, a director who wishes to contest an order of winding up of a company and the appointment of a provisional liquidator retains the power to do so*” must be placed and read in its proper context. That decision was reached on the basis of a passage in the case of **Re Scarel Pty Limited and Ian Francis Yates v City Loan & Credit Corporation Pty Limited** [1988] FCA 23 (10 February 1988) in particular to the underlined part which reads-

*“37. The situation is very different where the company is in liquidation. The ordinary rule there is that the liquidator, in the ordinary case, is the appropriate person in whom is vested the authority to decide whether the company should take or continue action to recover damages or secure other relief for an injury done to the company. In my view, this follows from the*

*operation of the provisions of the Code to which I have referred. A special case arises where the directors institute proceedings to have the winding-up order set aside: Nationwide New Pty. Ltd. v Samalot Enterprises Pty. Ltd. (1986) 10 ACLR 741. But the general proposition is that with the liquidation, both the directors and shareholders in general meeting cease to have authority to institute or continue litigation by the company: McPherson 'The Law of Company Liquidation' 3rd Ed, 171-172, 179, 231-232.*

Mr Moollan also relied on the case of **Factory Shops Investments Limited v Mushtaq M.O.N. Oosman & Ors** [\[2009 SCJ 200\]](#) in particular to the following extract which reads-

*“Once a company has been placed in receivership, **the board of the company**, which consists of directors, retains residual powers, one of which is the capacity to challenge the appointment of the receiver and/or manager.” (Emphasis added)*

The Court in **Factory Shops Investments Limited (supra)** also referred to the cases of **Hawkesbury Development Co. Ltd. v Landmark Finance Pty Ltd. (1969) 2 NSW 782** and **Newhart Development Ltd. v Co-op Commercial Bank Ltd. (1978) 2 All E.R. 896** which decided that *“**company directors** do in certain circumstances have power to bring proceedings on the company’s behalf...[and] **have residual powers** to bring proceedings against the debenture holder who appointed the receiver”* in support of its decision that *“the existence of the residual powers of the board of directors was recognized”*. (Emphasis added)

The above authorities relied upon by Mr Moollan are to the effect that the Board of directors of a company retains certain residual powers even when the company is in receivership or liquidation. While this principle is not in dispute, we are of the view that these authorities are of no avail to the appellant in the light of the particular context and specific facts and circumstances of the present case.

Article 15.1 of the appellant’s Bylaws provides that “[the] *business and affairs of the Company shall be managed under the direction and supervision of the Board*”.

In article 1.1, “*Board*” is defined as meaning “*‘Board’ or ‘Board of directors’ or ‘Directors’, in relation to this Company, means the directors of the company for the time being and where the number is not less than the required quorum acting together as a Board of Directors*”. And the quorum of the Board is not less than five (5) Directors (article 19.6).

From the above articles, it can be gathered that the appellant is to be managed by a board of directors, whose quorum is five directors. It is, however, not disputed that at the time of lodging this appeal, the appellant had at best an inquorate board of directors (four only). In fact, it is the respondent's contention that the term of office of three out of these remaining four directors, including Mr Eshun, expired in September 2023.

The appellant cannot seek assistance from the above decisions inasmuch as in our view, reference to the directors in the case of **Manhattan Coffee Investment Holding (supra)** can only mean those directors who are still in office, in other words, whose term of office has not expired. In addition, neither in **Scarel Pty Limited** nor in **Manhattan Coffee Investment Holding** was the Court called upon to decide the case in the context of a director or directors whose term of office has expired.

Similarly, the words "***the board of the company***" and "***the company directors have residual powers***" are to be understood and can only mean, in the appellant's case, firstly a quorate board and secondly, directors whose term of office has not expired. A reading of the judgment in **Factory Shops Investments Limited** or the extract cited from **Hawkesbury Development Co. Ltd.** and **Newhart Development Ltd.** does not reveal that the Court in any of those cases was faced with a situation where either there was no quorate board or that the directors' term of office had expired. The Court in either the case of **Scarel Pty Limited** or **Manhattan Coffee Investment Holding** was not called upon to decide the case in the context of a director or directors whose term of office has expired. It is, therefore, apparent that reference to the directors can only mean those directors whose mandate has not yet expired.

We are, therefore, unable to share the views of Mr Moollan that "*[t]he authorities therefore put it beyond doubt that the director of AfriNIC, Mr. Eshun, retains the power to instruct AfriNIC to challenge the receivership...*".

It is not disputed that the present appeal has been filed by Mr Eshun in his purported capacity as a director of the appellant. However, in view of the foregoing, Mr Eshun did not have the status of a director since his directorship expired on 18 September 2023. Mr Eshan cannot, therefore, be considered as a director of AfriNIC who was still in office on 28 September 2023 and had retained residual powers to instruct Messrs Moollan and Mardemootoo to lodge, prosecute and conduct the present appeal before the Court of Civil

Appeal. Mr Eshun was clearly not vested with the necessary authority to institute and prosecute the present appeal on behalf of the appellant. The question of exercising his residual powers does not therefore even arise.

In any case, even assuming that Mr Eshun was still a director, he would not have been able to exercise any residual power on his own. As we have seen above, the appellant is managed, as per its constitution, by a board of directors with a quorum of not less than five directors, so that Mr Eshun should have been duly mandated by a quorate board in order to be able to lodge the appeal in the appellant's name. There is, however, no board resolution to that effect. Moreover, the appellant's Board of directors was at best inquorate at the material time so that it was unable to transact any business (article 19.6(1) of the appellant's Bylaws).

We may reproduce the following extract referred to us by Mr Singla in the case of **Mitchell & Hobbs (UK) Ltd v Mill [1996] 2 BCLC 102** in support of his proposition that Mr Eshun could not exercise, alone, powers to institute proceedings on behalf of the company-

*"...[t]he action initiated by R in the name of the company against M should be struck out since reg 70 was intended to vest power to manage the affairs of a company in the board of directors as a whole and accordingly the power to institute proceedings on behalf of the company could not be exercised by one director alone."*

We also find pertinent the following extract taken from **Ramaiya's guide to the Companies Act, 14th Edition 1998 at page 2134**, reproduced in **ENL Limited & Anor v Independent Commission Against Corruption & Ors [2023 SCJ 190]**: -

**"Power to institute suits/legal proceedings.—Unless the power to institute a suit is specifically conferred on a particular director, he has no authority to institute a suit on behalf of the company. Needless to say that such a power can be conferred by the Board of directors only by passing a resolution in that regard.**

.....

*Individual directors have only such powers as are vested in them either under the company's memorandum or articles or otherwise authorised by the board of directors. Hence, the managing director, does not, much less the ordinary directors, have the power to engage the company in the serious task of litigation without specific authorisation either under the constitutional documents or by a resolution of the board. Any suit or*

*proceeding on behalf of a company not so authorised is liable to be dismissed.” [Underlining ours]*

**(ii) Whether Messrs Moollan and Mardemootoo were duly mandated to legally represent AfrinIC and conduct the appeal.**

We shall now address the objection of the respondent to Messrs Moollan and Mardemootoo appearing for the appellant with regard to this appeal.

Mr Moollan relied on Document A in support of his submission that Mr Mardemootoo and himself were duly mandated by the appellant to lodge, prosecute and conduct this appeal.

Document A is headed “**Extract of the minutes of the special board meeting held on 23 August 2021 at 09:11 UTC via online conferencing system**”.

Under the heading “**Business of the Day**”, at the third paragraph, we read-

*“The CEO informed that the new Legal Team, Me Anwar Moollan representing Moollan Chambers QC and Me Amba Chinien representing A & C Law, have been invited to attend the Special Board meeting for the purpose of Agenda no 2 - Update on Legal Cases.”*

The relevant part of item 2 of the Agenda which has for heading “**Update on Legal Cases**” reads-

*“The Board took note of the board paper with regards to legal representations and the status of the Legal cases as of todate. The approval of the Board is being sought as follows:*

*A) The services of the same Legal Team be retained in all cases involving AFRINIC and Cloud Innovation Ltd, made up as follows:*

*Solicitor: Dentons Firm of Solicitors – led by Me. Manon Mardemootoo S.A.*

*Counsels: Me. Anwar Moollan SC as leading Counsel and assisted by C&A Law Chambers together with Me. Ashok Radhakisson as AFRINIC’s external legal adviser.*

B) For the purposes of ongoing cases, as well as potential litigations involving AFRINIC, the Chief Executive Officer be formally authorised to represent and take such actions on behalf of AFRINIC in the following terms:

This is to certify that Eddy Mabano Kayihura, Chief Executive Officer at African Network Information Centre (AfrINIC) Ltd, also known as AFRINIC, (the "Company") is hereby duly authorised by the Board of Directors to take all actions that he may deem necessary for the defence and protection of the rights and interests of the Company as well as:

1. To instruct Counsel and Attorney-at-Law in order that they may enter all main actions, apply for all injunctions, whether interim, interlocutory, or perpetual, whether such actions be based on tort or in contract, to apply for all remedies and reliefs connected with same, to claim all damages, make all seizures, attachments or execution of any sort (and whether provisional or otherwise), to allow same to be cancelled or annulled, to claim, state, contest, compound, finally settle and adjust all claims, to compromise disputes and refer same to arbitration, to sign and execute all necessary bonds, submissions, and references, and to enforce any award;
2. To appear for the Company before any Tribunal, Court or other body in Mauritius or elsewhere, either as applicant, plaintiff, respondent, defendant, third party or intervenient and to sign and grant any necessary proxy or proxies to any Counsel and Attorney-at-Law of the said Courts and prosecute and defend any suit or suits or other proceedings brought by or against the Company and to proceed to judgment thereon or to suffer judgment, by way of non-suit or default to be entered against the Company and any judgments, order or decree of any of the said Courts, to appeal to any Court of Appeal and/or to the Judicial Committee of the Privy Council and to give necessary securities and sign all necessary bonds upon such appeal, to initiate or defend or give up or withdraw any appeal or proceedings judicial or extra-judicial
3. To swear all affidavits and make all declarations judicial or otherwise, sign all petitions and applications, serve and accept service of any process as may be necessary or desirable at his discretion in connection with or incidental to the matter or matters referred to above and to perform all or any of the obligations imposed on the Company by virtue of the same;



4. *To claim, state, contest, compound, finally settle and adjust all debts, claims, accounts, reckonings, and demands whatsoever between us and any person or persons whatsoever; and*
5. *To substitute and appoint one or more attorney or attorneys with the same or more limited powers, to remove such substitute or substitutes, and to appoint others in his or their places.*

*For avoidance of doubts, this power of attorney and/or delegation of authority shall apply to all cases directly or indirectly concerning or relating to the Company, whether on-going or to be lodged.*

*After discussion, the Board resolved as follows;*

**Resolution 202108.630**

**WHEREAS** *the board has taken note of the Board Paper reference legal cases and legal representations dated 20 August 2021 and;*  
**RESOLVED** *as per the recommendations made therein.”* **[Underlining ours]**

Mr Moollan relied heavily on Part A of the board resolution (Document A), in support of his contention that Mr Mardemootoo and himself were and are duly mandated to legally represent AfriNIC in the application before the Judge of first instance and in this appeal.

True it is that the appellant’s Board resolved, under Part A, to retain the services of the same legal team, including Messrs Moollan and Mardemootoo, in **all cases** involving the appellant and the respondent.

The Board’s resolution was, however, adopted on 23 August 2021 and this appeal was lodged on 28 September 2023. As a result, we believe that Part A should not be read on its own but should be read together with Part B of the resolution. By virtue of Part B, the appellant’s Board formally authorised Mr Kayihura, Chief Executive Officer, “*for the purposes of ongoing cases, as well as potential litigations involving AFRINIC*”, to represent and take action on the appellant’s behalf, including to instruct Counsel and Attorney-at-law. In view of the above chronology of events, the present appeal clearly falls under the category of “*potential litigations*”.

However, Mr Kayihura ceased to be AfriNIC’s Chief Executive Officer on 4 November 2022 with the result that AfriNIC found itself without a CEO on 7 March 2023, when the respondent lodged its application before the Bankruptcy Division against the appellant, and

on 28 September 2023 when an appeal was purportedly lodged by AfriNIC against inter alia the receivership order.

To our mind, so long as Mr Kayihura remained AfriNIC's CEO, he could instruct counsel and attorney pursuant to the board's resolution taken on 23 August 2021 to perform any of the acts set out in Part B of the said resolution in respect of ongoing or future litigation involving AfriNIC. It was to Mr Kayihura to whom the board in August 2021 entrusted the powers to instruct Counsel and Attorney-at-law to represent AfriNIC in any **potential litigations** involving AfriNIC. As stated above, the present appeal is a "potential litigation" as envisaged in Part B of the resolution but Mr Kayihura ceased to be the Chief Executive Officer on 4 November 2022. Being given that in March and September 2023 there was no CEO to mandate Messrs Moollan and Mardemootoo to legally represent, act and institute legal proceedings on behalf of AfriNIC, they cannot, in the circumstances, claim that they were duly mandated by the board of AfriNIC to legally represent AfriNIC in the March application and the appeal. Attractive as the arguments of Mr Moollan may sound, they are, however, misconceived.

For all the above reasons, we uphold the respondent's preliminary objections to the effect that Mr Eshun lacked the necessary power or authority to cause the present appeal to be lodged and to bind the appellant with any surety or recognisance so that there is no valid appeal before the Court of Civil Appeal.

We also uphold the respondent's objection that Messrs Moollan and Mardemootoo had no *locus standi* to lodge and appear in the present appeal in the name of the appellant.

In light of our above decision, we find it unnecessary to deal with the other objections of the respondent, that is whether permission of the official receiver and leave of the first instance Judge was required before lodging the appeal.

We, accordingly, set aside the appeal but make no order as to costs having regard to the particular circumstances of the present case. We restore the Order made by the learned Judge of the Commercial Division of the Supreme Court in an oral judgment delivered on 12 September 2023. The reconstitution of the appellant's Board of directors is certainly a matter of utmost urgency. With regard to the Order directing the receiver in the person of the Official Receiver to carry out the election of the Board as per the appellant's constitution and to complete the whole process within a delay of six months as from 12 September 2023,

we substitute therefor an order directing the Official Receiver to complete the whole process within a period of two (2) months as from the date of this judgment.

**N. Devat**  
**Senior Puisne Judge**

**D. Chan Kan Cheong**  
**Judge**

**15 October 2024**

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**Judgment delivered by Hon. N. Devat, Senior Puisne Judge**

**For Appellant : Mr M. Mardemootoo, Senior Attorney**  
**: Mr A. Moollan, Senior Counsel**

**For Respondent : Mr D. Ramdhur, Attorney-at-Law**  
**: Mr K. Singla, King's Counsel**  
**: Mr R. Gulbul, of Counsel**

**For Co-Respondent : Mr D.K. Manikaran, Principal State Attorney**  
**: Mrs S. Hajee Abdoula-Mamode Ally, Senior State Counsel**