CLOUD INNOVATION LTD v AFRICAN NETWORK INFORMATION CENTRE (AFRINIC) LTD

2022 SCJ 253

S.N. 1947/2021

IN THE SUPREME COURT OF MAURITIUS

(Before the Honourable Judge in Chambers)

In the matter of:-

Cloud Innovation Ltd

Applicant

v

African Network Information Centre (AfriNIC) Ltd

Respondent

INTERLOCUTORY JUDGMENT

The present application was made *ex parte* on 03 December 2021 against the decision of the respondent to terminate the applicant's membership as a Resource Member in the respondent as communicated in letter of 01 December 2021.

The learned Judge in Chambers issued an interim order in the nature of an injunction restraining and prohibiting the respondent, either by itself, its agent, representative or *préposé*, from:

> "(i) *acting in any manner whatsoever on or giving effect to its Board Resolution of the 08th July 2021 or any similar Board resolution or its letter of the 1st December 2021 or any other similar letter, in any manner whatsoever, which has the effect of terminating the membership of the applicant in the respondent as a Resource Member; and*
>
> (ii) *acting on or giving effect to its decision, in any manner whatsoever, which has the effect of breaching the Undertaking of the 15th July 2021 in application bearing Serial No. 1040/2021*." (sic)

and this pending the final determination of the disputes between the parties.

The dispute between the parties first arose when the respondent accused the applicant of having purportedly breached a Registration Services Agreement (hereinafter referred to as RSA) and the dispute escalated when the respondent attempted to terminate the membership of the applicant on 10 March 2021, first day of lockdown, when access to justice was very limited. The applicant sought and obtained the immediate intervention of a Judge in Chambers on 29 March 2021 but the interim orders granted were eventually set aside by the Judge in Chambers on 07 July 2021; that order was the subject matter of an appeal which was set aside on 14 February 2022. The Board resolved on the very next day, that is, 08 July 2021, to terminate the applicant's membership as Resource Member in the respondent. By virtue of an interim injunction dated 13 July 2021, the respondent was restrained and prohibited from acting in any manner whatsoever on its Board Resolution of 08 July 2021. The respondent failed to comply with the aforesaid order and deliberately flouted the duly served order dated 13 July 2021. On 15 July 2021, the respondent gave an undertaking that it would fully comply with the order of 13 July 2021 and the interim order was accordingly discharged. On 25 November 2021, before the then Acting Deputy Master and Registrar, learned Senior Counsel for the respondent withdrew the undertaking made before the learned Judge on 15 July 2021. By letter dated 01 December 2021 and emailed to the applicant on 02 December 2021, the respondent informed the applicant that those temporary services may come to an end at any time as from then and in any event on or before 31 December 2021.

Learned Senior Counsel for the respondent has raised several preliminary objections but at this stage, this court proceeded to hear the matter only on the issue of abuse of process as agreed by both parties.

In a nutshell, the arguments of learned Senior Counsel for the respondent on the issue are that:

(1) The applicant is seeking to characterise the present application as one which is "*based on entirely new facts*" and in which "*remedies sought are different*"; thus attempting to repackage the present application as a distinct one. However, in truth, the applicant is again and again only seeking to prohibit the termination of its membership as Resource Member in the respondent; something which it has been unsuccessfully trying since its first application for injunctive relief in March 2021. The letter dated 01 December 2021 issued by the respondent is no new fact at all being given that the applicant knew beforehand that its membership would be terminated by the end of the year.

(2) The multiplicity in litigation that has arisen in this matter is of the applicant's own making and not of the respondent's. The essential factual background has been obliterated by the applicant. The proper avenue would have been to engage with the respondent in respect of the breaches of contract. The applicant has failed to do so and has, instead, chosen to litigate the matter without resorting to its contractual rights.

(3) The applicant has not established in what manner the respondent is responsible for the present state of affairs and in what manner the respondent is allegedly abusing the process of court when all that the respondent has done, is to invoke, as it is entitled to, preliminary objections in law which have been upheld by the court.

(4) Taking into account the full factual matrix of the litigation between the two parties, the applicant has vexed the respondent more than once by entering applications for injunctive relief coupled with satellite applications for stay of proceedings and committal proceedings. This course of action on the part of the applicant was adopted with a view to unduly oppress the respondent. This present application amounts to the ninth application for interim relief lodged by the applicant.

(5) The applicant's several applications dated 24 March 2021, 10 July 2021, 13 July 2021 and 30 November 2021 reveal that the requirement of threefold identity pursuant to Article 1351 of the Civil Code is satisfied as they contain the same demand, albeit at times presented with slight modifications but in essence of all prayers are the same: they arose from the same cause of action, that is the applicant's breach of the RSA; and they involve the same parties acting in the same capacity. Since the above-mentioned cases were not subject to any appeal, they have '*autorité de la chose jugée'*.

(6) The applicant's overall conduct in persistently re-litigating the same issues through repeated applications for the same relief and which have already been determined, amounts to an abuse of process of the court and is tantamount to asking other Judges and divisions of the court to sit on appeal on previous orders. The successive cases initiated are clearly causing serious prejudice to the respondent in terms of wasted time and costs, duplication of effort, dispersal of evidence and there is a risk of inconsistent findings by the court.

(7) The court possesses inherent jurisdiction to strike out an application which is an abuse of process and this jurisdiction is invoked to safeguard two competing interests: the interests of litigants who have to be protected from unfair practices and the interest of the public in the proper functioning of the justice system. The applicant's conduct engages both public and private interests: first, the private interest of the respondent inasmuch as it is being harassed by successive applications for injunctive relief which it is being compelled to defend and second, the public interest because this court has been flooded with no less than eight applications for effectively the same relief, alongside stay proceedings. The applicant, having exhausted its chances in the Commercial Division, sought to try its luck elsewhere. Having already entered no less than six applications before the Commercial Division of the Supreme Court, the applicant decided, upon its reversal of fortune, to enter applications for similar relief before the Judge in Chambers sitting in the Supreme Court and not the Commercial Division of the Supreme Court.

The gist of learned Queen's Counsel's submissions on behalf of the applicant is that:

(1) The respondent has been offered the opportunity twice to undertake to preserve the position until a trial on the merits: It has consistently declined to accept this invitation, preferring instead, to continue with its attempt to prevent at every turn a trial proper from taking place. It cannot, in these circumstances, complain of abuse of process by the applicant.

(2) The respondent is wrong to say that there has been any re-litigation of matters already determined by previous Judges. There cannot be any abuse as there has been no determination of any litigation let alone re-litigation and none of it has been final. Pursuant to the test laid down in **Modaykhan A.R. & Ors v SBM (Mauritius) Ltd** [2021 SCJ 416], the applicant is not misusing or abusing the process of the court but rather calling the court's assistance in order to protect its right to a substantive trial on the merits. There is no evidence of abuse of process by the applicant and the legal test for abuse of process has not been satisfied. Before the Court of Appeal, the argument of abuse of process was never raised. The different applications made by the applicant for different reasons establish that the applicant has not made an abuse of process of the court but rather sought to protect its rights in an attempt to be afforded a right to be heard on the merits.

(3) The preliminary objection as to abuse of process as raised by the respondent has not been made pursuant to **Rule 15 of the Supreme Court Rules 2000**. Therefore, the test adopted laid down in **Ouvertures et Profilage Plastiques Ltee v Henri Martin De Launay** [2012 SCJ 184] would not find its application in the present circumstances. In the various applications, we note the determined strategy of the respondent to scupper the trial from taking place at every turn by using a number of devices. When the applicant applied to injunct the Board Resolution, the respondent gave an undertaking. Then the respondent devised a new scheme to terminate the RSA: by stating that it was repudiating its undertaking as the applicant had not respected the underlying condition, that is, to have the case fixed to an early date. The respondent then threatened not to renew the RSA for 2022. Each of these manoeuvres/schemes was tactical and an execution of the respondent's strategy of maintaining a procedural battle rather than having a trial on the real issues in dispute

(4) The letter of 01 December 2021 from the respondent amounts to a new fact inasmuch as it is the first time that the applicant was informed that respondent will precipitate termination of the agreement before January 2022. Learned Queen's Counsel pointed out that the respondent has never taken the point of abuse of process in any other previous proceedings. It is only when the judgment of the Court of Appeal made mention of the issue of abuse of process, that the respondent raised such a preliminary objection, which is delaying a hearing on the merits. Learned Queen's Counsel stressed that the applicant only wants a trial on the merits

(5) Pursuant to the test laid down in **Modaykhan (supra)**, in order to determine an issue as to abuse of process, the Judge in Chambers will need to make a broad, merits-based judgment considering public and private interests involved and all the facts of the case. On the basis of all facts, the public and private interests at stake, the conduct of the respondent amounting to an abuse of process by preventing finality of litigation between the parties, an interlocutory order is most warranted to prevent the respondent from further making an abuse of the process of the court and for the dispute between the parties to be finally determined in the main case.

As far as the doctrine of abuse of process is concerned, its source can be traced back to what Somervell L.J. had stated in **Greenhalgh v Mallard [1947] 2 All E.R. 255**, **at p. 257** in that the doctrine is "… *not confined to the issues which the court is actually asked to decide, but … covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them*."

It is well-settled that the court has an inherent power to prevent an abuse of its process inasmuch as "*the powers of the court must be used bona fide and properly, and must not be abused. The court will prevent the improper use of its machinery and will not allow it to be used as a means of vexatious and oppressive behaviour in the process of litigation."* (*vide* **Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice, 22nd Edition, D.B.Casson and I.H.Dennis- 1981**).

In **Hunter v Chief Constable of the West Midlands Police [1982] AC 529 at p. 536C**, Lord Diplock described the abuse of process jurisdiction as "*the inherent power which any court must possess to prevent misuse of its procedure in a way which, whilst not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to the litigation before it or would bring the administration of justice into disrepute amongst right-thinking people*".

In the recent judgment of **Modaykhan (supra)**, the court, citing Potter L.J in **Divine-Bortey v. Brent London Borough Council [1998] I.C.R 886**, pointed out that the basis of the rule is for "*the avoidance of a multiplicity of litigation in relation to a particular subject or set of circumstances in order to avoid the prejudice to a defendant which inevitably results in terms of wasted time and cost, duplication of effort, dispersal of evidence and risk of inconsistent findings which are involved if different courts at different times are obliged to examine the same substratum of fact which gives rise to the subject of litigation*."

In **Johnson v Gore Wood & Co (afirm) [2002] 2 AC 1, 59,** Lord Bingham provided the authoritative modern statement governing the principle of abuse of process and said the following:

> "*…there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole… It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an*

> *approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not…*" (Underlining is mine).

The statement of Lord Bingham in **Johnson (supra)** was cited with approval in the case of **Modaykhan (supra)**. Therefore, what is apparent from all the authorities cited above is that when determining whether the proceedings are abusive, the court must engage to make a broad, merits-based judgment which takes into consideration all the facts of the case.

It is apposite, at this stage, to quote what Popplewell L.J. stated in the recent case of **Koza Ltd v Koza Altin Isletmeleri AS [2020] EWCA Civ 1018**, when expatiating on the doctrine of abuse of process in matters of interlocutory hearings:-

> "*The Henderson and Hunter principles apply to interlocutory hearings as much as to final hearings. Many interlocutory hearings acutely engage the court's duty to ensure efficient case management and the public interest in the best use of court resources. Therefore the application of the principles will often mean that* ***if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief, absent a significant and material change of circumstances or his becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing****. This is not a departure from the principle in Johnson v Gore Wood that it is not sufficient to establish that a point could have been taken on an earlier occasion, but a recognition that* ***where it should have been taken then, a significant change of circumstances or new facts will be required if raising it on a subsequent application is not to be abusive***." (Emphasis is mine)

With regard to the contention of re-litigation, the principle is clearly expatiated in **Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd. [1982] 2 Lloyd's Rep. 132**, where Lord Justice Kerr held that "*it is clear that an attempt to re-litigate in another action issues which have been fully investigated and decided in a former action may constitute an abuse of process, quite apart from any question of res judicata or issue estoppel on the ground that the parties or their privies are the same…*"

In **Johnson (supra)**, Lord Millett clearly stressed that "*It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him*

the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is prima facie a denial of the citizen's right of access to the court…"

At the very outset, it is paramount to highlight that the issues raised in the present case, although similar to those in the previous cases lodged by the applicant, have never been litigated so that the court is not, here, concerned with the re-litigation of questions which have already been adjudicated upon by a competent court. It is worth noting that the learned Judges in the appeal case of **Cloud Innovation Ltd v African Network Information Centre (Afrinic) Ltd** [2022 SCJ 51] expressly held that they "*do not propose to deal with the merits of the remaining grounds of appeal"*. This observation clearly shows that there can be no issue of re-litigation, given that no final pronouncement on the merits was made by the Court of Civil Appeal on the real issues between the parties. The judgment of **Cloud Innovation Ltd (supra)** concerned only a decision of a Judge in Chambers setting aside an application for injunctive relief. Therefore, I am of the view that the respondent's submission in respect of re-litigation is misconceived at this stage.

Having duly considered the submissions of both Counsel, I have now to *"draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly unhounded given the history of the matter.*" (*vide* **Bradford & Bingley Building Society v Seddon Hancock & Others [1991] 1 WLR 1482**). As the court observed in **Techsol Services Ltd v National Transport Corporation** [2019 SCJ 166], "*on the one hand, a party who has a genuine claim must not be deprived of his right to put his case before the court and on the other hand, a defendant should not be oppressed by successive suits with respect to the same claim*."

It is unquestionable that in each application for an interim order in the nature of an injunction, it was essential for the applicant to put forward the same substantial material by way of background and context. However, the mere fact of such duplication cannot be the sole determining factor of abuse of process. Rather, the critical question is whether there has been a "*significant and material change of circumstances"* or whether the applicant became aware of facts which it did not know and could not have reasonably discovered at the time of making the previous applications for interim injunction. In the absence of any significant and material change in circumstances, the applicant's conduct would certainly be regarded as abusive. If, however, there has been a significant and material change in circumstances or that the applicant has become aware of facts which it could not have reasonably discovered

at the time of making the first or any previous application, the court would not reasonably regard the applicant's conduct as an abuse of process.

To determine whether the applicant's conduct, in the present circumstances, actually amounts to an abuse of process, I need to consider the previous applications lodged by the applicant, as contended by the respondent.

(1) The very first application lodged by the applicant dates as far back as 24 March 2021, whereby the applicant prayed for an interim injunction, restraining and prohibiting the respondent from (i) terminating, suspending and/or revoking the applicant's membership as Resource Member of the respondent, (ii) resolving through its Board that the membership of the applicant be terminated, suspended, revoked or altered and that the applicant be removed as a member of respondent as defined under Sections 1 and 296(2) of the Companies Act 2001, (iii) acting in any manner whatsoever or giving effect to the letter of 10 March 2021 issued by the respondent, (iv) interfering with the peaceful and uninterrupted enjoyment of its membership until such membership is terminated, suspended or revoked. On 29 March 2021, the learned Judge in Chambers granted the interim order restraining and prohibiting the respondent from terminating, suspending and/or revoking the applicant's membership as Resource Member of the respondent, pending the determination of that application.

(2) On 24 May 2021, the applicant lodged a petition under Section 178 of the Companies Act 2001 for (i) an order directing the rectification of the share register of members of the respondent to add details of the applicant as per the criteria set out at Section 91 of the Companies Act as its member, in the category of Resource Member, (ii) an order directing the Registrar of Companies to cause the proper entries to be made in the company records, to include the applicant as a member of the respondent within 14 days of the rectification of the share register, and (iii) an order directing and ordering the respondent to compensate the applicant in the sum of USD 1.8 billion, representing the prejudice suffered by the applicant. This matter is still pending as at date.

(3) On the same day, that is, 24 May 2021, the applicant also entered an Unfair Prejudice Claim which was fixed for Arguments on 30 May 2022 following a preliminary objection raised by the respondent.

(4) However, on 07 July 2021, following preliminary objections raised by the respondent, the learned Judge in Chambers set aside the application wherein she granted interim orders on 29 March 2021 on the ground that the applicant, having failed to appoint an agent or the Attorney-at-Law to represent it and give affidavit evidence on its behalf in support of its application in compliance with the provisions of the Deposit of Powers of Attorney Act, was fatal. On 08 July 2021, the applicant lodged an application to stay the execution of the judgment delivered on 07 July 2021 and restore the interim orders granted on 29 March 2021. Same was set aside on 12 July 2021 and the learned Judge in Chambers held that application was misconceived as a stay would restore the interim orders granted on 29 March 2021, in breach of the Deposit of Powers of Attorney Act. On 20 July 2021, the applicant lodged an application to review the decision of the learned Judge not to grant a stay of execution of her judgment, pending the appeal before the Court of Civil Appeal, but same was later withdrawn.

(5) It seems that each of these applications had its own '*raison d'être'*: following the letter dated 10 March 2021, the applicant sought to have recourse to litigation to preserve its membership. It must be noted that following the letter dated 10 March 2021, the applicant was provided with a delay of 30 days to provide its response and explanations. Yet, the applicant preferred to seek the urgent intervention of the Judge in Chambers for urgent relief, given that it could not risk its membership being terminated on the basis of the purported breaches. The applicant cannot be taxed for resorting to an independent court to safeguard its rights.

(6) On 08 July 2021, the applicant lodged an appeal against the judgment delivered by the learned Judge on 07 July 2021. The grounds of appeal were not determined and the said appeal was set aside on 14 February 2022 being given that the applicant had already obtained an interim order on 03 December 2021.

(7) It is worth pointing out that the respondent, through its Board Resolution on 08 July 2021, having taken note of the judgment delivered on 07 July 2021, had resolved to terminate the membership of the applicant with immediate effect. It is also worth highlighting that the applicant was exceptionally granted a grace period of 90 days to consider other available options in its best interests and that the actual reclamation of the relevant number resources would occur following the expiry of the said grace period. The applicant was informed of the decision of the Board on 09 July 2021, just past midnight.

(8) The said Board Resolution dated 08 July 2021 thus triggered the applicant's application dated 10 July 2021 for an interim order restraining and prohibiting the respondent from (i) acting in any manner whatsoever, on its Board Resolution dated 08 July 2021, (ii) freezing and reclaiming in any manner whatsoever the resources allocated to the applicant, and (iii) denying the applicant access in any manner whatsoever to the respondent's WHOIS database. On 11 July 2021, the learned Judge in Chambers set aside the application on the basis that: (i) the applicant, seeking the equitable jurisdiction of the Judge in Chambers failed to disclose material facts regarding whether following the letter of 10 March 2021, it has responded within the delay of 30 days; and (ii) the applicant was seeking to ask the Judge in Chambers to sit on appeal on the judgment delivered by the learned Judge in Chambers on 07 July 2021, given that the application for stay of execution was not yet ruled upon.

(9) All interim orders having lapsed, the applicant entered another application on 13 July 2021 for an interim order restraining and prohibiting the respondent from (i) acting in any manner whatsoever on its Board Resolution dated 08 July 2021, which had been taken following the judgment dated 07 July 2021 and subject to an appeal filed on 08 July 2021, (ii) freezing and reclaiming 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 AfriNIC WHOIS database. The injunction was granted and remained in force until 15 July 2021. On 15 July 2021, learned Senior Counsel for the applicant stated that notwithstanding the fact that the order was served on the respondent on 13 July 2021, the respondent was not complying with same. Learned Counsel for the respondent then stated that he was not aware of the respondent's non-compliance with the said order. However, he undertook that the respondent would fully comply with the order issued on 13 July 2021. Learned Senior

Counsel for the applicant stated that they **intended** to ask for an early hearing of the appeal. In view of the undertaking given by the respondent's representative to fully comply with the order, the learned Judge in Chambers discharged the interim order and set aside the application. I am of the view that the application lodged on 13 July 2021 for the interim order had its own '*raison d'être'* inasmuch as the applicant sought to preserve its right and protect its position as a member of the respondent. It is important to bear in mind that at that point in time there was no interim order in force and the applicant was faced with the strong determination of the respondent to terminate its membership. In these circumstances, how can it be held against the applicant that it resorted to the court to preserve its rights?

(10) On 20 July 2021, the applicant entered an application for stay of execution of the judgment delivered on 07 July 2021 but this application was subsequently withdrawn on 26 July 2021. Then on 27 July 2021, the applicant entered an application for the validation of attachment proceedings before the Honourable Judge in Chambers of the Commercial Division. That said application was set aside on a preliminary point that the applicant did not give the power to the Attorney-at-Law to initiate attachment proceedings.

(11) The applicant further lodged a contempt of court application on 03 August 2021, moving the court for an order declaring that the respondents had deliberately and willfully flouted the Judge's Order dated 13 July 2021 until the time it was discharged. The applicant also lodged a plaint with summons on 03 August 2021, praying for a judgment ordering the respondent to pay to it a sum of USD 80,000,000 for alleged defamation. Those two matters are still pending as at date.

(12) On 27 August 2021, the respondent issued a letter to the applicant, referring to the evidence of Mr Hare Brown that the IP addresses allocated to the applicant were being used for illegal practices and that more than two-thirds of the 632 active and operational sites relate to illegal gambling, illegal streaming of movies and adult content/pornography sites. The applicant was requested to provide the required information within 15 days of the letter and on 13 September 2021 at latest. The applicant did not reply to that letter, but rather preferred to lodge further applications. On 03 September 2021, the applicant lodged an application before the Judge in Chambers for (i) a mandatory order

in the nature of an injunction ordering and directing the respondent to disclose to the applicant the internet addresses, domain names, URLs and all other factual evidence regarding the said 632 active and operational sites as stated in the letter dated 27 August 2021; and (ii) an interim order restraining and prohibiting the respondent from acting in any manner on its letter of 27 August 2021 and from terminating and/or suspending the applicant's membership as resource member in the respondent, pursuant to the letter of 27 August 2021. The learned Judge declined to grant the order and instead issued a summons. Being given that the returnable date was after the deadline imposed, the applicant withdrew the application as it served no purpose. At the end of the day, it is the letter of 27 August 2021 that triggered yet another application for an injunction before the Judge in Chambers**.**

(13) On 03 September 2021, the applicant lodged an application before the Honourable Judge in Chambers of the Commercial Division for an order authorising the applicant, at its own risks and perils, to proceed with the '*saisie conservatoire commerciale'* of all of the 6.9 million IPv4 unused addresses held by the respondent. The said application was set aside on 07 September 2021.

(14) On 06 September 2021, the applicant lodged another application for an interim order in the nature of an injunction restraining and prohibiting the respondent from acting in any manner on its letter of 27 August 2021 and terminating and/or suspending the applicant's membership as a Resource Member in the respondent. No interim order was issued and a ruling is reserved in respect of the issue of fortification of damages and security for costs.

(15) The applicant lodged three more applications in October 2021, among which two were withdrawn and the third one, relating to the stay of the judgment, was set aside.

(16) During the court sitting of 25 November 2021 before the Acting Deputy Master & Registrar, learned Senior Counsel for the respondent expressly stated that the undertaking given by his client on 15 July 2021, was being withdrawn by reason of the alleged breach of the applicant's undertaking to have the appeal fixed to an early date. It is important to highlight that the Judge's Order does not reflect that the applicant gave a conditional undertaking on 15 July 2021, in other words, on condition that an early date is earmarked for the hearing. What

is apparent is that they merely **intended** to have the case fixed to an early date. In light of the statement of learned Senior Counsel for the respondent on 25 November 2021, the applicant lodged an application on 26 November 2021 for an interim order in the nature of an injunction maintaining the '*status quo'* quoad the membership of the applicant as a Resource Member in the respondent and restraining and prohibiting the respondent from unilaterally withdrawing and/or revoking in any manner whatsoever its undertaking on 15 July 2021. The learned Judge in Chambers set aside the application on the ground that there is no '*raison d'être'* for same, given that the undertaking given by the respondent **had already been withdrawn on 25 November 2021.**

(17) The Judge's Order to the effect that the respondent's undertaking of 15 July 2021 had been withdrawn, prompted the applicant on 30 November 2021, to make another application for an interim order in the nature of an injunction praying for an order maintaining the '*status quo'* quoad the membership of the applicant as a Resource Member in the respondent and restraining and prohibiting the respondent from giving effect to its decision to withdraw its undertaking given on 15 July 2021, whether directly and indirectly or any decision to terminate the applicant's membership in the respondent as a Resource Member. The learned Judge in Chambers held that the application was a further attempt to obtain an injunction which had already been declined on 25 November 2021 and the application was in fact a disguised appeal. She set aside the application. There was no appeal against that order.

(18) All applications for injunctions, having been set aside, and with apparently no undertaking whatsoever in place, the respondent issued a letter on 01 December 2021 addressed to the applicant, informing that "*those temporary services may come to an end at any time* ***as from now and in any event on or before 31 December 2021***." (Emphasis is mine).

This is the very letter that triggered the present application.

Although I bear in mind the full factual matrix of litigation between the parties, I am still of the view that the present application can be clearly distinguished from those wherein one or more applications have been entered by a party against the same party before the same forum in relation to a matter which eminently could have formed the subject matter of a single action in one initiating process only. (*vide* **Ouvertures et Profilage Plastiques Ltee (supra)**).

A perusal of the facts as set out above, can only lead to the pertinent conclusion that, at the time of making each and every application, some new circumstance had emerged as to warrant the lodging of a fresh application. As such, I find the following:

(1) The very first application made on 24 March 2021 for an interim injunction was triggered by the respondent's letter dated 10 March 2021. The applicant was left with no other choice than to lodge subsequent applications related to that application dated 24 March 2021 when it was set aside on 07 July 2021. The subsequent chain of applications varied from applications for stay of execution of the order of 07 July 2021 up to an appeal against that same order.

(2) The Board Resolution dated 08 July 2021, having resolved to terminate the membership of the applicant with immediate effect, is deemed to be a fact in itself, and it justifies the resulting applications for interim injunctions lodged on 10 July 2021 and 13 July 2021, as those issues raised therein could not reasonably have been raised in previous proceedings.

(3) The undertaking given by the respondent in court on 15 July 2021 and consequently withdrawn on 25 November 2021, triggered various other applications related to the breach of the undertaking, including contempt of court cases, plaint with summons and further applications for interim injunctions as clearly explained above.

(4) On 27 August 2021, the respondent issued a letter to the applicant, referring to the evidence of Mr Hare Brown that the IP addresses allocated to the applicant were being used for illegal practices and that more than two-thirds of the 632 active and operational sites relate to illegal gambling, illegal streaming of movies and adult content/pornography sites. It is against that background that the applicant lodged another application for an interim injunction on 06 September 2021. This is a new element which came up on 27 August 2021 and the applicant had no alternative than to seek the protection of the court albeit again to preserve its rights and membership in the respondent.

(5) It is undeniable that several applications have been lodged before the Commercial Division for other reasons.

(6) Most importantly and the very '*raison d'être'* of the application before me is the letter dated 01 December 2021. It was addressed to the applicant, informing that "*those temporary services may come to an end at any time as from now and in any event on or before 31 December 2021".* This is undeniably a material change in the circumstances and gave rise to a new issue which could **not** have been raised in any earlier proceedings inasmuch as it was the very first time that the applicant was informed that its membership would be terminated before but in any event on 31 December 2021 because there was no undertaking in force. The applicant, at that point in time, had an Order dated 25 November 2021 to the effect that for all intents and purposes, the undertaking had been withdrawn and a letter giving a definite date for the termination of its membership in the absence of any undertaking. In these circumstances, the only step the applicant could take to preserve its rights, was to make a fresh application to the Judge in Chambers.

(7) True it is that the prayers in the previous applications for interim injunctions revolved around prohibiting the respondent from terminating the applicant's membership as a Resource Member, but none of those previous applications was a result of the respondent's clear and unambiguous affirmation in a letter dated 01 December 2021 that the services would be terminated before 31 December 2021. Therefore, I cannot help but acknowledge that the present application has its own '*raison d'être'* and it would be over simplistic to say that it is a duplicity of the previous cases lodged and therefore amounts to an abuse of the process of the court.

I will not comment on the propriety of the procedure adopted to withdraw an undertaking given before a Judge although I cannot turn a blind eye in the interests of fairness and justice.

In the light of the above remarks, I am of the view that to uphold this preliminary objection would imperil the future administration of justice. Indeed, to uphold this preliminary objection would not serve the interests of justice as the matter in dispute, which both parties have conceded is indeed a serious matter to be tried, would remain unresolved. I do not agree that the applicant is, in respect of the application before me, being a vexatious litigant causing prejudice to the respondent. Although it is undeniable that there has been a history of cases lodged by the applicant during the past year, there have been various intervening factors throughout and it cannot be said that the issues which require determination in the present

case have already been settled by a court decision, or that to continue with the present proceedings would amount to an abuse of process.

I, therefore, set aside the present motion.

S.B.A. Hamuth-Laulloo
Judge

19 July 2022

For Applicant: **Mrs Y. Hurnaurn-Calcuteea, Attorney-at-Law together with Mr D. Ramdhur, Attorney-at-Law**

Mr N.S. Singla, QC together with Mr R. Gulbul, of Counsel

For Respondent: **Mr M. Mardemootoo, SA**

Mr A. Moollan, SC together with Mr A. Radhakissoon, of Counsel, Mr A. Adamjee, of Counsel, Mr K. Dhondee, of Counsel and Ms P. Gokhool, of Counsel