

**BENJAMIN ADZENYAMEBEYE ESHUN v AFRICAN NETWORK INFORMATION
CENTRE (AfrinIC) LTD**

2023 SCJ 63

Record No. SC/COM/MOT/000882/2022

**THE SUPREME COURT OF MAURITIUS
(Bankruptcy Division)**

In the matter of-

Benjamin Adzenyamebeye Eshun

Applicant

v

African Network Information Centre (AfrinIC) Ltd

Respondent

JUDGMENT

This is an application pursuant to section 136 of the Companies Act (the Act) moving the Court for an order–

- (a) appointing any three of the following persons approved by the Nomination Committee of the respondent as director until its next Annual General Member Meeting as may be held in 2023, namely-
- (i) Mrs. Clara Thadeus Mramba;
 - (ii) Mrs. Grace Nyariara Githaiga
 - (iii) Mr. Adewale Emmanuel Adedokun;
 - (iv) Mr. Amin Dayek; and
 - (v) Mr. Habib Youssef;
- (b) ordering that the directors so appointed by the Court shall be deemed to be elected directors for the purpose of AfrinIC's Constitution/by-laws; and/or
- (c) making any other order(s) as the Court thinks just and equitable in the circumstances.

The respondent has no objection to the application and concurs with the oral and written submissions made on behalf of the applicant.

Learned Senior Counsel for the applicant has argued that from the facts on record, there are only three directors on the Board of the company, that is, the respondent as opposed to nine members as required by the Constitution of the company. The Board does not have the required quorum of five directors for a meeting to be held with the result that the respondent is no longer in a position to meet its regulatory obligations or meet its business objectives or proceed with other corporate issues which require consideration at the level of the Board.

It has been further submitted that the appointment of directors is governed by Article 13 of the Constitution of the company. Article 13.4 of the Constitution of the company provides that the Board shall comprise of nine directors out of whom six shall be elected by the Annual General Member Meeting (AGMM) and two directors elected by the said AGMM upon the recommendation of the NomCom based on their competencies and the Chief Executive Officer. Following an injunction granted by the Court on 16 May 2022 against the respondent following an application by Larus Cloud Service Limited, the Board has not been able to proceed with the election of its directors. Following another injunction granted by the Court on 14 June 2022 further to an application by Africa on Cloud (PTY) Ltd, the respondent has been restrained and prohibited from convening any Board meeting where Dr. Abdalla Omari is present in his capacity as director of AfriNIC and resolving or participating in any Board meeting which has as agenda the extension of the terms of office of the respondent's elected members. A third injunction was obtained against the respondent on 30 June 2022 where Mr. Eddy Kayihura has been restrained and prohibited from acting as *ex-officio* director of the respondent until such time as the Board of the respondent is reconstituted by election and also restraining and prohibiting the respondent from acting on a Board Resolution bearing Resolution 202110.655. As a result, it has been argued that the respondent has been left with only three directors as a result of which, the respondent does not have the required quorum to conduct a board meeting.

The applicant has drawn the attention of the Court to the prejudice that is being faced by the respondent by the situation that it terms as a "deadlock" which includes amongst others the inability to have the financial budget of the year 2023 approved and the inability to meet its financial commitments. It has been further submitted by the applicant that such a situation may have an impact on the lives of both Mauritian and foreign workers.

The case of **ECP Africa Fil Investments LLC v Barnwell Enterprises Ltd & Ors** [\[2013 SCJ 410\]](#) has been relied upon by the applicant to support the proposition that the Court is empowered to intervene and make the necessary appointment where the company is at a deadlock and where it would be in the interests of the company. Learned Senior Counsel has also relied upon an extract from **Morison's Company and Securities Law** as reproduced in the latter case and which reads "*Where it is necessary for the company to continue functioning, but it is not possible to call a shareholder's meeting, there would seem to be good grounds for a Court appointment*".

I have given due consideration to the oral and written submissions of learned Senior Counsel. What I have to decide is whether this is a fit case for the Court to exercise its discretion to appoint three directors amongst those mentioned at prayer (a) above.

The question arises as to whether there is a deadlock situation that has been created by the issue of the injunctions so as to call for the intervention of the Court under section 136 of the Act.

Whether there is a deadlock situation is one which is predominantly of fact in each case. Having regard to the factual evidence that can be gathered from a reading of the applicant's affidavit evidence dated 24 November 2022, the Court takes due notice that there have been injunctions issued against the respondent and which are yet to be determined. To state that there is a situation of a complete deadlock having occurred would, in the Court's view, be presumptuous given that corporate democracy demands that the rights of all members of a company should be catered for. A reading of Article 6.3 of the AfriNIC by-laws lists out who can be members of AfriNIC; there may well be other interested parties that may claim to have an interest or say in the appointment of directors of AfriNIC. The Court cannot be called upon also at this juncture to pronounce itself as to the status of resource members of AfriNIC which the applicant claims are not guarantor members of AfriNIC but which have obtained injunctive relief against the respondent; neither is the instant case one where the Court has to pronounce itself on whether Crystal Web is a registered member or shareholder of AfriNIC.

From the own averments of applicant at paragraph 59 of his affidavit, it can be seen that the respondent has been able, in spite of the "Larus Injunction", to proceed with other items on its AGMM Agenda Notice where, *inter alia*, the respondent's Audited Financial Statements for the year 31 December 2021 have been adopted. The Court also notes from the very averments of the applicant at paragraph 60 of his affidavit, there is the possibility for

the respondent under section 115(5) of the Act to call for a further special meeting but the Court has not been told at what point in time this special meeting would have been convened. The Court has only been told that Africa on Cloud and Crystal Web have opted in utter bad faith to make an abuse of the Court's process to cause a deadlock in the operations of AfriNIC in spite of being aware that the latter was yet to convene a special meeting.

Consequently, in the light of the foregoing, the Court is not prepared at this juncture to intervene under section 136 of the Act. The Court cannot turn a blind eye to the fact that there are injunctions that have been granted and which are yet to be determined.

The Court, however, does recognise the importance of having an operative board and in that regard, it urges the parties to see to it through their respective legal advisers that the injunction cases are put into shape at the earliest possible so that these cases can be heard expeditiously especially given that the Court has been apprised by learned Counsel appearing for the respondent that mediation has not been reached in those cases.

The application is dismissed. No order is made as to costs.

P. D. R. Goordyal-Chittoo
Judge

14 February 2023

For Applicant : **Mr. O. Bahemia, Attorney at Law**
: **Mr. R. Pursem, Senior Counsel together with**
Ms. M. Jeetah, of Counsel

For Respondent : **Mr. M. Mardemootoo, Senior Attorney**
: **Mr. A. Moollan, Senior Counsel together with**
: **Ms. J. Chinien, of Counsel**