

SC/COM/WRT/000168/2021

THE SUPREME COURT OF MAURITIUS
(Commercial Division)
(Judge in Chambers)

In the matter of:-

Cloud Innovation Ltd

Applicant

v.

African Network Information Centre (Afrinic) Ltd

Respondent

JUDGMENT

On 29 March 2021, I granted an Interim Order restraining and prohibiting the respondent, either by itself and/or through any of its agent, proxy, préposé or any other person in whatsoever capacity from terminating, suspending and/or revoking the membership of the applicant as Resource Member of the respondent in any manner whatsoever, which membership has been duly renewed on the 1st January 2021, pending the determination of the present application.

The respondent has in an affidavit dated 17 May 2021 raised the following preliminary objections which read as follows:

Preliminary objections

3. *The Respondent avers that both the Covering Affidavit and the purportedly founding affidavit sworn by one Mr Paul Po Hon Lam dated 24 March 2021 in Hong Kong, both purportedly acting for and on behalf of the Applicant are procedurally flawed pursuant to the provisions of Sections 2(1) and 3 of the Deposit of Powers of Attorney Act 1928, and thus fatal to the present proceedings inasmuch as:*

- (a) *having regard to the averments made by the deponent to the Covering Affidavit (paragraphs 1,4 and 5 thereof refer), the Respondent contends that the latter has clearly acted outside her mandate as “mandataire ad litem” and instead implicitly held herself out as one of Applicant’s local representative (proxy) so that she was also then bound to comply with **Section 3 of the Deposit of Powers of Attorney Act 1928** viz any power of attorney (if so exists) accorded to her by the Applicant;*
- (b) *it is undisputed that at the material time of lodging the present application for injunction, the purported power of attorney given in favour of Mr Paul Po Hon Lam had not been duly deposited with a Notary in Mauritius and registered at the Supreme Court of Mauritius, a strict requirement of **Section 3 of the Deposit of Powers of Attorney Act 1928**.*

As such, both the purported covering affidavit and the affidavit sworn by Mr Paul Po Hon Lam in Hong Kong are invalid, of no probative value and cannot be relied upon in support of the Applicant’s application.

4. *The Respondent avers that in view of the admissions made at paragraphs 2 and 3 of the Covering Affidavit as well as the averments contained in paragraph 3 of the Applicant’s initial affidavit dated 24 March 2021 is inadmissible ab-initio and cannot be relied upon inasmuch as same, being a foreign affidavit as well as constituting a notarial act executed in Hong Kong, did not, at the time of the present application being made, bear the ‘apostille’ certificate pursuant to the Hague Convention of October 1961.*
5. *The Respondent contends that having regard to the nature of the present application, the Hon Judge in Chambers sitting in the Commercial Division of the Supreme Court has no jurisdiction to entertain the said application inasmuch as Respondent is not, for all intents and purposes, a trader as per **Articles 1, 17 and 18 of the Mauritian ‘Code de Commerce’**, nor that the present application is based on a commercial transaction existing between the Applicant and Respondent.*
6. *Having regard to the nature of the contractual relationship existing between the parties, the Respondent contends that, pursuant to **Article 1142 of the Civil Code**,*

the prejudice allegedly being caused to the Applicant may be adequately compensated by pecuniary damages.

7. *That, having regard to the ratio-decidendi in the case of **Heenye M. D vs Central Electricity Board 1998 SCJ 420**, the Respondent avers that since both the Applicant and Respondent are contractually bound to a Registration Service Agreement, the said agreement including the processes stipulated therein must be given their full effect so that the intervention of the Hon Judge in the circumstances are most unwarranted.*
8. *The Respondent avers that the Applicant failed to come before the Hon Judge in Chambers with clean hands and instead:*
 - (a) *is using the present application as a colouring device to cover up for its own breaches of the Registration Service Agreement, thus making a contemptuous and abusive use of the court's due process; and*
 - (b) *it has deliberately, as part of its initial affidavit, concealed material facts to the Hon Judge that its status, with the Mauritian Registrar of Companies bearing reference C115736 is 'defunct' so as to assert a right under **section 296(1) of the Companies Act 2001 (as amended)** – a copy of the publicly available records is herewith annexed and marked as **ANNEX R2**.*
9. *Further, the Respondent contends that in accordance with **Article 21 of the Civil Code**, Applicant being a foreign party cannot proceed with the present application unless and until such security for costs is provided by the latter.*

On the issue of jurisdiction, learned Counsel for the respondent has conceded that this Court has jurisdiction to hear the present matter.

On the issue of non-compliance of the Deposit of Powers of Attorney Act, learned Counsel for the respondent has submitted that the applicant as well as the deponent (Mr Paul Po Hon Lam) who has sworn the founding affidavit on 24 March 2021 on behalf of the applicant are both foreigners and the purported power of attorney allegedly given in favour of the deponent had not been deposited with a Notary in Mauritius and registered at the Registry of the Supreme Court and therefore the affidavit of Mr P. H. Lam cannot be considered for the purpose of the present application. Learned Counsel has also submitted that Mrs Hurnaurn-Calcuttea has acted outside

the scope of her mandate as a *mandataire ad litem* and has explicitly given evidence in her “*covering affidavit*” dated 24 March 2021 in the absence of a proper power of attorney.

On the other hand, learned Counsel for the applicant has submitted that the Deposit of Powers of Attorney Act finds no application in the present matter inasmuch as Mr Paul Po Hon Lam (referred to as “Mr Lam”) has sworn the main affidavit as an employee of the applicant and he was duly authorised by Mr Lu Heng on 23 March 2021 to “*enter and implement any actions and documents relating to any litigious and other matters adjunct to any litigation matters involving the company*”. He has also submitted that in Chambers matter there is no need for an applicant company to designate a representative as the Attorney-at-Law would be representing the applicant. Learned Counsel has further submitted that unlike the case of **Transnet Retirement Fund v RMB Westport GP & Ors** [\[2019 SCJ 233\]](#), there has been no delegation of power to Mr Lam by the applicant to act on its behalf and the involvement of Mr Lam is strictly limited to the swearing of the founding affidavit in his capacity as employee of the applicant and not as its agent or representative.

I have considered the submissions of both learned Counsel.

The issues to be determined in the present case are: firstly, whether Mrs Hurnaurn-Calcutteea, the applicant’s Attorney-at-Law, has exceeded the scope of her mandate as a *mandataire ad litem* in the “*covering affidavit*” solemnly affirmed by her on 24 March 2021; secondly, whether Mrs Hurnaurn-Calcutteea needs a special power of attorney to give evidence on behalf of the applicant in the present application; thirdly, whether Mr Lam has been duly authorised to swear an affidavit on behalf of the applicant; fourthly, the applicant being a foreign company, who is representing it in the present proceedings.

It is settled principle that a party may either put in a personal appearance in court proceedings or may be represented by a designated representative. Such representative must be granted a power of attorney to that effect.

The Deposit of Powers of Attorney Act 1928 provides for the manner in which a person or legal entity may be represented in a Court in Mauritius and the relevant sections are set out below:

Section 2 - Deposit of power of attorney

(1) *Where any person who has left or leaves Mauritius has appointed or appoints an*

attorney or agent in Mauritius to represent him in any capacity in any proceedings before a court, by an authentic deed, or by a deed under private signatures, the notary who has drawn up such deed or who received or receives the deposit of such power of attorney, or the holder of any such power of attorney under private signatures, where it has not been deposited with a notary, shall within 15 days from the date of such power of attorney or of the date of the deposit thereof with the notary file in the Registry, where the same may be inspected on payment of the fee provided in the Legal Fees and Costs Rules 1990, an extract from such power of attorney relative to such powers of agency and to the names of such agents.

- (2) No party to any proceedings before a court shall pretend ignorance of any such power of attorney so deposited in the Registry.

Where the power of attorney, whether authentic or under private signatures, appointing an attorney or agent has been or is drawn up outside Mauritius, the attorney or agent appointed shall deposit the same with a notary in Mauritius before any use is made of it and section 2 shall apply to it.

Section 4 – Penalty

Any person who contravenes this Act shall commit an offence and shall, on conviction, be liable to a fine not exceeding 10,000 rupees. (Underlining is mine).

Section 2 of the Act deals with a power of attorney drawn up by a Notary in Mauritius given by a person appointing an agent or an Attorney-at-Law in Mauritius to represent him in court proceedings in his absence from the country whereas section 3 deals with a foreign deed of appointment or a foreign power of attorney drawn up outside Mauritius, whether by way of authentic deed or under private signature, appointing an Attorney-at-Law or an agent to represent a person (a natural or legal entity) in any capacity in any proceedings before a Court in Mauritius. Section 3 makes no difference whether the person appointing an agent to represent him in court proceedings in Mauritius in his absence is a foreigner who is abroad or that the power of attorney is given to an Attorney-at-Law or agent in Mauritius or to an agent appointed abroad to come and represent him in Mauritius. The crux of section 3 is that so long as the power of attorney is drawn up abroad, it has to be deposited with a Notary who then files it in the Registry of the Supreme Court.

It is the submission of learned Counsel for the applicant that Mrs Hurnaurn-Calcutteea is representing the company in the present application.

At this juncture, it is apposite to refer to **notes 84, 92 to 99** of **Dalloz Jurisprudence Générale, Verbo Avoué** and **note 101** in **Dalloz Répertoire de Procédure Civile, Verbo Avoué** in **Dalloz Nouveau Répertoire, Verbo Avoué**, which explain the scope of the mandate between the client and the Attorney-at-Law and which are hereunder reproduced:

- 84.** *L'avoué une fois constitué est tenu d'occuper jusqu'à la fin de l'instance.....*
- 92.** *1° Généralités. – L'avoué est le mandataire de sa partie; celle-ci est liée par ses faits ou déclarations jusqu'à désaveu de sa part, alors même qu'il s'agirait d'une instance où le ministère de l'avoué est facultatif. – La remise des pièces à un avoué par une partie équivaut, sauf preuve contraire, à un mandat ad litem donné par cette partie et accepté par l'avoué. ... » (Dalloz, Nouveau Répertoire De Droit – Tome Premier, Verbo Avoué)*
- 93.** *2° Etendue du mandat. – Le mandat ad litem confère à l'avoué le droit d'accomplir tous les actes nécessaires pour parvenir au jugement qui doit terminer l'instance, et même de faire des offres ou des aveux, de donner ou accepter des consentements, sauf, s'il n'a pas reçu un mandat spécial de faire ces offres, aveux ou consentement (C. pr. civ., art. 352), la faculté pour sa partie de le désavouer (V. Désaveu). Le client est engagé par son avoué pour tous les actes faits en son nom, tant qu'il n'est pas démontré par la procédure du désaveu que l'avoué a dépassé son mandat (Civ. 27 nov. 1939, D.H. 1940. 14 ; Req. 13 nov. 1911, D.P. 1912. 219; 2 mars 1926, D.H. 1926. 253).» (Dalloz, Nouveau Répertoire De Droit – Tome Premier, Verbo Avoué)*
- 94.** *L'avoué constitué est le mandataire de sa partie; celle-ci est liée par ses faits et déclarations jusqu'au désaveu de sa part, alors même qu'il s'agirait d'une instance où le ministère de l'avoué est facultatif. La remise des pièces à un avoué par une partie équivaut, sauf preuve contraire, à un mandat ad litem donné par cette partie et accepté par l'avoué, L'avoué qui s'est constitué et a conclu pour une partie est présumé avoir reçu de celle-ci pouvoir suffisant pour la représenter et cette présomption s'impose à tous aussi longtemps qu'une manifestation de désaveu n'est intervenue*
- 95.** *Le mandat ad litem confère à l'avoué le droit d'accomplir tous les actes nécessaires pour parvenir au jugement qui doit terminer l'instance et même de faire des offres ou des aveux, de donner ou accepter des contentements, sauf, s'il n'a pas reçu un mandat spécial de faire ces offres, aveux ou consentements, la faculté pour sa partie de le désavouer....*

101. *Le mandat ad litem confère à l'avoué le droit d'accomplir tous les actes nécessaires pour parvenir au jugement qui doit terminer l'instance ...*

It is aptly explained above that the mandate of an Attorney-at-Law is one “*ad litem*” which confers upon him “*le droit d'accomplir tous les actes nécessaires pour parvenir au jugement qui doit terminer l'instance*”.

It is also stipulated in the following notes of **Dalloz Répertoire Pratique Tome 10 Vo Responsabilité Civile** under the heading “**Responsabilité des avoués**”:

Note 357. *L'avoué peut agir comme mandataire ad litem, ou comme mandataire ad negotia, ou cumuler ces deux mandats.*

Note 358. *En principe, le mandat ad litem n'implique par lui-même, pour l'officier ministériel qui l'a accepté, d'autre obligation que de pourvoir aux actes de procédure rentrant directement dans l'exercice de sa charge (Civ. 25 févr. 1891, D.P. 91. 1.173). ...*

Note 359. *Il appartient aux juges du fond d'interpréter souverainement les termes du mandat ad litem (Civ. 17 févr. 1885, motifs, D.P.85. 1. 352; 25 févr. 1891, D.P. 91. 1. 173).*

Note 361. *Répertoire Pratique (supra)provides as follows: “Par dérogation au principe posé supra, no. 358, l'avoué peut avoir reçu de son client mandat de prendre toutes les mesures nécessaires pour la sauvegarde des droits de celui-ci. Ce mandat ad negotia peut être exprès ou tacite (Agen. 3 déc. 1889, D.P. 90.2.170; Req. 2 mai 1891, D. P. 92.1.31).*

The general rule is that the responsibility of an Attorney-at-Law is limited by virtue of a *mandat ad litem* to the conduct of the case and proceedings as mandated by his client. This would include the implementation of all incidental procedures which are necessary for that purpose. His responsibility, however, may be extended where his mandate further provides for the taking of all measures necessary to safeguard and protect the rights and interests of his client, *vide Bernd M C A v Agowan A 2015 SCJ 143*.

It was held in **J C Bamford Excavators v Khadun Construction Ltd 2019 SCJ 138** that *in any case, the attorney retained by the plaintiff as l'avoué constitué is responsible for the “mise*

en état” of the proceedings. He has a “*mandat ad litem*” which empowers him to deal with procedural issues and ensure that the pleadings are completed for the case to be in shape for hearing. To that end he does not require a “*mandat special*” from his client, be it a foreigner.

In the present application, it is common ground that Mrs Hurnaurn-Calcutteea is the applicant’s *mandataire ad litem* (*l’avoué constitué*) such that she has the mandate to initiate the present proceedings on the applicant’s behalf.

The first issue to be determined is whether Mrs Hurnaurn-Calcutteea has exceeded the scope of her mandate as a *mandataire ad litem* in the “*covering affidavit*” solemnly affirmed by her on 24 March 2021.

A perusal of the “*covering affidavit*” of Mrs Hurnaurn-Calcutteea shows that she has made a summary of the salient issues in support of the application and has averred at paragraph 4 that-

4. (iii) *AFRINIC (the respondent) is exclusively responsible for the distribution and management of internet number resource. For instance operators like Mauritius Telecom and Emtel hold membership in AFRINIC to operate its main line of business as internet providers.*
4. (iv) *The applicant is a Resource Member of AFRINIC since the year 2013 and specializes in IP address management and has a wide spectrum of clients across the world, but mainly across Asia, such as China Telecom and Baidu (equivalent of Google in Asia and which has only this week been listed on the Hong Stock Exchange).*

Indeed, it can safely be concluded from a reading of Mrs Hurnaurn-Calcutteea’s affidavit that she was not limited to introducing Mr Lam but she went further and gave evidence on behalf of the applicant without having annexed a special power of attorney from the applicant company giving her the power to represent it in the present application, to act as its attorney-in-fact and to give evidence on its behalf.

The “*mandat ad litem*” which Mrs Hurnaurn-Calcutteea has, only confers upon her the power to lodge the present application in Chambers and to take “*tous les actes nécessaires pour parvenir au jugement qui doit terminer l’instance*” and not to represent the applicant and give evidence on its behalf. It is indeed clear that by giving evidence in her covering affidavit, Mrs Hurnaurn-Calcutteea has indeed transgressed her mandate as a “*mandataire ad litem*”.

The case of **Transnet Retirement Fund v RMB Westport GP** [\[2019 SCJ 233\]](#) is distinguishable to the present matter inasmuch as in the former case, Attorney de Froberville only swore “*covering affidavits*” to introduce Mr Maritz’s affidavits which he put up as attachments in his own affidavits and he did not swear as to the substance of the case. After perusing the affidavits of Attorney de Froberville, the Court concluded the following: “*they clearly limit the responsibilities of Mr de Froberville acting within the scope of his “mandate ad litem” as attorney for the applicant.*” Mrs Hurnaurn-Calcuttea can therefore only represent the applicant in Chambers as an Attorney-at-Law in the present proceedings but she cannot be the representative of the applicant and give evidence on its behalf.

It was held in **Transnet Retirement Fund** (supra) that the document conferring authority to Mr Maritz to act on behalf of the applicant, a foreign litigant, has to meet the requirement of the Deposit of Powers of Attorney Act before it can be used and non-compliance with the said Act would accordingly be fatal.

Being given that the applicant is a foreign company, the second issue to be determined is whether Mrs Hurnaurn-Calcuttea needs a special power of attorney to give evidence on behalf of the applicant in the present application.

I do not agree with the submission of learned Counsel for the applicant that Mrs Hurnaurn-Calcuttea is representing the applicant as deponent in the present application in the absence of a power of attorney from the applicant’s board of directors which would have given her the power to represent the applicant and to give evidence on its behalf.

Learned Counsel for the applicant has also submitted that Mr Lam swore the founding affidavit dated 24 March 2021 on behalf of the applicant as its employee and he had been duly authorised by Mr Lu Heung.

It is apposite to refer to the letter of authorisation of Mr Lam, annex 1, which has been signed by one Mr Lu Heung and it reads as follows:

“This letter serves as authorization for Paul Po Hon Lam to enter and implement any actions and documents relating to any litigious and other matters adjunct to any litigation matters involving the Company...”

It is noted in annex 1 that no mention is made of who Mr Lu Heung is and in what capacity he has signed the alleged letter of authorisation.

However, in the course of his submission, learned Counsel for the applicant has referred to annex R2 of the respondent's affidavit and has submitted that Mr Lu Heung is the director of the applicant. A perusal of annex R2 in paragraph 8 of the respondent's affidavit reveals that it is an extract of an online search on <http://companies.govmu.org> pertaining to Cloud Innovation Ltd in Mauritius from the Corporate and Business Registration Department whereby mention is made that the said company's registered address was c/o AAA Global Services Ltd 1st Floor, The Exchange 18 Cybercity Ebène Mauritius. It is also mentioned that Mr Lu Heung was the director in "2013" and the status of the company is "defunct". It is therefore clear that annex R2 is not in relation to the applicant company but is related to a Mauritian company which is now defunct and therefore cannot be taken into account to ascertain the status of Mr Lu Heung.

An analogy may be drawn from the case of **Hassamal S.M v Stoll Financial Services GMBH & Anor** [\[2018 SCJ 20\]](#) in which the resolution of the board of directors signed by the CEO and Managing Director of the Stoll Company as well as its official stamp was held to be a power of attorney. The Court of Appeal carefully looked at the wordings of the resolution which was passed by Stoll and produced by Mr Rolando and concluded that *"to our mind, this leaves absolutely no doubt that Mr Rolando had been authorized to do two things, namely: (a) to represent Stoll in Court, that is physically appears as a party standing in the shoe of the company and having the carriage of the proceedings; and (b) to depose on behalf of the company. Based on the above, we find that Mr Rolando was present in Court and deposed in his capacity as representative of Stoll, and not as a witness."* The Court of Appeal held that such resolution was to all intents and purposes a power of attorney under private signature as contemplated by the Deposit of Powers of Attorney Act and therefore needed to comply with the said Act.

Although the case at hand is a Chambers matter, the Deposit of Powers of Attorney Act finds its application with the same rigor as in the case of **Hassamal (supra)**. Unlike an action entered by a plaintiff with summons, the Attorney-at-Law should in Chambers matter at the initial stage of the proceedings make it clear as to who is representing the applicant and is giving evidence on its behalf.

It is undoubtedly clear that the authorisation given to Mr Lam to give evidence on behalf of the applicant falls short of being a power of attorney as provided in section 2 of the Deposit of

