LOGIC WEB INC v AFRICAN NETWORK INFORMATION CENTRE (AFRINIC) LTD

2023 SCJ 306

SC/COM/WRT/00705/2021

IN THE SUPREME COURT OF MAURITIUS

(BEFORE THE JUDGE IN CHAMBERS)
(COMMERCIAL DIVISION)

In the matter of:-

Logic Web Inc

Applicant

v

African Network Information Centre (AfriNIC) Ltd

Respondent

RULING

The applicant has prayed for an interim order in the nature of an injunction which was declined and instead a summons was issued against the respondent to show cause why an interlocutory order in the nature of an injunction should be not be issued -

(i) restraining and prohibiting the respondent either personally or through any person/employees and/or his agents and/or préposés and/or representatives from taking any step unilaterally or otherwise to purportedly reclaim the IP prefix 196.52.0.0/14 Legacy subnet;

(ii) restraining and prohibiting the respondent and/or his agents and/or préposés and/or representatives from interfering into the business and affairs of the applicant and the peaceful, quiet enjoyment of the possession of the IP prefix 196.52.0.0/14 Legacy subnet;

(iii) restraining and prohibiting the respondent and/or his agents and/or préposés and/or representatives from requiring the applicant to complete the application form to become a Resource Member of the respondent in respect of the IP prefix 196.52.0.0/14 Legacy subnet.

The application is resisted by the respondent. However, before dwelling into the merits of the application, preliminary objections had been raised by the respondent as regards-

(i) Mr Sarangavany Sengayen, of Steven Associates Consulting Ltd not having proper mandate to represent the applicant as its deponent;

(ii) Security for costs need to be furnished by the applicant as it is a foreign entity and in the amount of USD 100,000; and

(iii) Fortification of undertaking in damages is required from the applicant in the amount of USD 1 million.

In fact, a power of attorney was drawn up before a public notary in the United States of America whereby the applicant gave mandate to Steven and Associates Consulting Ltd, a law firm established in Mauritius, to represent it and inter alia, swear affidavits. The objection of the respondent is that the said Mr Sengayen cannot act as the proxy and agent of the applicant as the power of attorney was not given to him personally but to Steven and Associates Consulting Ltd. In the first affidavit, in support of the application, the said power of attorney was annexed and it had been deposited with a notary in Mauritius in compliance with the Deposit of Powers of Attorney Act.

There was also a board resolution from the said law firm dated 13 May 2021 but bearing the signature of only Mr Sengayen as director and with mention that the latter was duly authorised to deposit the power of attorney pursuant to the Deposit of Powers of Attorney Act.

Following the preliminary objections raised by the respondent, the applicant annexed in its affidavit of 22 April 2022, a board resolution emanating from the law firm of 1 May 2021, bearing the signatures of the two directors of the law firm, with mention that Mr Sengayen was authorised to deposit the power of attorney and also to represent the applicant, LogicWeb.

Counsel for the respondent objected to the validity of this board resolution as it is in breach of article 7(1) of the Eighth Schedule of the Companies Act. Further, it is only being adduced after the preliminary objection had been raised by the respondent and there is no evidence that a copy of such resolution had been entered in the minute book of the board proceedings.

After having considered the submissions of both respective counsel as regards whether the deponent is duly mandated to represent the applicant, I am satisfied that the board resolution of 1 May 2021, albeit it was annexed to an affidavit of the applicant after a preliminary objection had been raised, is valid as a board resolution and in compliance with the Companies Act. It has been duly signed by the two directors of the law firm and it gave

Mr Sengayen, a power of attorney to enter the present cause of action and to represent it and act on its behalf. It is clearly set out in the said board resolution that Mr Sangayen has been authorised to act on behalf of the applicant.

True it is that the power of attorney from the United States of America was given to the consulting company which is a law firm in Mauritius. However, Mr Sengayen in his capacity as a director of the law firm had been duly empowered to represent the consulting firm which is acting on behalf of the applicant in the present proceedings by way of a board resolution of 1 May 2021. Mr Sengayen averred having the mandate to represent the applicant and swear the affidavit and the copy of power of attorney which was deposited at the notary in Mauritius and duly apostilled is in conformity with the Deposit of Powers of Attorney Act.

I disagree with learned senior counsel for the respondent that the power of attorney given to the law firm was only a *mandat ad litem*. It is the instructing attorney of the applicant who has been given the *mandat ad litem* whereas the law firm has been given the mandate to act and represent the applicant and for that matter the law firm has duly authorised Mr Sengayen to do so. I therefore overrule the above-mentioned preliminary objection regarding the mandate of the deponent of the applicant to put in affidavits duly sworn.

As regards the issue of security for costs which the applicant needs to provide as it is a foreign entity, there is no dispute between the parties as to the law regulating security for costs. It is also admitted by the applicant that it has to furnish costs but not in the amount of USD 100,000 as requested by senior learned counsel for the respondent. According to the applicant, that amount of security for costs as suggested by the respondent is grossly exaggerated, unconscionable, excessive and tantamount to a denial of access to Court and justice. Security for costs should be in a reasonable amount.

As held in **Vestalane Investments (Pty) Ltd. v Federal Trust (Mauritius) Ltd.** [2007 SCJ 84], the security for costs are costs which are directly linked into defending the action. According to counsel for the respondent, the security for costs should be in the total amount of at least USD 100,000. This is is made up of expenses incurred for the time spent on this case from the Chief Executive Officer, Legal Officer, Senior IP Resources Specialist and Head of Member Services and Database Manager plus additional expenses representing the disturbance caused in defending the present case. I have considered the submissions of both learned counsel as regards the payment of security for costs. It is agreed that it is within the discretion of the Court to award security for costs. Having regards to the circumstances of the case, the amount to be fixed should be just. I have also considered the case of **Al-Rawas**

I.S.A.A. v Pegasus Energy Limited & Ors [2006 SCJ 274] which held that judicial discretion is to be exercised in the interests of justice. As such, the amount of security for costs ordered should be a reasonable amount.

In looking at the nature of the remedies sought and the type of disputes arising between the parties which also involve a technical aspect of the matter, I find that it is fair and just in those circumstances to pay security for costs in the amount of USD 10,000.

As for the fortification of undertaking in damages, it is the case of the respondent that the undertaking in damages made by the applicant for an interlocutory injunction is not adequate and sufficient but must be fortified and this in the amount of USD 1 million. As of note, the respondent is a non-profit, private company set up in Mauritius and is responsible for the management of internet number resources within the African region since 2005. The respondent can be considered to be the internet registry for Africa and the Indian Ocean. Therefore, for the applicant to be required to pay a fortification of undertaking in damages, the burden is on the respondent to successfully establish the damages that it is likely to suffer as a result of the present application for an injunction is granted.

It is within the discretion of the Court to decide on the amount of fortification of undertaking in damages even when the respondent succeeds in proving damages that it is likely to suffer should an injunction be granted. I have found it apt to refer to what was referred in the case of **The Polo/Lauren Company L.P v Hossen F (Optical Supplies) Ltd & Anor** [2010 SCJ 433] regarding fortification of undertaking in damages –

> *"A study of the appropriate authorities shows that the relevant principles to be addressed in considering whether the case has been made out for the fortification of the cross-undertaking in damages are the following:*
>
> *(1) Before an application to fortify an undertaking can succeed, a likelihood of a significant loss arising as a result of the injunction and a sound basis for belief that the undertaking will be insufficient must be shown: See* ***Iain S. Goldrein Q.C, "Commercial Litigation, Pre-emptive Remedies" Thomson Sweet and Maxwell*** *at paragraph A 1-242(d), page 103.*
>
> *The applicant for fortification must in fact show a sufficient level of risk of loss to require fortification. In that connection, Mann J pointed out in* ***Sinclair Investment Holdings v Cushnie (2004) EWHC 218 (Ch)*** *at paragraph 24:*

"In many cases the fact that there is a risk of loss will be obvious merely from the general situation, and while it may not be possible to put anything like a precise figure on the loss, the court will if necessary, do what it can on the evidence before it to reach an appropriate figure […] In some cases it will be possible to make a more precise or confident assessment than in others. The mere absence of particularised evidence does not mean that there is no evidence of a risk of loss. [Counsel] submitted that what he had to show was a risk of loss; any more refined questions of causation and likelihood would be appropriate for the enquiry (if any) should the cross-undertaking be called upon. I agree with that as a general approach. By and large it will be unnecessary and inappropriate for a court to go into a detailed and prolonged assessment of difficult questions on causation on applications for interim relief, not least because it might become entirely academic".

(2) Where fortification is sought, then although the loss itself, and certainly the quantification of the loss will lie in the future, the court is nonetheless required to make an intelligent estimate of the likely amount of the loss: ***DPR Futures Limited (1989) 1WLR 778 at 786****.*

(3) Loss will not qualify for compensation under the cross-undertaking unless it has been caused by the grant of the injunction: See ***Sectrack NV v Satamatics Ltd & Anor [2007] EWHC 3003 (Comm)*** *where the cases mentioned above are cited with approval."*

Taking into account the above considerations in deciding whether there should be fortification of undertaking in damages or not, I find that the respondent has not provided any sound basis that fortification of undertaking in damages should be in the amount of USD 1 million. There has been no evidence brought forward that the applicant is unlikely to be able to honour its undertaking to pay damages if ordered to do so. True it is that the applicant is a foreign entity and has no realisable assets in Mauritius but I find that the respondent has failed to show the basis on which the sum of USD 1 million is arrived at. Such basis must be sound for it to conclude that the undertaking in damages is inadequate.

We have on record that the applicant is a private company, incorporated in the US, providing various IT hosting services and it has been trading and conducting businesses by using the IP Prefix 196.52.0.0/14 Legacy Subnet since 2012 until it was informed by the respondent in 2019 that it could not do so.

Having considered the orders sought, the circumstances of the case and after having examined the considerations for the requirement of a fortification of undertaking in damages, I exercise my discretion in not allowing a fortification of undertaking in damages in the amount of USD 1 million.

Preliminary objections had also been raised by counsel for the applicant that the first affidavit of the respondent, dated 10 March 2022, sworn by one Ms Madhvi Gokool is defective. The defect is that Mr Mabano Eddy Kayihura, the CEO to whom the board gave authority by way of a board resolution of 27 October 2021 to appear and represent the respondent is not entitled to delegate his authority to Ms Madhvi Gokool. Counsel for the applicant also added that the defect is such that it cannot be cured by the second affidavit of the respondent, sworn by Mr Mabano Eddy Kayihura on 15 July 2022. Counsel also submitted that Mr Mabano Eddy Kayihura could not have sworn an affidavit as, by way of an interim order issued in the case of **Crystal Web (Pty) Ltd v Afrinic Ltd and Eddy Mabano Kayihura**, the latter has been prevented from acting an ex officio director of the respondent. Therefore, counsel for the applicant submitted that since both affidavits of the respondent are defective, the application for an interlocutory injunction should be granted.

Counsel for the respondent has not offered submissions on this matter. However, from a careful reading of the board resolution of 27 October 2021, **Annex R1** of the respondent's first affidavit of 10 March 2022, I am satisfied that the wordings of the board resolution, that is, "*Mr. Mabano Eddy Kayihura, Chief Executive Officer at African Network Information Centre (AfriNIC) Ltd, also known as AFRINIC, (the "**Company**") be 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:……"* are such that I am satisfied that the CEO could have delegated his power to the said Ms Gokool.

As to the argument put forward by counsel for the applicant that the CEO of the respondent was not entitled to swear an affidavit on the basis of an interim order issued between the respondent and a different entity, Crystal Web (Pty) Ltd, I find that since I am not in presence of all the facts of that case and of the circumstances in which an interim order of such a nature had been made, I cannot rely on same to conclude that Mr Mabano Eddy Kayihura was not entitled to put in an affidavit dated 10 July 2022. I accordingly overrule the preliminary objections raised by counsel for the applicant.

In the light of the above, I order the applicant to furnish security for costs in the amount of USD 10,000. The case is otherwise sent back to the e-filing for the case to be fixed to be heard on the merits.

M.J Lau Yuk Poon
Judge

28 July, 2023

FOR APPLICANT	**:**	**Mr O.D. Cowreea, Attorney-at-Law** **Mr R. Ramsaha, of Counsel**
FOR RESPONDENT	**:**	**Mr M. Mardemootoo, Senior Attorney**
	:	**Mr A. Moollan, Senior Counsel**
	:	**Ms J. Chinien, of Counsel**