



## **AFRINIC ELECTIONS TO BE HELD WITHIN SIX MONTHS**

*Cloud Innovation welcomes Supreme Court Judgment Of Appointment Official Receiver*

(Port Louis, Mauritius 14 September 2023) The Supreme Court of Mauritius has appointed the Official Receiver in Mauritius to oversee, amongst other pertinent matters, elections for African Network Information Centre (AFRINIC) Ltd . The Judgment handed down by the Supreme Court of Mauritius on 12 September 2023 provides the pan-Africa Regional Internet Registry the much needed stability after a series of failings by its former management.

Cloud Innovation welcomes this landmark judgment by the Supreme Court of Mauritius to appoint an official receiver to preserve AFRINIC's assets and to hold elections for AFRINIC as quickly as possible. Ruling in favour of Cloud Innovation application to appoint a Receiver and to hold elections, the Supreme Court judgment stated: "Cloud Innovation Limited, is fully justified, reasonable, and fair".

Seychelles based Cloud Innovation is a central part of the Africa internet ecosystem and as such is prioritising working with the community to ensure that elections are held within six months (unless otherwise extended by Court) so that a new CEO may be appointed. Cloud Innovation has called upon the whole RIR community to support the Official Receiver in their work to deliver the court ordered elections to ensure that AFRINIC remains an important part of the RIR system.

Cloud Innovation Chief Executive Officer, Lu Heng welcomed the judgment and said:

"I welcome the Judgment of the Supreme Court of Mauritius agreeing to our request to appoint an Official Receiver so that elections can be held for AFRINIC within six months. This provides much needed stability for Africa's regional internet registry. It is important for the stability of AFRINIC that all members follow the Judgment and work with the Official Receiver to ensure elections can take place. The RIR community must come together and join Cloud Innovation in protecting the interests of Africa's internet users".

Mr Lu added: "The Judgment makes clear that the action sought by Cloud Innovation was "fully justified, reasonable and fair" and our focus now must be on supporting the staff and members of AFRINIC and delivering the Court Ordered elections so that AFRINIC can look to the future with confidence focused on its core services as Africa's internet registry."



In the Judgment handed down on 12 September 2023 by Supreme Court Judge Honourable M J Lau Yuk Poon, ruling in favour of Cloud Innovation who had argued that AFRINIC was not a properly constituted organisation after the terms of previous elected and appointed Directors and CEO had expired. In addition to tasking the Official Receiver to hold elections within six months, the Court ordered that:

- AFRINIC is prohibited from relocation, takeover, merger or restructuring
- The assets and value of business of AFRINIC are preserved
- That a CEO is appointed by the new elected board

The deadline for AFRINIC holding elections is 12 March 2024 - unless otherwise extended by the Court.

Ends

Enclosed: Judgment of Supreme Court of Mauritius

# **IN THE SUPREME COURT OF MAURITIUS**

## **(COMMERCIAL DIVISION)**

**SC/COM/MOT/000156/2023**

**In the matter of:-**

**CLOUD INNOVATION LTD**

**APPLICANT**

**In the presence of**

**AFRICAN NETWORK INFORMATION CENTRE (AFRINIC) LTD**

**INTERESTED PARTY**

### **RULING**

This is a motion paper dated 7 March 2023, entered by the applicant, praying for the interim orders pursuant to section 178 of the Companies Act as follows –

- (i) an order pursuant to section 178(2) of the Companies Act, regulating the future conduct of the affairs of AfriNiC Ltd by restraining and prohibiting the latter from relocating and/or subject itself to a takeover and/or merger and/or restructuring and/or management control in any manner whatsoever; and
- (ii) an order pursuant to section 178(2)(e) of the Companies Act, for 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 AfriNiC Ltd is preserved and that the value of the business is maintained.

An affidavit of the applicant dated 7 March 2023, in support of the motion paper was filed in Court. Three preliminary objections had been raised by counsel for the interested party namely

-

- (i) the issue of security for costs in the amount of USD 100,000;

- (ii) the locus standi of the applicant in entering the present application; and
- (iii) the present matter constitutes an abuse of the process of the Court.

Mr Singla, Kings Counsel (KC), together with Mr R Gulbul, Counsel instructed by Mr D Ramdhur, attorney appear for the applicant. Mr A Moollan, Senior Counsel appears for the Interested Party and is instructed by Mr M Mardemootoo, Senior Attorney.

When the case was being heard on the preliminary objections raised and Mr Ramdhur, the attorney who is the deponent for the applicant in the present case was under cross examination by Mr Moollan, Senior Counsel, the legal representation of AfriNiC Ltd, the interested party, was made an issue before this Court.

This ruling is, therefore, to address the legal point raised by Mr Singla, KC, that neither Mr Moollan nor Mr Mardemootoo can appear for AfriNiC Ltd in the present matter for want of having been duly appointed by the Board of Directors of AfriNiC Ltd. Following the issue of legal representation for AfriNiC Ltd being raised, Mr Moollan, Senior Counsel put in the board resolution dated 23 August 2021 which according to him, entitles both him and Mr Mardemootoo to represent the company.

Mr Singla, KC submitted that a company can only act through its board of directors and by way of board resolutions passed. In the present case, the powers which Mr Eddy Kayihura, the then Chief Executive Officer (CEO) of AfriNiC Ltd, held by way of the board resolution dated 23 August 2021, are no longer valid as he has ceased being the CEO of AfriNiC Ltd since 4 November 2022 on his term of office coming to expiry. As at now, there is no CEO at AfriNiC Ltd.

Therefore, according to counsel for the applicant, for all intents and purposes the board resolution of 23 August 2021 cannot be relied upon for counsel and attorney to state in Court that they can legally represent AfriNiC Ltd.

Mr Singla, KC, added that insofar that for there to be a quorum of the board for AfriNiC Ltd, in looking at Annexure 4 in the affidavit of the applicant, which is the AFRINIC Bylaws (Constitution) 2020, at clause 19.6 under the heading "Quorum", it is provided that –

*"A quorum for a meeting of the Board shall be the majority of Directors,*



*which shall not be less than five (5) Directors”.*

Since there are only four directors as at date in AfriNiC Ltd, there cannot be the required quorum to constitute the board. He added that a quorum of three directors would not be applicable in this case from the reading of what is provided in the constitution of the company. Since a quorum cannot be constituted, that is, five directors, the operation and applicability of a quorum of three directors does not kick in.

Counsel also referred to clause 19.8 which provides that *“a resolution of the Board is passed if a majority of the votes cast on it by eligible Board Members is in favor of the resolution.”*

On the basis of no quorate, no board resolution and the non-existence of a CEO and that the board resolution of 23 August 2021 cannot be relied upon coupled with the fact that there was an order made by the Judge in Chambers of the Commercial Division, in an application bearing reference **SC/COM/WRT/000454/2022** between Crystal Web (Pty) Ltd v AfriNiC Ltd and Eddy Mabano Kayihura as respondent nos 1 and 2 which is published on the website of AfriNiC Ltd and which held that –

*“I order that an interim in the nature of an injunction be issued restraining and prohibiting –*

*(a) the respondents and/or their representatives and/or agents and/or prepose from henceforth acting on Board Resolution bearing reference Resolution 202110.655 given that respondent no.1 does not have a Board of Directors in existence as per the law; and*

*(b) respondent no. 2 from acting as an ex officio director of respondent no. 1 until such time as the Board of respondent no.1 is reconstituted by election.*

According to counsel for the applicant, Mr Moollan therefore cannot rely on the purport and content of the board resolution of 23 August 2021.

Mr Moollan submitted that he was fully and legally entitled to represent AfriNiC Ltd on the basis of the board resolution of 23 August 2021 wherein it was clearly set out that Mr Kayihura was duly mandated by the Board to decide who to instruct as counsel and attorney at law for cases of various types and nature involving AfriNiC Ltd and Cloud Innovation Ltd amongst others. He contends that the board resolution can be relied upon and he referred to the case of **LogicWeb Inc v AFRINIC Ltd [2023 SCJ 306]** wherein it was held that Mr Kayihura could delegate his powers to Ms Gokhool. Likewise, Mr Kayihura had duly appointed Mr Moollan and Mr

Mardemootoo to appear in the present case. This board resolution stands good and is valid and can be relied upon by the respondent for its legal representation in Court.

I have considered the submissions of both learned counsel and it is undisputed that as at now, AfriNiC Ltd has only four directors and Mr Kayihura is no longer the CEO of AfriNiC Ltd and in fact, there is no CEO at AfriNiC Ltd as at now until an election takes place. It goes to the root and fundamental and sacrosanct principle in company law that a company is bound by its constitution and the governing company laws of the country. AfriNiC Ltd is duly registered as a company in the territory of Mauritius as a company limited by guarantee. Section 182 of the Companies Act would be applicable to AfriNiC Ltd and it is clearly borne out that subject to its constitution, a company may, by an instrument in writing executed in accordance with section 181(1)(a) of the Companies Act appoint a person as its attorney either generally or in relation to a specified matter. In examining section 181(1)(a) of the Companies Act, the contract would be required to be made in writing and made on behalf of the company in writing and signed by the company. Doc A lacks those credentials for it to be within the provisions of the Companies Act.

The other issue to be decided by this Court is whether the board resolution of 23 August 2021 can be relied upon by counsel for AfriNiC Ltd to submit that it is legally entitled to represent the company for a case which has been entered in March 2022. At the outset, I need to make a distinction between a company which is up running and going with a required number of directors to constitute a quorum for board resolutions and with a CEO. In this case, we are faced with a company which no longer has the required number of directors to constitute a quorum for board resolutions nor the presence and existence of a CEO be it in the name of Mr Kayihura or some other person.

A company like AfriNiC Ltd as per its objects as set out in its constitution and which is operating without the benefit of being able to take decisions by way of board resolutions is a matter of regret and deep concern. I find and am satisfied 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. One does not lose sight that AfriNiC Ltd is not a company which is being managed as per its constitution as at now. In view of its significance and importance in the spectrum and area of internet and internet resources, this Court finds that the board resolution of 23 August 2021 cannot be relied upon for the legal representation in Court in year 2023 in view of the circumstances of the case.

Furthermore, even if the injunctive orders made by the learned Judge in Chambers were specific to a case involving AfriNiC Ltd and Crystal Web Inc, the fact remains that Mr Kayihura has been enjoined from acting as CEO until the disposal of the main case in connection therewith since 30 June 2022. As such it is irresistible on my part to refer to “what’s good for the goose is good for the gander”. 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.

In the light of the above, in view of the urgency of the present application and inasmuch as the term of office of the directors expires on 18 September 2023, I order that the present case stands fixed for continuation on 12 September 2023 at 1030 hours.



**M J Lau Yuk Poon**

**Judge**

**11 September 2023**



**IN THE SUPREME COURT OF MAURITIUS**  
**(COMMERCIAL/BANKRUPTCY DIVISION)**

**On Tuesday 12<sup>th</sup> of September 2023**

***Before the Honourable M J Lau Yuk Poon, Judge***

---

**SC/COM/MOT/000156/2023**

**In the matter of:**

Cloud Innovation Ltd

**Applicant**

**In the presence of:**

African Network Information Centre (AfriNIC) Ltd

**Interested Party**

**Mr N Singla, King's Counsel, appears together with Mr R Gulbul, of Counsel, for the applicant instructed by Mr Attorney D Ramdhur. Messrs. Gulbul and Ramdhur are also in attendance.**

Mr Nirmal Manic, Head of Finance, Mr Kishna Dhondee, Internal Legal Advisor, Mr Arthur Cardinal N'Guessan, Head of Stakeholder Development, Afrinic, are present on behalf of the Interested Party.

**The proceedings are being digitally recorded and transcriber's script shall be the official court record.**

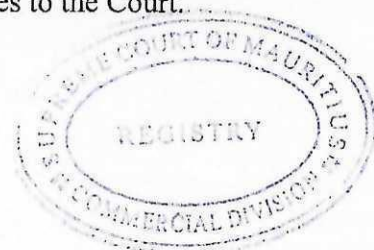
At this stage, from the floor of the court room, Mr Arthur addresses to the Court.

Exchanges between the bench and Mr Arthur. (In French)

At this stage, Mr Singla submits.

**Oral Judgment:**

After having considered the oral submission of Mr Singla, KC, today, in court as well as the statement made by Mr. Arthur Cardinal N'Guessan, who is an employee at Afrinic Limited. Considering the circumstances of the present case, and having been satisfied that the





preliminary objection, raised at the material time by Counsel appearing for the interested party have not been substantiated and that Mr. Singla has proved to this court that these preliminary objections do not hold. Taking into account that the Court is satisfied that the applicant is an entitled person and also based on the definition section of entitled person in the Companies Act as well as Court refers to paragraph 80 of a judgment **2023 NZHC 563, GJ HOLDING TRUSTEE LIMITED as trustee of GJ HOLDING TRUST** as Plaintiff **V KERRY FRITH**, as defendant, delivered on the 23rd March 2023, more specifically to paragraph 80 of that judgment, so that Court is fully satisfied that the applicant has got the locus standi to enter the present application before this Court.

In view of the situation prevailing at AfriNIC Limited, and in view of its importance for the good running and operation of AfriNIC Limited, Court is satisfied that the prayers sought as per the motion paper made by the applicant, i.e. Cloud Innovation Limited, is fully justified, reasonable, and fair in those circumstances. So that notwithstanding and albeit the fact that the applicant fears that there could be relocation of AfriNIC limited outside the jurisdiction of Mauritius and taking into account that on record, there has been no objection on the part of the applicant for the interested party to put in an affidavit so that the affidavit which is on record in support of the motion has remained un rebutted. For all intents and purposes, all the averments are deemed to have been accepted. Taking all this into account, Court orders:-

(i) pursuant to section 178 (2)(C) of the Companies Act, regulating the future conduct of the affairs of AfriNIC Ltd, by restraining and prohibiting AfriNIC from relocating and/or subject itself to a takeover or merger, or restructuring or management control in any manner whatsoever;

(ii) under section 178 (2)(C) of the Companies Act, for 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 AfriNIC Ltd is preserved and that the value of the business is maintained.

And also 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 also having regard to the Eighth Schedule of the Insolvency Act, regarding the powers of the receiver, Court directs and order the receiver to comply with paragraph 1, 2a, 2h, 2 j, 2 k,

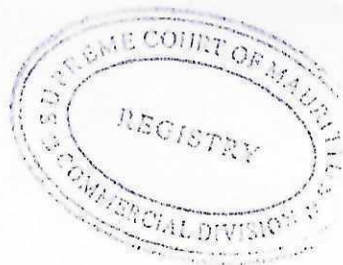
2 i, 2 o, 2 r, 2 s, 2t, of the Eighth Schedule of the Insolvency Act . Regarding his powers in relation to his appointment in the present case, Court also orders him to expedite matters as far as the election process is concerned, having regards that on the 18th of September, 2023, the directorship of those four directors will come to an end. So having regards to the terms and conditions set out in the constitution for the election of the board members and considering that it's only six days to the 18th of September 2023, the Court finds that it would be difficult in those circumstances for the official receiver to comply strictly with the provisions of the constitution for the nomination of the board. However, the Court directs the receiver to proceed with the constitution of the board within and to complete the whole process within a delay of six months as from today. In the event that this exercise is incomplete, he is to come back to this Court to ask for an extension of time so that necessary and needful can be done. No orders as to costs.



**Mrs D Hurkhoo**

**For Master & Registrar**

*(Minutes of proceedings as per transcriber's script from 10.46 am to 11.44 am-court no 15)*



# IN THE SUPREME COURT OF MAURITIUS

## 'BANKRUPTCY DIVISION'

### NOTIFICATION TO OFFICIAL RECEIVER

In the matter of:-

SC/COM/MOT/000156/2023

Cloud Innovation Ltd

Applicant

In the presence of:

African Network Information Centre (AfriNIC) Ltd

Interested Party

In virtue of an **Oral Judgment** delivered by the above Court on the 12<sup>th</sup> day of September, 2023 by and before Honourable M. J. Lau Yuk Poon, Judge, IT IS ORDERED that the Official Receiver **BE APPOINTED** as the **RECEIVER** for the purpose of holding the ring and ensuring that the status quo of the assets of the interested party, that is, AfriNIC Ltd **BE** preserved and that the value of the business **BE** maintained.

This 12<sup>th</sup> day of September, 2023.



H.K. LOFUR-PAROWTEE  
Principal Court Officer  
H. K. Lofur-Parowtee (Mrs)  
**Principal Court Officer**  
Bankruptcy Division  
Supreme Court, Port Louis.

