

IN THE SUPREME COURT OF MAURITIUS

SN. 1030/2021

In the matter of:

CLOUD INNOVATION LTD

Applicant

V

AFRICAN NETWORK INFORMATION CENTRE (AfrINIC) Ltd

Respondent

And in the matter of:

Ex Parte:

CLOUD INNOVATION LTD

Applicant

ORDER

I have considered the praecipe and the affidavit both dated 10 July 2021 filed in support of the application together with the documents thereto annexed.

The applicant is under prayer A of its application seeking an interim order in the nature of an injunction restraining and prohibiting the respondent acting through its board and/or its representative and/or préposé in whatever capacity from –

- “(i) acting in any manner whatsoever, on its Board Resolution dated 8th July 2021 which had the effect of terminating the membership of the applicant in the respondent with immediate effect;
- (ii) freezing in any manner whatsoever, any or all of the resources allocated to the applicant;
- (iii) denying the Applicant access in any manner whatsoever to the ARFINIC WHOIS database;
- (iv) reclaiming any or all of the resources allocated to the Applicant in any manner whatsoever,

and this pending the final resolution of the appeal already filed and being prosecuted before the Supreme Court.”

In the alternative, under prayer B, it is praying for a summons calling upon the respondent, on a date and hour to be mentioned in such summons, to show cause why the interim orders in the nature of an injunction prayed for under prayer A should not be converted into an interlocutory writ of injunction pending the final resolution of the appeal filed and being prosecuted before the Supreme Court.

In the further alternative, it is praying, in case I decline to grant prayers A or B, for a summons to be issued calling upon the respondent, on a date and hour to be fixed, to show cause, if any, as to why an interlocutory writ of injunction should be granted restraining and prohibiting the respondent acting through its Board and/or its representative and/or préposé in whatever capacity, from

- (i) acting in any manner whatsoever, on its Board Resolution dated 8 July 2021 which had the effect of terminating the membership of the applicant in the respondent with immediate effect;
- (ii) freezing in any manner whatsoever, any or all of the resources allocated to the applicant ;
- (iii) denying the applicant access in any manner whatsoever to the ARFINIC WHOIS database;
- (iv) reclaiming any or all of the resources allocated to the applicant in any manner whatsoever,

pending the final resolution of the appeal already filed and being prosecuted before the Supreme Court.

In its affidavit filed in support of its application, the applicant has averred that-

1. the present application which “is being filed in circumstances of extreme urgency against the backdrop of the major risks and stake for hundreds of millions of internet end users across the world who would be left without

internet connectivity if the respondent is allowed to proceed in the illegal ways and manners it has been engaging into, thus leaving the applicant with no effective legal remedy”;

2. ICANN oversees the delegation of IP address blocks to regional registries for routine allocation to internet end-users within the regions served by those registries. ICANN has accredited five Regional Internet Registries (RIRs) for a comprehensive management of Internet resources with a view to ensuring the transparent, economic, equitable and efficient access to these Internet resources;
3. the respondent, which is a non-governmental organisation, is the fifth Regional Internet Registry contractually accredited by ICANN in 2005 and covers the African continent and the Indian Ocean region.
4. it is a private company incorporated under the laws of Seychelles which specialises in IP address management and delegates IP addresses to customers, such as, global telecommunication companies and Internet Service Providers (“ISPs”); it is the third largest member of the respondent;
5. it is a Resource Member of AFRINIC since the year 2013 in accordance with the Constitution and pursuant to the African Network Information Registration Service Agreement (the “RSA”);
6. the RSA was entered for a duration of one calendar year which was subsequently renewed on an annual basis (in accordance with Clause 11(c) of the RSA) and it has systematically settled its membership fee every year;
7. the deeming membership provision at Clause 6.4 of the Constitution which affords the applicant its membership as Resource Member of AFRINIC provides as follows-

“Resource Member – a legal entity (local internet registry or end-site) shall be deemed to be a Resource Member of AFRINIC after it has completed the following formalities cumulatively:

- 1. Justified its need for the right to use Internet Resources to AFRINIC;*
 - 2. Signed AFRINIC’s Registration Service Agreement; and*
 - 3. Paid the relevant setup and membership fees related to Internet Number Resources allocated/assigned to it by AFRINIC Registration Service.”*
8. by way of a letter dated 23 June 2020, respondent notified it of alleged shortcomings in terms of the RSA and the Consolidated Policy Manual of AFRINIC;
 9. it was requested to provide its comments and justifications by 14 July 2020, which it did by way a comprehensive letter dated 13 July 2020, setting out its justifications and rebutting in entirety the purported breaches as alleged by the respondent;
 10. *‘further to the aforesaid reply, it did not receive any further correspondence’;*
 11. it was surprised to receive an email on 1 January 2021 whereby the respondent informed the applicant that any renewal of membership would be subject to an on-going review being conducted against it;
 12. notwithstanding the said email, its membership was renewed for the year 2021;
 13. it received a letter dated 10 March 2021 on behalf of AFRINIC setting out purported breaches of the Consolidated Policy Manual, the RSA and the Constitution, which in effect are the same as alleged in its letter dated June 2020;

14. the respondent provided the applicant with a delay of 30 days to provide its response at latest by 12 April 2021 and indicated that it reserves its right to terminate the membership of applicant at its sole discretion, after receiving comments of the applicant;
15. whilst it intended to respond within the deadline provided to it, it could not risk its membership being threatened on the basis of frivolous purported breaches which are devoid of any substance and pending the determination of the merits of the alleged breaches, it had to seek the urgent intervention of the Honourable Judge in Chambers for urgent relief in March 2021;
16. as Resource Member, it has the right to be afforded a fair opportunity to present its case and justifications, which it intends to do diligently, in accordance with set procedures.

It is also clear from the application that –

(a) the Judge in Chambers granted an interim order in the nature of an injunction “*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*”, in terms of prayer A(i) sought in the application made before her; [See Annex O]

(b) the matter was argued on 17 June 2021 and judgment was delivered by the Judge in Chambers on 7 July 2021 (although as averred by the applicant the application was set aside on the basis of only one preliminary objection relating to the *mandat ad litem*, without considering the merits of the matter); [See Annex Q]

(c) on the day following the judgment, the applicant caused an appeal to be filed against the judgment and made an application for stay of execution of the said judgment under Article 806 of the Code de Procédure Civile; [See Annex R]

(d) the application for stay is yet to be determined by the Judge in Chambers.

The present application stems from the fact that the applicant "has been notified by way of an email issued just after midnight Mauritian time on 9 July 2021 that the respondent would be terminating the applicant's membership with immediate effect and the IP resources would be reclaimed within 90 day grace period". [See Annex S]

I note that the applicant who is seeking the equitable jurisdiction of the Judge in Chambers has failed to disclose material facts regarding whether, following the letter dated 10 March 2021, it has responded within the delay of 30 days provided to it by the respondent and given its comments regarding the purported breaches of the Consolidated Policy Manual and the RSA.

The applicant has also failed to aver that in its email issued after midnight on 9 July 2021, the respondent has stated that-

(a) as a responsible Regional Internet Registry, AFRINIC's Board of Directors also resolved that *"all affected users will exceptionally be granted a grace period of 90 days to consider other available options in their best interests and that the actual reclamation of the relevant number resources will occur following the expiry of the said grace period"*;

(b) the applicant was being informed of the above so that it could in turn inform *"all concerned users of the relevant number resources"*.

Further, and more importantly, I am of the view that the applicant has entered two parallel proceedings regarding the same issue: one before the Judge in Chambers in March 2021 which is pending an appeal and an application for stay, and the other one before me, with the risk of conflicting outcomes. In effect, the applicant is asking me to sit on appeal on the judgment delivered by the Judge in Chambers on 7 July 2021. In addition, the applicant is through the present application seeking to circumvent the decision of the Judge in Chambers as to whether to grant the application for a stay of execution of her judgment, pending the determination of the appeal against the judgment delivered on 7 July 2021.

In the circumstances, I find that my intervention is not warranted. I therefore set aside the application.

Chambers, this Sunday 11 July, 2021.

K D Gunesh-Balaghee
Judge