

**LIQUID TELECOMMUNICATIONS HOLDINGS LIMITED v
WEST INDIAN OCEAN CABLE COMPANY LIMITED & ORS**

2021 SCJ 229

Record No. 121003- 5A/300/20

**THE SUPREME COURT OF MAURITIUS
BEFORE DESIGNATED JUDGES**

In the matter of:-

Liquid Telecommunications Holdings Limited

Applicant

v

- 1. West Indian Ocean Cable Company Limited**
- 2. Imara Trust Company (Mauritius) Limited**
- 3. Gilat Satcom Nigeria Limited**
- 4. Seychelles Cable Systems Company Limited**
- 5. Telkom Kenya Limited**
- 6. Zanzibar Telecom Public Limited**

Respondents

**WEST INDIAN OCEAN CABLE COMPANY LIMITED v LIQUID
TELECOMMUNICATIONS HOLDINGS LIMITED & ANOR**

Record No. 121147- 5A/16/21

**THE SUPREME COURT OF MAURITIUS
BEFORE DESIGNATED JUDGES**

In the matter of:-

West Indian Ocean Cable Company Limited

Applicant

v

Liquid Telecommunications Holdings Limited

Respondent

In the presence of:

1. Gilat Satcom Nigeria Limited
2. Seychelles Cable Systems Company Limited
3. Telkom Kenya Limited
4. Zanzibar Telecom Public Limited Company
5. Imara Trust Company (Mauritius) Limited

Co-Respondents

And In the matter of Ex-Parte

West Indian Ocean Cable Company Limited

Applicant

JUDGMENT

With the agreement of the parties, the above applications have been consolidated as they are connected.

In the first application lodged under **Sections 6** and **23** of the **International Arbitration Act 2008** on 15/12/2020, the applicant, Liquid Telecommunications Holdings Limited, hereinafter referred to as LTH, is seeking the issue of the following injunctive Orders:

- A. *An Interim Order in the nature of an Injunction, subject to such contrary or varying order as may be made by a Tribunal duly appointed in the proposed Arbitration against:*

- (a) *The First and Second Respondents, restraining and prohibiting the First and Second Respondents, whether directly or indirectly, from taking any steps to carry into effect the proposed board and shareholder resolutions circulated on 24 November 2020, and intended to be voted on 17 December 2020 (i.e the 17 December Resolutions as defined in paragraph 86 the hereto appended witness statement), or any like resolutions with substantially the same effect, or any of them, including (but not limited to) restraining and prohibiting the First and Second Respondents from registering any purported transfer of shares made under or pursuant to the 17 December Resolutions, or any like resolutions to substantially the same effect, or any agreement referred to therein; and against*
- (b) *The Third to Sixth Respondents, restraining and prohibiting the Third to Sixth Respondents, whether directly or indirectly, from taking any steps to carry into effect the 17 December Resolutions, or any like resolutions to substantially the same effect, or any of them, including (but not limited to) restraining and prohibiting the Third to Sixth Respondents from entering any agreement for, or executing or causing to be executed, any transfer of shares as contemplated by the 17 December Resolutions, or any like resolutions to substantially the same effect.*
- B. *A summons be issued, calling upon the abovenamed Respondents to be and appear before the Supreme Court (comprising of three Designated Judges), on a day and at a time to be mentioned in the said summons, then and there to show cause, if any, why the Interim Orders of Injunction above referred to should not be confirmed; and*
- C. *Should any of the Interim Orders above referred to not be granted on an ex parte basis, the issue of a summons, calling upon the above-named Respondents to be and appear before the Supreme Court (comprising of three Designated Judges), on a day and at a time to be mentioned in the said summons, then and there to show cause why an Interlocutory Order of Injunction should not be issued, subject to such contrary or varying order as may be made by a tribunal duly appointed in the proposed Arbitration against:*

- (a) *The First and Second Respondents, restraining and prohibiting the First and Second Respondents, whether directly or indirectly, from taking any steps to carry into effect the 17 December Resolutions, or any like resolutions to substantially the same effect, or any of them, including (but not limited to) restraining and prohibiting the First and Second Respondents from registering any purported transfer of shares made under or pursuant to the 17 December Resolutions, or any like resolutions to substantially the same effect, or any agreement referred to therein, and against*
- (b) *The Third to Sixth Respondents, restraining and prohibiting the Third to Sixth Respondents, whether directly or indirectly, from taking any steps to carry into effect the 17 December Resolutions, or any like resolutions to substantially the same effect, or any of them, including (but not limited to) restraining and prohibiting the Third to Sixth Respondents, from entering any agreement for, or executing or causing to be executed, any transfer of shares as contemplated by the 17 December Resolutions, or any like resolutions to substantially the same effect.*

On 16/12/2020, Judge J. Benjamin. G. Marie Joseph granted the interim order in the nature of an injunction prayed for and further ordered that summons be issued on the respondents to show cause why the interim order should not be made interlocutory. Following service of the summons, respondent No. 1, West Indian Ocean Cable Company Limited, hereinafter referred as WIOCC, put in an appearance through legal advisers who indicated that they were also representing respondents Nos. 2 to 6 and that all the respondents were resisting the application.

WIOCC alone subsequently entered the second application to have the interim injunction, issued on 16/12/2020, discharged and in the alternative, for the fortification of the undertaking in damages given by LTH. In that respect, it is moving for the following Orders:

- a. *An order directing the immediate discharge and/or setting aside of the Judge's Order dated 16 December 2020 issued by the Honourable Judge Mr B G M Joseph in the case bearing cause number SCR 121033 (5A/300/20); or*

- b. IN THE ALTERNATIVE, should the Honourable Designated Judge decline to grant prayer a above, the Applicant prays for an Order directing the Respondent to fortify its undertaking in damages by providing to the Applicant a bank guarantee in the amount of USD 209.6 million; and for the present matter to be made returnable and determined at the earliest before the Supreme Court (comprising three Designated Judges); and/or*
- c. For such other Order(s) which the Honourable Designated Judge/Court may deem fit and reasonable in the present circumstances*

This second application is resisted by LTH.

LTH and WIOCC have supported their applications and their respective replies in opposing the application directed against them by filing witness's statements. At the hearing of the applications, learned counsel representing them came up with both oral and written submissions.

The undisputed facts arising out of the witnesses' statements and the submissions of counsel are as follows. LTH is a large wholesale technology and telecommunications operator on the African continent. Its activities include the operation of a network of fibre-optic cable and involvement in five sub-sea fibre-optic cables and the operation of data centres around Africa.

WIOCC was formed in 2007 by a consortium of African national telecommunications operators and is currently the largest stakeholder in a consortium operating the Eastern African Submarine Cable System, a fibre-optic cable system which interconnects countries along the eastern seaboard of Africa to the rest of the world.

LTH is a shareholder in WIOCC owning 5.02% of the latter's shareholding. The other 13 shareholders of WIOCC, amongst which are respondents Nos. 3 to 6 in LTH's application, are also telecommunications operators holding shares ranging between 5.02% to 9.13%. Respondent No. 2 in LTH's application is the corporate secretary of WIOCC.

The relationship between WIOCC and its shareholders is regulated by its Constitution and a shareholder's agreement, hereinafter referred to as WIOCC SHA, to be construed in accordance with English Law. The WIOCC SHA provides, amongst others,

under its clauses 14.4.1 and 14.4.2, two conditions to be applied in the selling or transfer of its shares by a shareholder. The first condition is an obligation on a prospective selling shareholder to give prior notice of his wish to transfer, by way of a Notice of Intention, to the company and the other shareholders (Clause 14.4.1). The second condition affords to the non-selling shareholders, a right to acquire pre-emptively the shares to be transferred, which right is to be exercised by way of a Notice of Exercise to the selling shareholder (Clause 14.4.2).

WIOCC has initiated a corporate financial scheme, which the parties call the Skynet Project, aiming at attracting third party investment in WIOCC. The project aims at enabling WIOCC to secure necessary funds to invest, as part of its commercial strategy, in a new subsea cable and to enter into the Data Centre (DC) market and in particular to finalise its investment in a Google subsea cable on the west coast of Africa (Equiano) and related DC plans and cable landing station in Lagos, Nigeria. In the context of that project, WIOCC has entered into negotiations with ACA, a potential stand-alone investor. The results of the negotiations with ACA were first brought to the attention of the Board of Directors of WIOCC in August 2020.

The main aspects of the proposed transaction with ACA are summarized as follows:

- i. Shareholders in WIOCC will exchange their shares for those in a new holding company, WIOC Holding Company Limited (WHCL).
- ii. ACA will invest funds in WHCL in return for the issue of new shares in WHCL, giving it a substantial minority interest in WHCL.
- iii. Certain shareholders will sell their new shareholdings in WHCL back to WHCL, with those shares being acquired principally by ACA, subject to the exercise by existing shareholders of certain pre-emption rights.

On 16/08/2020, following the negotiations with ACA, WIOCC proceeded to the signature of a Term Sheet with ACA, which, according to WIOCC, was done on the basis that LTH will not exercise its pre-emption rights on the shares that will be sold by other shareholders in the process of the transaction. In that term sheet, no amendment to the existing pre-emption rights of shareholders, as provided for in Clauses 14.4.1 and 14.4.2 of the WIOCC SHA was contemplated.

According to LTH, on 03/09/2020, WIOCC enquired from LTH by email, whether it intended to exercise its pre-emption rights on shares that would be offered for sale by other shareholders in the context of the proposed deal with ACA. A deadline was even set and the papers for a Board meeting on 17/09/2020 included a timetable for the exercise of pre-emption rights.

At a Board meeting held on 01/10/2020, after the finalization of the deal with ACA, LTH expressed its intention to exercise its pre-emptive rights on the shares being sold by selling shareholders. Consequently, the deal with ACA was renegotiated and following the renegotiations, ACA agreed to invest primary capital in WIOCC's business on the following conditions:

- i. the existing shareholders are restricted to purchase only 577 in aggregate by exercise of their pre-emption rights upon proposed buy-back by WHCL.
- ii. no existing shareholders may hold more than 12% of the shares in WHCL without prior approval by way of a special resolution in the company.

In order to satisfy and give effect to the conditions imposed on WIOCC in the renegotiated deal, WIOCC had to amend the WIOCC SHA in Clauses 14.4.1 and 14.4.2. By virtue of Clause 21 of the WIOCC SHA, the required amendment can only be done with the written consent of the qualified majority of a minimum of 25% in number of shareholders representing at least 75% in value of the share capital of the Company.

The revised draft documents in respect of the transaction with the new proposed terms, including the intended amendments to Clauses 14.4.1 and 14.4.2 of the WIOCC SHA, were circulated on 07/10/2020 and on 24/11/2020, for approval of a Board and shareholders meetings intended to be held on 17/12/2020.

LTH believes that maintaining the interim order and the granting of the injunctive order prayed for are justified. In that respect, it contends that if the respondents are allowed to give effect to the intended resolutions in the context of the WIOCC/ACA deal, the final relief sought from the intended arbitration would become nugatory by the disapplication of its pre-emption rights on the shares that would be transferred.

To substantiate its contention and application for an injunction, LTH has tried to make a number of points, which can be summed-up as follows:

- i. its unlimited pre-emption rights as a shareholder in WIOCC, guaranteed presently under Clauses 14.4.1 and 14.4.2 of the WIOCC SHA, are being threatened by the intended amendments to the latter SHA inasmuch as it would be prevented from acquiring more than 151 shares (out of 2,700 available) from selling shareholders in the exercise of such rights and from increasing its shareholding to more than 12%;
- ii. the share swap contemplated in the context of the WIOCC/ACA deal and the intended amendments to the WIOCC SHA for that purpose, would be prejudicial to LTH inasmuch as it would be compelled to substitute its current rights as a shareholder in WIOCC for materially worse rights as a shareholder in WHCL;
- iii. being given the fact that respondents Nos. 3 to 6, in their application have already given their undertaking by way of a Letter of Understanding (LoU) issued at the request of WIOCC, to sell their shares in the context of the deal with ACA, the existing provisions of Clauses 14.4.1 and 14.4.2 of the WIOCC SHA still prevail (as they have not yet been amended), thus giving LTH as well as the other non-selling shareholders the right to exercise pre-emption rights on those shares being sold;
- iv. therefore, the intended amendments to the existing clauses of the SHA alluded to, if adopted, would result in a further breach of Clause 14.4 depriving LTH of its pre-emption rights and the opportunity to increase its shareholding in the transaction with ACA, which would be an irrevocable prejudice to LTH;
- v. the intended amendments to the SHA in the context of the WIOCC/ACA deal is, towards LTH, tantamount to a violation of the principles adumbrated in English law protecting minority shareholders against abuse by the majority;
- vi. as LTH is the only shareholder who has expressed the wish to exercise fully its pre-exemption rights, the majority abuse complained of will be prejudicial to it;
- vii. such prejudice is apparent in the fact that those shareholders who have expressed the intention to exercise their pre-emption rights on the

- basis of the amended clauses of the SHA contemplated will be fully accommodated within the 577 limit proposed;
- viii. LTH further suggests that the reason put forward by WIOCC that unless these amendments to the SHA are made, ACA will not invest is hard to accept as they were not mentioned at any earlier stage and the impact on ACA, if LTH exercises its pre-emption rights fully, will only be marginal;
 - ix. the stance of the other shareholders to vote in favour of the resolutions is not taken in the best interests of WIOCC and is rather a move on their part to serve their own commercial interests; and
 - x. the above is explained by the fact that LTH and the minority shareholders are all competitors in their respective field of operation and the other shareholders apprehend that if LTH is to increase its shareholding in the new corporate body, it will increase its influence on the market.

In reply to the contentions of LTH and in order to substantiate its claim that both LTH's application for an injunction and the interim order in force are unjustified, WIOCC, has come up with the following arguments:

- i. the transaction with ACA is of importance to WIOCC in the context of its commercial strategy which needs external private investment;
- ii. such investment is required in order to expand WIOCC's operations and to invest in new opportunities and in particular the operation of new Data centres and subsea cables;
- iii. the pre-emption rights under the WIOCC SHA were extensively discussed with WIOCC's Board and shareholders, so that LTH was well aware of the issue of pre-emption rights that formed the basis of the transaction agreed with ACA;
- iv. all shareholders, including LTH, have been asked whether they wished to exercise their pre-emptive rights and LTH stated on numerous occasions that it wished to exercise its pre-emptive rights to the extent of USD10m or to increase its shareholding to the level of the largest telecommunications shareholder in WIOCC, that is, 9.13%;

- v. despite being asked to do so on numerous occasions, it failed to confirm its position and only did so at the shareholders meeting held on 01/10/2020;
- vi. therefore, the negotiations with ACA and the Term Sheet with the latter signed on 19/08/2020 were concluded on the basis that LTH would not exercise its pre-emption rights;
- vii. as a result of the stand taken by LTH on 01/10/2020, the deal with ACA had to be renegotiated and the new deal, which requires the contested amendments to the SHA proposed to the shareholders;
- viii. WIOCC also explains the stand and move of LTH by the fact that the latter is one of the competitors in the same field of operation, which contention is explained in detail in its witness's statements and the written submissions;
- ix. in respect of the above, it is averred that ever since 26/03/2018, LTH declared a conflict of interest with regard to WIOCC's strategy in data centres and that LTH would eventually be a competitor with WIOCC in the Equiano cable project which is closely linked to the fibre-cable project with Google;
- x. in the contention of WIOCC, therefore, LTH is bent on trying to disrupt its position with Google as the party operating the landing station for Equiano;
- xi. WIOCC further complains that as a consequence of the interim order obtained by LTH, it has failed commitments to be satisfied for further disbursements by lenders such as Proparco/EAIF;
- xii. WIOCC has also failed the obligation imposed upon it by the lenders to secure a binding offer from investors in a form satisfactory to them in order to obtain further disbursements;
- xiii. the lenders have accepted the investment provided in the Skynet Project and were expecting the resolutions to go through on 17/12/2020;
- xiv. the fact that the vote on the resolutions have been blocked places WIOCC at a serious risk of recall by lenders, thus depriving it of the much needed funding which the lenders have agreed to disburse;
- xv. WIOCC dismisses the contentions of LTH that the risk it complained of do not exist in view of the availability of funds already disbursed by the lenders;

- xvi. the arguments in support of the above are fully elaborated in the written submissions filed on its behalf and LTH has misled the Judge on this matter; and
- xvii. WIOCC denies the allegation of LTH that shareholders are not acting in the best interest of the company in order to benefit from dividends and rebates or favourable payments that otherwise would be denied if LTH were to acquire a larger share in the shareholding.

Learned counsel on both sides have in their respective submissions elaborated on how the facts of the case disclose sufficient elements substantiating the respective contentions of the parties. They thus claim, on the one hand, that each and every condition required in law for an interlocutory injunction to issue as adumbrated in the authorities alluded to are satisfied and, on the other hand, that the matter falls short of warranting such a conclusion.

We have considered the merits of both applications in the light of the witness's statements filed and the submissions of counsel. We note that there is no dispute about the applicable law as learned counsel on both sides have alluded to the principles referred to in the oft quoted case of **American Cyanamid Co v Ethicon Ltd [1975] AC 396** as summarized and applied by the Supreme Court of Mauritius. The Mauritian cases cited are **Sofap Ltd v Mauvilac Co Ltd [2010 SCJ 143]** and **Ripple Fish International Ltd v Development Bank of South Africa & Ors [2012 SCJ 252]**. For the purpose of the present matter, it is appropriate to quote an extract from **Ripple Fish (supra)**, which provides an explicit list of conditions to be satisfied in an application for an order based on the principles enunciated in **American Cyanamid (supra)**. It reads as follows:

*"The present application being for the equitable remedy of injunction the relevant matters to be considered are as set out in the classical case of **American Cyanamid Co v Ethicon [1975 1 AR ER 504]** and applied in numerous cases here, two among the recent ones in being **Sofap Ltd v Mauvillac Co Ltd [2010 SCJ 143]**, **D.B Mc Cam v Copex Management Services Ltd [2011 SCJ 43]**. Those principles require the answers to the following questions:*

- 1) Is there a serious question to be tried?*
- 2) Can the applicant if eventually successful in a main case be adequately compensated by damages?*

- 3) *Is the balance of convenience in favour of the one or the other party's prayer(s)?*
- 4) *Should the status quo be maintained pending the matter(s) in controversy between the parties being thrashed out before the competent Court in a main case?"*

Therefore, in considering the application for injunctive relief of LTH and that of WIOCC for an order setting aside the interim order granted to LTH, we have to determine whether the conditions alluded to above are satisfied.

On the question of a serious issue to be tried

Both learned counsel for LTH and WIOCC and the other respondents in the two applications have elaborated lengthily on the facts of the case and their clients' respective contentions which according to them, as the case may be, disclose or do not disclose a serious issue to be tried. We need not repeat them as they have already been set out. It is sufficient to observe that in relation to this particular requirement of a serious issue to be tried, learned senior counsel for LTH submitted that its case raises at least a realistic prospect of establishing its claims in the intended arbitration. Once its claims are established, LTH would be entitled to, or at the very least, able to arguably secure a relief under principles of English law.

The English law principles invoked by the applicant, in effect, stipulate that it is either an implied term of the shareholders' agreement or a principle of equity that the power of a majority of shareholders to alter the constitution of a company is not an unfettered one. That power must be exercised *bona fide* for the sole benefit of the company and not in such a way that is oppressive, unfairly discriminatory or unjust, in bad faith or for a collateral purpose.

On the facts, learned senior counsel dismisses the contention of WIOCC that the proposed amendments to the WIOCC SHA are in fact in the *bona fide* interest of WIOCC. In that respect, LTH recalls that basically, LTH's intention is solely to enforce its current contractual pre-emption rights and sets out a series of arguments on the facts to substantiate his contention that in application of the English law principles invoked, LTH would be entitled to the remedy available in the contemplated arbitration.

On the other hand, learned counsel for WIOCC tried to make the point that there is no serious issue to be tried by arguing firstly, that as matters stand, no pre-emption rights as such have accrued, so that LTH has not been deprived of an opportunity to exercise them. Secondly, as the crux of the matter is an internal dispute of shareholders with regard to the internal management of a company, unless necessary, the Court should refrain from interfering in it as it has no jurisdiction to do so. The court cannot therefore allow a minority to complain of a matter which can be ratified by the majority of the company.

Learned counsel for WIOCC substantiated her contention that in law, a Court cannot interfere in the present dispute between the parties by citing the cases of **Sonoo & Ors v Issur & Ors and Chittoo** [\[1968 MR 207\]](#) and **Reddy K C v Velankani Holdings Mauritius Ltd & Ors** [\[2014 SCJ 235\]](#). She specifically referred to the following *dicta* from **Sonoo** (*supra*):

“...the Court has no jurisdiction to interfere in the internal management of a company which is acting within its powers and will not therefore allow a minority to complain of a matter which can be ratified by the majority of the company in general meeting.”

In **Reddy** (*supra*) one can in effect read the following:

“The Judge in Chambers should refrain from embarking in the internal dispute of shareholders unless necessary.”

Now, we note from the above and all the facts put before us that the claim of LTH is basically that of a minority shareholder in WIOCC contesting an intended resolution which it appears has the support of a big majority of the rest of the shareholders, if not all of them. The intended resolution undisputedly aims at amending the existing shareholders agreement in order to reduce and restrict shareholders' acquired unlimited pre-emption rights on shares disposed of by any shareholder by way of sale or any other form of transfer. Therefore, as contended by LTH, if the impugned resolution is passed, its existing pre-emption rights as a shareholder in WIOCC will be reduced in the context of the WIOCC/ACA deal.

In law, LTH's claim is based on established principles of English company law alluded to by learned senior counsel for LTH. As submitted by the latter, these principles are indeed meant for the protection of minority shareholders of a company against any abuse by the majority and aimed at ensuring that in making decisions pertaining to the company, the majority of shareholders act *bona fide* in its best interest.

On the other hand, we further note the uncontroverted contention of WIOCC in reply, that the dispute having given rise to the applications under consideration relates to the internal management of a company. As a matter of fact, it is agreed that the impugned intended resolution has been initiated in the context of an investment project as part of the development strategy of the WIOCC. Therefore, it can be hardly disputed that LTH's claims concern an internal decision pertaining to the management of a company. As it is clear from the authorities cited by learned counsel for WIOCC that, in law, this Court is not entitled to interfere in the dispute of the kind having given rise to the applications under consideration, the contention of WIOCC cannot be ignored.

It is correct to say that in the two applications under consideration, the injunctive orders sought, if granted, would result in blocking an internal management decision of WIOCC and likely to cause prejudice to the latter party in case LTH loses its main action. In that respect, we are alive to the risk of the Skynet project collapsing as explained by WIOCC.

However, we do not consider that this is a sufficient reason in the particular circumstances of the present applications to refrain from intervening on the basis of equity as we are called upon to do. We say so for two reasons. Firstly, any injunctive order granted would only be a temporary measure with a view to maintain the *status quo* pending determination of the main action contemplated by LTH. Secondly, the application for the fortification of the undertaking in damages, in case LTH loses in the main action, caters for compensation to WIOCC for prejudice likely to occur.

Having stated this, the existence of a serious issue to be tried is not enough by itself to justify an injunctive order of the kind sought. LTH also has to satisfy the remaining conditions pertaining to the adequacy of damages and balance of convenience.

On the facts, we note also that there is no dispute on the Skynet project itself and the initiative to secure investment to finance that project by way of a deal with ACA. The parties' only conflicting stand concerns the appropriateness, necessity and *bona fide* justification of the decision to adopt a resolution to amend the existing shareholders agreement in the manner contemplated in the context the WIOCC/ACA deal and for such deal to materialise.

At this stage, it is appropriate to further point out that LTH cannot be compelled in any way to vote for the resolution. It is perfectly entitled to express its reservations and disagreement on the intended amendment of the shareholders agreement and eventually to seek whatever appropriate remedy in law from the competent jurisdiction.

In the light of the observations made above, it can hardly be disputed that there exists in the dispute from which stems the applications under consideration, an issue to be tried both on the facts and in law. We would not go to the extent of accepting without any reservations learned senior counsel's submission that LTH's has at least a realistic prospect of establishing its claim and obtaining a relief under principles of English law. But, we are satisfied that there are sufficient elements which are indicative of the fact that the claims of LTH are neither frivolous nor vexatious.

Therefore, and being given that in the context of an application for an injunctive order the condition of a serious issue to be tried ought to be appreciated in the sense of a claim which is neither frivolous nor vexatious [see **Sofap (supra)**], we hold that the condition of a serious issue to be tried is satisfied.

On the question of adequacy of damages and balance of convenience

On this particular issue, in the contention of LTH, unless the shareholders vote in favour of the proposed amendments to implement the intended deal with ACA is restrained, WIOCC and WHCL will be able to implement the resolutions affecting the existing pre-emption rights complained of. That would mean a permanent deprivation of LTH's existing pre-emption rights on shares to be sold in the context of the deal and, eventually, of its right to increase its stake in WIOCC and WHCL. In the event that the WIOCC/ACA deal materializes, the relevant shares may well be transferred and LTH's pre-emption rights irrevocably altered, so that a resolution of the dispute in its favour at the contemplated arbitration would not be of any practical effect to LTH.

LTH dismisses WIOCC's contention that it could be compensated by damages if the proposed resolution is voted in view of the relatively small value of its current stake in WIOCC. In that respect, LTH explains that such a contention by WIOCC cannot stand inasmuch as, if the interim injunction had not been granted, the impugned intended resolution would have been voted and LTH would have lost an opportunity to increase its stake in the group in accordance with its existing rights. It would have also lost a chance to

assume a more important role in the governance of the group, which is an important player in the African telecommunications ecosystem. Therefore, the loss to LTH cannot be confined to the readily compensable present value of LTH's stake in WIOCC, but also be considered in the perspective of the pre-emption rights affected and the loss of opportunities it could entail insofar as LTH is concerned.

LTH further contends that there is no risk of WIOCC suffering damages which cannot be compensated if the injunction is maintained, so that the latter party cannot claim that the balance of convenience tilts in its favour as it suggests. In that respect, LTH argues that it is not apparent that the injunction will cause material harm to WIOCC.

LTH also challenges the arguments made on behalf of WIOCC that the proposed transaction with ACA will not materialise if the injunction is maintained and that it will miss the much-needed funding from ACA for investment in new sub-sea fibre cable projects and a proposed new data centre project. With regard to this complaint, LTH claims that no good evidence has been forthcoming to show with certainty that ACA would not be willing to or unable to proceed with the transaction within the "*investment window*" alluded to in the witness's statement filed on its behalf. Furthermore, the argument of WIOCC that it would be unable to attract alternative investment in the event ACA withdraws from the deal is unsubstantiated. In that respect, LTH recalls that in its own witness's statement, WIOCC states that it had engaged with a large number of investors, that several of them have been willing to commit themselves and that an investor group recently made an offer to invest.

LTH adds that on 25/01/2021, LTH itself made an offer to step in the place of ACA by providing the funding required to buy the shares of selling shareholders. The proposal of LTH is not time-constrained and would directly replace ACA investment. This offer which could mitigate the risk complained of by WIOCC has been rejected by the Board and Shareholders meeting of the latter.

LTH also dismisses the claim of WIOCC as to the urgency for the ACA deal materializing due to the urgent need for investment in certain sub-sea fibre cable projects in the short and medium-term. In that respect, it relies on a number of witness statements from WIOCC that do not reflect any urgency with regard to the ACA deal and which according to LTH allude to outcomes of recent Board and Shareholders meetings and to a number of intended other projects and funding already received and available from different sources.

It is therefore the contention of LTH that the risk of irreparable harm is clearly greater to it if the ACA deal is allowed to proceed than if the deal is delayed by an injunctive order pending the resolution of its claim by arbitration. The balance of convenience is, according to LTH, in favour of maintaining the injunction.

On the other hand, WIOCC recalls in its submissions the test propounded in **American Cyanamid (supra)** to determine the question of adequacy of damages to compensate the claimant in case he suffers a loss between the time of an unsuccessful application for an injunctive order and the determination of the competent jurisdiction in its favour.

In the contention of WIOCC, the claim of LTH concerns only the rights of a minority shareholder to exercise a pre-emptive right. So, the loss it could suffer can be adequately compensated by damages inasmuch as a pecuniary value can be ascribed to the shares lost. Furthermore, since the only consequence that would result from the discharge of the interim order and the setting aside of the application for an interlocutory injunction would be the adoption by the required majority of shareholders of the resolutions contemplated, the prejudice to LTH would only be minimal. The resulting situation would then be that of an informed decision of the majority of shareholders in the best interest of the company.

With regard to the issue of balance of convenience, WIOCC recalls again the applicable test propounded in **American Cyanamid (supra)**, particularly the conflicting rights that should weigh in the balance. Those rights, being on the one hand that of the claimant to be protected against any possible injury resulting from the refusal of an injunctive order and, on the other hand, that of the defendant to be protected against any possible injury resulting from the grant of such an order.

WIOCC submits that the balance of convenience clearly tilts in its favour. In trying to make its point in that respect, WIOCC points out that the interim order has put on hold the Skynet project since without the much-needed new investment it cannot go ahead with its new DC strategy and invest in new subsea cables. Furthermore, the ACA investment was to close on 27/02/2021 and in the event this happens, it is uncertain that investment would happen. Added to that, if the Skynet project is not completed, it is unlikely that another private equity firm would invest in WIOCC and certainly not within the timeframe required to allow investment in the current opportunities. As a result, the prejudice to WIOCC in terms of

loss of equity value is substantial and cannot be compensated through damages, the more so since it will have a domino effect affecting its corporate and financial affairs.

Therefore, in the contention of WIOCC, the balance of convenience is clearly in its favour being given the scale and importance of the Skynet project in WIOCC business interest and that of its shareholders, as opposed to LTH being a minority shareholder whose prejudice can be adequately compensated by damages.

In considering the issues of adequacy of damages and the balance of convenience, it is appropriate to point out that it stems from the arguments set out above that LTH invokes three main consequences of the impugned intended resolution, if it is passed, as being possible causes of damage and prejudice. First, it lays stress on the amendment of the SHA bringing about a reduction of the pre-emption rights it currently enjoys as a shareholder of WIOCC on share transfers in that entity. Second, loss of opportunity to acquire more shares in the transfer of shares process contemplated in the WIOCC/ACA deal than it would have been entitled to under the SHA as it stands now. Third, the resulting loss of opportunity to increase its stake in WIOCC and eventually a loss of its importance and influence in the group and of the chance LTH has to assume a more important role in the governance of the group.

It is quite understandable that these losses may well occur in case the resolution amending the SHA goes through. But, in so far as we are concerned in the present application for an injunctive order, what we have to determine is whether these losses can be adequately compensated by an award of damages.

We agree that in the light of the pecuniary value ascribed to the shares, LTH will not be able to buy shares in the exercise of its pre-emption rights as they stand now and that this can be a relevant consideration in assessing the damages resulting from the intended reduction of such pre-emption rights. We however also agree that the assessment of damages to compensate for the loss of opportunity to increase LTH's stake and influence in WIOCC stands on a different footing since the assessment of such damages cannot be restricted to the pecuniary value of the number of shares LTH would have to forego and their nominal value. But, we are not satisfied that the prejudice which will be suffered for such loss of opportunity and chance cannot be adequately compensated by a proper assessment of damages.

As a matter of fact, we have not been convinced by the arguments put forward to substantiate the contention of LTH that damages would not be an adequate remedy for such loss. Although LTH can legitimately entertain the expectation or ambition to play a more important and influential role in WIOCC and in the field of telecommunications and data services on the African continent, we cannot conclude, based on the evidence before us, that such a one-off loss of opportunity to increase its stake in WIOCC will make such expectation or ambition definitely unachievable in the future.

At this stage, it is appropriate for us to recall that the assessment of damages is only a matter of appreciation by the competent jurisdiction. We are therefore not minded to go into such an exercise in the present applications. But we still have to be at least satisfied that the kind of prejudice likely to be suffered by the claimant cannot be appropriately compensated by pecuniary damages, which, having regard to our observations, we find LTH has failed to do.

Therefore, we hold that LTH cannot successfully claim inadequacy of damages to compensate for any loss or prejudice resulting from the adoption of the impugned resolution.

With regard to the balance of convenience, we note WIOCC's complaint that if the resolution required to carry out the WIOCC/ACA deal is blocked or prolonged, there is a risk of ACA backing off and WIOCC losing the investment opportunity to proceed with Skynet project. The consequences of the collapse of the deal at this stage on WIOCC's commitments with lending institutions and the promoters of the Skynet project are extensively set out in the witness's statements of WIOCC and highlighted in the submissions on its behalf.

We have already alluded to them and we believe after due consideration of the facts and circumstances of the present applications that the complaint of WIOCC is neither frivolous nor farfetched. Cogent reasons have been put forward to justify the complaint and the urgent need to avoid blocking the WIOCC/ACA deal as well as the Skynet Project which, it should be pointed out, have the support of a large majority of shareholders.

As contended by LTH, one could indeed be of the view that in the event that ACA backs off, WIOCC can still look for and secure the participation of another individual investor. But, this would mean restarting a process that had been almost completed, had it not been for the last minute contestation by LTH of only one aspect of the deal, which is the reduction

in pre-emption rights of shareholders. And, there is no exaggeration in the contention of WIOCC that the situation that might result in the granting of an interlocutory injunctive order could undermine the credibility of WIOCC as a reliable investment opportunity in the eyes of potential investors.

With regard to the position adopted by LTH, it is pertinent to add that in the submissions put forward on its behalf, LTH is presented as a direct competitor of WIOCC and a potential alternative to ACA in case the latter backs off. This, we believe, cannot go much to the credit of LTH or undermine WIOCC's claims as, in the particular circumstances of the present case, we cannot exclude the possibility that LTH's move may be an attempt to bring about the collapse of the WIOCC/ACA deal for its own benefit.

In the light of the observations made above, we are satisfied that WIOCC has shown that there is a real likelihood of more prejudice to it in the event that the interlocutory injunction prayed for by LTH is granted.

Having said that, we do agree that the prejudice caused to WIOCC, if the interlocutory injunction is granted, can be compensated by damages. However, in the particular circumstances of the present applications, we believe, in all equity, that the potential prejudice to WIOCC should carry more weight in the balance of convenience than that which LTH is likely to suffer if its application for an interlocutory injunctive order is refused.

In coming to the above conclusion, we take into account two things. First, the blow to WIOCC as a trustworthy undertaking for investment in the eyes of potential investors if the WIOCC/ACA deal collapses or is unduly delayed by reason of the stand of a minority shareholder potentially bent on pursuing its own interests. Secondly, as already pointed out earlier, it is quite conceivable to see in the stand of LTH a last minute attempt to block the conclusion of a deal supported by a large majority of shareholders.

Therefore, we have no difficulty in finding that the balance of convenience tilts in favour of WIOCC.

As a result of our findings on the adequacy of damages to compensate LTH and the balance of convenience in favour of WIOCC, we hold that the application of LTH for an interlocutory injunctive order cannot succeed and we accordingly set it aside with costs.

Since the application of LTH for an injunctive order has been set aside, the interim order issued on 16/12/2020 cannot stand and is therefore discharged.

In view of the fact that the application by LTH for an injunctive order has been set aside, there is no need for us to delve into WIOCC's application for fortification of the undertaking of LTH in damages, which is therefore also set aside.

**J. Benjamin G. Marie Joseph
Judge**

**N.F. Oh San-Bellepeau
Judge**

**P. D. R. Goordyal-Chittoo
Judge**

08 July 2021

Judgment delivered by J. Benjamin G. Marie Joseph, Judge

**For Applicant: Mr A. Robert, SA
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