

**APPEAL TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
FROM THE SUPREME COURT OF MAURITIUS**

Appeal Number : JCPC 2025/0070

EGALLYS LIMITED

APPELLANT

V

INFORMATION COMMUNICATION TECHNOLOGIES AUTHORITY

RESPONDENT

THE APPELLANT’S WRITTEN CASE

References to the Electronic Bundle are in the form [EB/page/line], where appropriate.

A. INTRODUCTION

1. This appeal raises important questions of company law and civil procedure concerning the authority of a company representative in litigation:
 - a. The first issue is whether, where a company has only one director, and that director is therefore the Board for the purposes of section 128(7)(b) of the Companies Act 2001, a separate Board resolution is required before that sole director may represent the company in proceedings and swear evidence on its behalf.
 - b. The second issue is whether, if there was any defect in authority, that defect was necessarily fatal to the Application, or was instead an internal and curable matter which ought to have been addressed by allowing ratification or regularisation.
2. The Appellant brought an application before the Bankruptcy Division of the Supreme Court of Mauritius under section 181 of the Insolvency Act (the “*Application*”) to have set aside

a Statutory Demand dated 13 July 2020 that the Respondent had caused to be served on the Appellant on 4 August 2020, by which the Respondent claimed Rs 14,066,666.68 in unpaid licence fees, together with attorney's commission, VAT and costs. The Application was brought by motion paper signed by the Appellant's attorney-at-law. [EB/106] The motion paper itself was not challenged on the basis that the attorney lacked authority. The objection which succeeded below was directed instead to the absence of a separate Board resolution or other documentary authorisation showing that the sole director, Mr Jose Carlos Teixeira Esteves, had been authorised to represent the Appellant or swear affidavits on its behalf.

3. The Bankruptcy Division upheld that objection, holding that, notwithstanding section 128(7)(b), there was no evidence or document showing that Mr Esteves had been authorised to swear affidavits or represent the Appellant. [EB/205] The Court of Civil Appeal confirmed that conclusion and held that the absence of such documentary authorisation was fatal to the Application. [EB/252-258]
4. The Appellant submits that this conclusion was wrong. As a matter of statutory construction, no separate delegation from the Board was required because, in a one-director company, the sole director is the Board. The authority flows from sections 128(7)(b) and 129 of the Companies Act, not from a further act of self-authorisation.
5. In any event, the particular facts of this case did not justify the dismissal of the Application. Those facts include the terms of the affidavits exchanged between the parties, the manner in which the Respondent dealt with Mr Esteves, the absence of any competing corporate representative, Mr Esteves' position as sole director and majority shareholder, the constitutional mechanisms available for regularisation, and the curable nature of any alleged defect.

B. THE REASONING OF THE COURT OF CIVIL APPEAL

6. For the purposes of this appeal, the reasoning of the Court of Civil Appeal may be analysed in four steps.
7. That analysis is important because the Respondent now seeks to characterise the appeal as turning only on a finding of primary fact. The reasoning of the Court of Civil Appeal shows,

however, that the dismissal of the appeal depended on a legal conclusion as to how a company, including a one-director company, must authorise the institution of proceedings and the swearing of affidavit evidence.

8. The Court, as its **first step**, began from the proposition that the Appellant, as an incorporated company, was distinct from Mr Esteves and could act only through natural persons: “*It is trite law that the appellant as an incorporated company under the Companies Act is a body corporate which has a distinct legal personality of its own. As a company it should be distinguished from and should not be confounded with, Mr Esteves [...]. Given its artificial nature as a legal entity, a company can only act and take decisions through natural persons*”. [EB/254/8-14]
9. The Court then linked that proposition to sections 128(7) and 129 of the Companies Act. It accepted that section 128(7) provides that the Board may consist of a sole director, but held that management remains vested in the Board: “*Although Section 128(7) of the Act provides that the ‘Board’ in relation to a company may consist of a sole director where the company has only one director, the management of a company is vested in the Board [...]*” (emphasis added). [EB/254/19-22]
10. The Court then set out section 129, including the provisions that the business and affairs of a company are to be managed by, or under the direction or supervision of, the Board, and that the Board has the powers necessary for that management. [EB/254-255]
11. As its **second step**, the Court identified a delegation requirement. Relying on ***ENL Limited & Anor v Independent Commission Against Corruption* [2023 SCJ 190]**, the Court treated decisions falling within the powers of the Board as decisions to be taken by resolution of the Board: “*The company being an inanimate entity, decisions of the company have to be taken by its decision-making organs; the primary organ may be the Board or its members in a general meeting. All decisions which fall within the powers of the Board are taken by the passing of resolutions at a properly constituted meeting of the Board.*” [EB/255]
12. The Court then referred to section 131 of the Companies Act, which permits the Board to delegate powers to a committee, director, employee or other person, and relied again on ENL for the proposition that the Board may delegate its authority to institute proceedings

and designate a director or an employee to swear an affidavit or give evidence on its behalf.

[EB/257]

13. From those propositions, the Court drew the conclusion that a director may act for a company in proceedings only where valid delegation or documentary authority is shown: *“A director may therefore only institute proceedings on behalf of a company by showing that he has been validly delegated with the power to do so”* (emphasis added). [EB/258/1-2]
14. The Court stated that such authority could be shown through the company’s constitution, by a power of attorney, or by *“any resolution or decision duly taken by the Board”*. [EB/258]
15. The **third step** was the application of that requirement to a sole director, which is the central point in this appeal. The Court held that there was no special position for a sole director: *“There is no exceptional situation nor any specific provisions prescribed in the Act entitling or empowering the sole director of a company to institute legal proceedings otherwise than in conformity with the provisions set out above.”* [EB/258/13-15]
16. Applying that reasoning, the Court held that there was no evidence that Mr Esteves had been lawfully authorised by the Appellant: *“Since in the present matter there was no evidence indicating that Mr Esteves was lawfully authorised by the company to enter the application and act on its behalf for the purpose of the present proceedings, the learned Judge cannot be faulted [...]”*. [EB/258]
17. The **fourth step** concerned waiver, proof and ratification. The Appellant had argued before the Court of Civil Appeal that Mr Esteves’ authority had not been properly disputed. The Court rejected that argument. It held that the Respondent had raised the point from the outset because its first affidavit stated that no document had been annexed in support of Mr Esteves’ authority. [EB/258-259]
18. The Court nevertheless accepted that absence of authority would not make the proceedings void *ab initio* and could be ratified: *“It is well settled that where proceedings have been commenced in the name of the company without proper authority, the proceedings are not*

a nullity i.e. void ab initio. The company may ratify the unauthorised act by passing a subsequent resolution granting the required authority.” [EB/259/19-22]

19. The Court held that the issue of Mr Esteves’s authority could simply have been addressed and rectified in the course of the hearing, and that the Appellant had ample opportunity to do so, but it did not. Accordingly , the Court held that there had been no breach of fairness or of the rules of natural justice. **[EB/260-261]**
20. On that basis, the Court dismissed the appeal with costs and amended the date for payment of Rs 14,066,666.68, together with attorney’s commission, to the end of November 2024, failing which the Respondent would be entitled to apply to put the Appellant into liquidation. **[EB/261]**
21. It follows that the Court of Civil Appeal’s decision was not confined to a finding that Mr Esteves had failed, as a matter of fact, to prove authority. The Court first held, as a matter of law, that a sole director was in no exceptional position and could institute proceedings only by showing delegation or documentary authority in one of the forms identified by the Court. It is that legal premise which the Appellant challenges in this appeal.

C. GROUND 1

The Learned Judges of the Court of Civil Appeal erred in holding that a sole director, whose status as sole director was not in dispute, still required a resolution of the Board of the Appellant to represent it in court proceedings and/or give evidence on its behalf, in particular having regard to section 128(7)(b) of the Companies Act.

22. The Appellant places primary reliance on section 128(7)(b) of the Companies Act. That provision states that, in relation to a company, “Board” or “Board of directors” means the directors of the company “*or the sole director where the company has only one director.*”
23. On its plain and natural meaning, section 128(7)(b) provides that, where a company has only one director, the Board is that sole director. That is precisely why the provision is necessary. In a one-director company, there are no other directors to convene, no quorum

of directors to satisfy, and no vote of directors to take. The Companies Act therefore treats the sole director as the Board: the sole director's decision is the Board's decision.

24. Thus section 128(7)(b) operates to supply the meaning of “*Board*” wherever the Companies Act confers powers on, or imposes duties upon, the Board. Section 129 is one such provision. It vests the management of the business and affairs of the company in the Board. In the case of a company with only one director, section 128(7)(b) tells us who that Board is: the sole director.
25. The Respondent's Notice of Acknowledgment seeks to answer this point by saying that section 128(7)(b) is merely an interpretative provision and does not deem a sole director to be the Board. That submission does not meet the point. The Appellant accepts that section 128(7)(b) is a definitional provision. But definitions have operative force. Where the Act confers powers on, or imposes duties upon, the Board, the definition identifies the person or persons in whom those powers and duties are vested. In the case of a company with only one director, that person is the sole director.
26. The Court of Civil Appeal, however, approached section 128(7)(b) in terms which do not reflect the language of the provision. It treated the section as describing the composition of the Board, rather than as defining who the Board is where the company has only one director. The Court stated: “*Although Section 128(7) of the Act provides that the ‘Board’ in relation to a company may consist of a sole director where the company has only one director, the management of a company is vested in the Board [...]*” (emphasis added). [EB /248]
27. With respect, the difficulty lies in the words “*may consist*”. It is self-evident that a Board made up of one director consists of one director. The statute did not need to say that. By treating section 128(7)(b) merely as a provision about composition, the Court of Civil Appeal reduced it to a tautology and deprived it of its operative force. For example, section 129 vests management in the Board. The relevant question in a one-director company is therefore: who is the Board in whom those powers are vested? The answer that the Board “*may consist*” of the sole director is no answer at all. Instead, it is stating the obvious without performing the definitional work that section 128(7)(b) was enacted to perform.

28. That error led the Court of Civil Appeal into the delegation analysis described at paragraphs 10 and 11 above. The Court then treated Mr Esteves as a director requiring authority from a Board separate from himself. But on the undisputed premise that Mr Esteves was the sole director, there was no Board separate from him.
29. Section 131 illustrates the difficulty with that construction. Section 131 enables the Board to delegate one or more of its powers to a committee of directors, a director, an employee of the company, or another person. It is a provision concerned with delegation by the Board to a person or body which is distinct from the Board acting as such.
30. On the Court of Civil Appeal's approach, the sole director must, as Board, delegate authority to himself as director before he may act. That is not delegation in any meaningful sense. Delegation presupposes a distinction between the person or organ conferring authority and the person or body receiving it. In a one-director company, that distinction collapses.
31. The artificiality of that requirement is illustrated by the later document [EB/266] that was produced after the judgment of the Court of Civil Appeal, in support of the Appellant's application to the Supreme Court for leave to appeal to the Board, in order to comply with the very requirement which the courts below had imposed. It is an "*Extract of Minutes of the Board of EGALLYS Limited*" by which Mr Esteves, "*as sole director*", certifies that he is authorised to represent Egallys in the proceedings and to give evidence and swear affidavits. If the Court of Civil Appeal's approach is correct, the law requires the sole director to produce a document by which he records that he has authorised himself. It is a self-referential act of authorisation by the very person whose authority is said to require confirmation.
32. It is therefore submitted that the correct approach was to hold that, once Mr Esteves' status as sole director was factually not in dispute, he was the Board for the purposes of sections 128(7)(b) and 129. No further Board resolution was required as a matter of corporate authority.
33. At paragraph 9 of the Respondent's Notice of Acknowledgment, the Respondent contends that section 128(7)(b) is merely an interpretative provision, that it does not deem a sole

director to be the Board, and that, absent a valid delegation under section 131, the powers of the Board had to be exercised by a validly convened Board meeting or by written resolution under the Eighth Schedule. That submission does not address the Appellant's point. The Appellant does not contend that section 128(7)(b) permits a company to ignore applicable requirements of the Act or its Constitution. The point is that, where the Act itself defines the Board as the sole director where the company has only one director, the Respondent cannot treat the sole director as though he were a delegate requiring authority from some other Board. If the Respondent wishes to advance a different argument, based on clause 19.4 of the Appellant's Constitution and the alleged requirement for two directors, that is not the basis on which the Court of Civil Appeal decided the appeal, although the Appellant addresses that point below.

34. For those reasons, the Appellant respectfully submits that Ground 1 should be allowed.

D. GROUND 2

The Learned Judges of the Court of Civil Appeal erred in law by misconstruing the correct legal test, which was not whether there was an actual board resolution, but whether the Court could be satisfied, on the balance of probabilities, that the sole director, who under section 128(7)(b) of the Companies Act is deemed to be the Board and is presumed to have tacit or implied authority to manage and represent the company, had such authority.

35. Under Ground 2, the Appellant respectfully submits that the Court of Civil Appeal misconstrued the question that it had to determine. The question was whether, on the material before it, the Court could accept that Mr Esteves was authorised to represent the Appellant and swear affidavits on its behalf. It was not whether the Appellant had kept or produced a particular form of internal corporate record, namely a Board resolution.

36. That is why the Respondent's attempt, at paragraph 2 of its Notice, to characterise the issue as a pure question of fact is wrong. The appeal concerns the legal test by which authority was assessed. Once the Court treated the absence of a Board resolution or documentary authority as determinative, it committed an error of law.

37. It is necessary, in that respect, to distinguish three matters. First, there is the source of power. That may be found in the Companies Act, the constitution of the company, the office held by the person concerned, a decision of the Board, or implied or tacit authority arising from the circumstances. Secondly, there is the decision to exercise that power. Thirdly, there is the record of that decision, which may take the form of a Board resolution, minute, letter, power of attorney, or other document.
38. A Board resolution may be the most useful, convenient, or even compelling evidence that authority exists and that a decision was taken. However, the evidence of authority is neither the source of that authority, nor the decision itself. The absence of such evidence does not invariably mean that no authority existed or that no decision was taken.
39. In the present case, there plainly was a decision by the Appellant to challenge the Statutory Demand. The application was lodged in the name of the Appellant by its attorney. The motion paper was signed by the Appellant's attorney-at-law. [EB/106] That attorney's authority to lodge the application was not challenged. Affidavits were sworn on the Appellant's behalf by Mr Esteves, who averred that he was authorised to make the affidavit on behalf of the Appellant, and later that he was the sole director and was by law authorised to do so [EB/107; EB/117]. The issue was whether, in all the circumstances, the Court could accept Mr Esteves' averment of authority, assuming that there had been a proper challenge to that authority (that latter question is addressed under Ground 4).
40. The Court of Civil Appeal did not approach the matter in that way. It held that: "*A director may therefore only institute proceedings on behalf of a company by showing that he has been validly delegated with the power to do so.* The Court stated that this may be done either by the company's constitution and articles vesting the director with authority, or by a power of attorney under section 182(1), or by a resolution or decision duly taken by the Board authorising him to act on behalf of the company. [EB/258/1-2]
41. The Court then concluded that, since there was "*no evidence indicating that Mr Esteves was lawfully authorised by the company to enter the application and act on its behalf*", the learned Judge of the Bankruptcy Division could not be faulted for setting aside the application. [EB/258] Thus, the Court of Civil Appeal treated the absence of a Board resolution, power of attorney, or constitutional provision as determinative.

42. With respect, that approach reduces authority to record-keeping. It also converts what may, in a proper case, be an evidential requirement into a rigid procedural rule that a company must produce a Board resolution whenever a person purports to represent it or swear evidence on its behalf. There is no such rule in the Companies Act or in the rules of civil procedure.
43. The issue of company representation only became a source of controversy fairly recently in Mauritius. It began, in substance, with *Meaders Feeds Ltd v Parboteeah D & Ors* [2020 SCJ 317], where a company witness began to depose and it was said that he could not represent and depose for the company without a Board resolution. The same line of reasoning was then followed in *Jyoti's Clinic Ltd v Sika (Mauritius) Ltd* [2021 SCJ 295], *Laser Informatics Ltd v RBRB Construction Ltd* [2021 SCJ 407], and *Barachois Villas Company Ltd v Super Builders Co Ltd* [2022 SCJ 201], where the Courts adopted an increasingly strict approach, treating the absence of a Board resolution or proof of specific mandate as fatal.
44. The controversy led the Full Bench in *ENL Limited* (*supra*) to attempt to clarify the position. The Full Bench itself described the state of the authorities as one of “*confusion*”, referring expressly to *Mahé P L J & Ors v Mayer A & Ors* [2017 SCJ 421], *Meaders Feeds*, *Jyoti's Clinic*, *Laser Informatics*, and *Barachois Villas*.
45. Crucially, for present purposes, the Full Bench did not treat the production of a Board resolution as an invariable procedural requirement. It recognised that the issue was whether authority had been established to the satisfaction of the Court, where the authority of the company representative had been expressly denied. It also cited with approval the passage from Halsbury that the intention of a company may be established by its directors, “*even if acting informally*”, depending on the nature of the matter, the relative positions of the directors in the company, and all the circumstances of the case. That passage was also relied upon by the Court of Civil Appeal in the present case. [EB/256]
46. Thus, the Full Bench confirmed that the proper inquiry was evidential and contextual. It depended on whether the Court could be satisfied of authority in the circumstances of the

case. It was not enough to ask whether one particular form of internal record had been produced.

47. That is important because, in company litigation, authority questions should not be treated as jurisdictional traps. A company can only act through natural persons, and its internal records may not always perfectly record every act of authority at the precise moment when proceedings are commenced or evidence is sworn. Where there is no genuine dispute as to corporate will, no competing representative, and no prejudice, the law should not treat an omission in the internal record as automatically fatal.
48. The proper question is not whether a particular document was produced at the outset, but whether any alleged deficiency in authority is capable of being confirmed or ratified by the company. If it is, the proper course is to allow confirmation or ratification, not to strike out or dismiss proceedings without determining their merits.
49. The Court of Civil Appeal's approach was inconsistent with those principles. It placed on the Appellant an automatic burden to produce a Board resolution, without first recognising the distinction between authority, decision and record, and without asking whether any alleged omission was capable of confirmation or ratification.
50. Thus, assuming there was a proper challenge, the Court was required to decide whether, on the material before it and applying the ordinary civil standard, Mr Esteves' authority could be accepted. It could not simply treat the absence of a Board resolution as a bar. In doing so, it misconstrued the correct legal test.
51. For those reasons, the Appellant respectfully submits that Ground 2 should be allowed.

E. GROUND 3

The Learned Judges of the Court of Civil Appeal erred in construing that the failure of the Appellant to produce a resolution of its Board confirming the authority of its sole director to represent the Appellant could, in and of itself, invalidate the Application, where it was not in dispute that the Application had been correctly entered by the attorney-at-law acting for the Appellant.

52. Under Ground 3, the Appellant's case is that the Court of Civil Appeal erred in treating the alleged absence of documentary authority for Mr Esteves as if it affected the validity of the Application itself. In doing so, the Court assimilated three separate matters which, the Appellant respectfully submits, are both conceptually and practically distinct: first, the institution of proceedings; secondly, representation before the Court; and thirdly, evidence filed in support of the Application.
53. The Application was instituted by motion paper under section 181 of the Insolvency Act. The motion paper was therefore the originating process. It was neither signed by Mr Esteves, nor filed by him personally. It was signed and filed by the Appellant's attorney-at-law. [EB/106]
54. The authority of the Appellant's attorney to lodge the Application was not challenged.
55. In an application before the Supreme Court, the party is represented by its attorney-at-law and counsel. That is exactly what happened before the Bankruptcy Division: counsel appeared for the Appellant, instructed by the Appellant's attorney-at-law, who was also in attendance. [EB/188]
56. Mr Esteves' affidavits thus performed a different function. They did not establish representation, but were evidence filed in support of the Application. In the first affidavit, Mr Esteves averred that he was a director of the Appellant and was duly authorised to make the affidavit on its behalf. In the second affidavit, he averred that he was the sole director of the Appellant and was by law authorised to make the affidavit on its behalf. [EB/117]
57. If the Court considered that Mr Esteves' authority to swear affidavit evidence had not been sufficiently shown, that raised an evidential question. It could affect the admissibility, sufficiency, or weight of the affidavit evidence, but did not necessarily entail that the motion paper itself had not been validly filed.
58. The Court of Civil Appeal's reasoning, however, blurred the distinctions between institution of proceedings, representation before the Court, and evidence filed in support of the Application.

59. That is also why the language of “*entering*” or “*instituting*” proceedings was, with respect, misplaced. The Court held that a director may “*only institute proceedings*” on behalf of a company by “*showing*” valid delegation through the constitution, a power of attorney, or a Board resolution or decision. [EB/258] But Mr Esteves did not institute the Application. The Application was instituted by motion paper signed by the Appellant’s attorney-at-law. [EB/106]

60. The point is confirmed by the Full Bench in *ENL Limited (supra)*. The Full Bench distinguished between the authority of the deponent to swear affidavits and the authority of the attorney to lodge and conduct the proceedings. It observed that there was no challenge to the attorney’s authority to lodge the application and take the steps required for conducting the case under his ‘*mandat ad litem*’.

61. The same distinction was confirmed in *RKG Fruits Co Ltd v Maersk (Mauritius) Ltd [2025 SCJ 220]*. The Court of Civil Appeal accepted that, in Mauritius, an attorney has a ‘*mandat ad litem*’ and does not need a special power of attorney to enter a case on behalf of a plaintiff or applicant. *Meaders Feeds (supra)* is also consistent with that distinction when properly understood. The objection there arose when the company’s witness began to depose. It was therefore concerned with whether that person could represent or give evidence for the company, not with whether an originating process filed by an attorney was invalid.

62. It follows that, even if the Court considered the affidavit evidence deficient, the proper course was not to set aside the Application as if it had never properly existed. The Court could have considered whether the evidence otherwise sufficed, required further proof, permitted a confirming affidavit or resolution, or dealt with the merits on the material properly before it. What it could not properly do was treat a possible evidential deficiency as a defect in the institution of the proceedings.

63. The error is particularly clear where the statutory question under section 181 included whether the Appellant had a counterclaim, set-off or cross-demand. The Application itself was brought on the basis, among other matters, that there was a substantial dispute and that the Appellant had a counterclaim against the Respondent. [EB/109] Those were matters going

to the statutory grounds for setting aside the demand. If the Court was satisfied, or if the parties accepted, that a counterclaim, set-off or cross-demand existed in an amount sufficient to meet the statutory threshold, the proper course was to address that issue as part of the section 181 inquiry. It was not to treat the Application as invalid merely because of an alleged deficiency in the authority of the deponent.

64. The Court of Civil Appeal therefore erred in treating the alleged absence of documentary authority for Mr Esteves as depriving the Appellant of locus to bring the Application. The Application had been brought by the Appellant through its attorney-at-law. Any alleged deficiency in Mr Esteves' authority went, at most, to evidence. It did not invalidate the proceedings.

65. For those reasons, the Appellant respectfully submits that Ground 3 should be allowed.

F. GROUND 4

The Learned Judges of the Court of Civil Appeal erred in law in treating the authority of the Appellant's deponent as a live issue requiring proof, when the Respondent had not, at any point in the exchange of affidavits, disputed or denied the authority of the Appellant's deponent, as sole director, such that the latter's authority was not properly in contention before the Court and ought to have been treated as admitted.

66. Ground 4 concerns the way in which the issue of Mr Esteves' authority was said to have arisen on the affidavits. The Appellant submits that the Court of Civil Appeal erred in holding that the Respondent had challenged that authority from the outset and that the Appellant was therefore required to prove it by producing a Board resolution or other document.

67. In his first affidavit, Mr Esteves averred that he was "*the director of the Applicant*" and that he was "*duly authorised*" to make the affidavit on behalf of the Appellant. [EB/107] In response, the Respondent did not deny that Mr Esteves was authorised, nor did the Respondent plead that Mr Esteves lacked authority. The Respondent only stated that, "*without making any admission*", no document had been annexed in support of the averment that he was duly authorised to affirm the affidavit. [EB/112]

68. It is submitted that this, properly understood, was not a traverse of authority. It was an observation as to the absence of an annexed document. The Respondent did not suggest that there was any internal corporate dispute, any rival director, any competing representative, or any restriction in the Appellant's constitution preventing Mr Esteves from acting.
69. In any event, the position changed materially when Mr Esteves filed his second affidavit. He averred that he was "*the sole director of the Applicant*" and that he was "*by law authorised*" to make the affidavit on its behalf. [EB/117] That averment was a new and material factual basis for his authority, distinct from his averment in his first affidavit. The Respondent, this time, merely took note of the averment, without more. [EB/128]
70. It is submitted that the Respondent's response was insufficient to keep the issue alive.
71. The ordinary rule is that a material allegation must be specifically traversed if it is to be put in issue. A party cannot allow a material averment to stand without denial and later treat the matter as if it had been contested throughout.
72. The Court of Civil Appeal held that it was "*beyond dispute*" that the Respondent had, from the outset, averred that in the absence of any document Mr Esteves had not been duly authorised to swear affidavits or act on behalf of the company. [EB/259] With respect, that conclusion gives the Respondent's first affidavit a wider effect than its language bears. The Respondent did not positively aver that Mr Esteves lacked authority. It averred that no document had been annexed in support of his averment of authority. That cannot constitute a dispute of Mr Esteves' authority.
73. The Court of Civil Appeal further relied on the fact that, in answer to that first objection, the Appellant took note of the Respondent's averment. [EB/259] That is correct as far as it goes. But it does not address the material development in the same affidavit: Mr Esteves expressly stated that he was the sole director of the Appellant and was by law authorised to make the affidavit on its behalf. [EB/117] The Respondent's answer to that new and material averment was merely to "*take note*". It did not deny that Mr Esteves was the sole director.

It did not deny that, as sole director, he was by law authorised to act. It did not put either matter to proof.

74. That was not a sufficient challenge. It is particularly so where the alleged defect concerned an internal corporate matter. The mere pointing out of the absence of an annexed internal document could not, without more, displace the ordinary position flowing from Mr Esteves' status as sole director and from the absence of any competing corporate representative. If the Respondent wished to say that the authority asserted by Mr Esteves was false, legally ineffective, or otherwise insufficient, it had to traverse that averment clearly and credibly. It could not merely reserve its position on the absence of a document and later treat authority as having been fully contested throughout.
75. The same approach was adopted in *RKG Fruits Co Ltd* (*supra*). There, the Court of Civil Appeal held that where the respondent merely "*took note*" of the Board resolution and did not expressly deny, rebut, traverse or contradict the relevant averment, the representation issue was no longer properly in dispute. The point applies with greater force here, where the Respondent took note of Mr Esteves' averment that he was the sole director and was by law authorised to make the affidavit on the Appellant's behalf.
76. The Respondent's later written submissions could not cure that omission. Submissions are not pleadings or affidavit evidence. Indeed, the Appellant's written submissions below recorded that the Respondent had raised the preliminary objection "*for the very first time and by way of written submissions*". [EB/180]
77. It follows that the issue of authority was not properly in contention before the Bankruptcy Division. The Court of Civil Appeal therefore erred in holding that the Appellant bore an onus to produce documentary proof of Mr Esteves' authority in circumstances where the relevant averment had not been denied.
78. In any event, the wider Record was inconsistent with the suggestion that there was any real doubt as to Mr Esteves' role. The Respondent had granted the Appellant a 15-year ILD licence in 2013. [EB/107; EB/111] In the course of the very dispute giving rise to these proceedings, the Respondent addressed correspondence to "*The Director, EGALLYS Limited*" for the attention of "*Mr Jose ESTEVES*", including the notice of proposed

revocation dated 10 December 2020 and the letter rejecting the Appellant's application for a Dealer's Licence dated 24 December 2020. [EB/123; EB/127] Other correspondences were also on record. [EB/134; EB/148-150] The Record also disclosed connected litigation between the same parties, including the judicial review proceedings bearing SCR No. 119215 (SA/273/19), in which the Respondent initially objected to leave but later withdrew its objections, following which leave was granted. [EB/117; EB/121-122] The later revocation proceedings likewise show Mr Esteves swearing affidavit evidence as director, sole director and majority shareholder of the Appellant. [EB/135; EB/152] This was therefore not a case of a stranger purporting to act for the Appellant, nor a case involving any competing corporate representative.

79. For those reasons, the Appellant respectfully submits that Ground 4 should be allowed.

G. GROUNDS 5 & 6

The Learned Judges of the Court of Civil Appeal erred in finding that the Appellant ought not to have been provided an opportunity to produce a Board resolution confirming the sole director's authority or otherwise ratify the sole director's authority, rather than dismissing the Application.

The Learned Judges of the Court of Civil Appeal erred in adopting a course that was disproportionate and unjust having regard to all the circumstances of the case.

80. Under Grounds 5 and 6, the Appellant advances a broader point about fairness, ratification and proportionality. The point applies whether the alleged defect is characterised narrowly, as the absence of a Board resolution or other documentary confirmation of Mr Esteves' authority, or more broadly, as the Respondent now seeks to do, by reference to clause 19.4 of the Appellant's Constitution, the alleged requirement for two directors, and the Eighth Schedule to the Companies Act. On either analysis, the issue was fact-sensitive and curable. It was not a basis for dismissing the Application without any determination of its merits.

81. The Court of Civil Appeal held that the Appellant ought not to be afforded any further opportunity to produce a Board resolution confirming Mr. Esteves' authority on the following reasoning:

- a. the Court accepted that proceedings commenced without proper authority are not void *ab initio* and may be ratified by a subsequent resolution granting the required authority; [EB/259]
- b. however, the Court held that the Appellant had failed to avail itself of the ample opportunity given to it to produce a Board resolution, power of attorney, or constitutional provision establishing Mr Esteves' authority once the issue had been raised in the Respondent's first affidavit; [EB/260]
- c. the Court further held that it was never the Appellant's case before the Bankruptcy Division that Mr Esteves should be afforded an opportunity to produce evidence of his authority. [EB/261]

82. The Appellant respectfully disagrees with the Court of Civil Appeal's reasoning.

(i) No Competing Authority and Alleged Defects

83. This was not a case where there was any other competing authority within the Appellant, such as rival directors, shareholders, a receiver, a liquidator, or some other person claimed to speak for the company. Mr Esteves' position was that he was the sole director of the Appellant and was by law authorised to swear the affidavit on its behalf. The Record also showed that he was the majority shareholder of the Appellant. [EB/135; EB/152] If the corporate extract showing 4,800 shares out of 5,000 shares is admitted or included in the Record, the Appellant will further rely on the fact that Mr Esteves held 96% of the issued shares. If the Court was against the Appellant on the primary point, it would have been straightforward for Mr Esteves to produce, out of caution, a Board resolution confirming his authority. The later resolution illustrates the point: it is a document by which Mr Esteves, "*as sole director*", authorised himself to represent Egallys in the proceedings and to swear affidavits.

(ii) The Respondent's new constitutional argument was not the premise of the decisions below

84. The Respondent now seeks to rely, by way of further reason, on a point which was not the premise of either judgment below. It contends that clause 19.4 of the Appellant's Constitution required the Appellant to have at least two directors and that, by reason of that provision and the Eighth Schedule to the Companies Act, Mr Esteves could not validly cause the Appellant to commence or continue the Application as sole director.
85. That was not the basis on which the Bankruptcy Division dismissed the Application, nor the basis on which the Court of Civil Appeal dismissed the appeal. The courts below did not hold that Mr Esteves was disabled from acting because of clause 19.4 of the Constitution. Rather, they approached the matter on a general legal footing, namely that even where a company has a sole director, that sole director must produce a Board resolution or other documentary authority before he may represent the company or swear affidavits on its behalf. It is that general legal premise which is challenged under Grounds 1, 2 and 3.
86. The Respondent should not be permitted to uphold that general legal premise by substituting, at this stage, a different and fact-sensitive constitutional argument which was not determined below. If that new argument is to be entertained, it cannot be considered selectively. The Appellant must equally be permitted to rely on the full corporate and factual context, including the shareholding position. The Record already showed that Mr Esteves was the majority shareholder of the Appellant. [EB/135; EB/152] If the corporate extract is admitted or included in the Record, the Appellant will further rely on the fact that Mr Esteves held 4,800 out of 5,000 shares, representing 96% of the issued shares.

(iii) The Constitution itself showed how any defect could be cured

87. In any event, the Respondent's own reliance on the Constitution shows why dismissal was disproportionate. If the Constitution is to be examined, it must be examined as a whole. The Constitution itself provided mechanisms at paragraphs 1.1, 5.1, 17.2, 19.1 and 19.5 by which any alleged defect could have been cured or regularised. For instance, the Constitution further provides that shareholders could pass a resolution relating to the management of the Company which, if passed as a special resolution, would be binding on the Board. It also provided that directors could be appointed by ordinary resolution or by

notice signed by the holder or holders of the majority of ordinary shares, and that the Company could by ordinary resolution increase or reduce the number of directors.

88. Accordingly, if the Respondent is permitted to rely on clause 19.4 of the Constitution to say that the Appellant should have had two directors, the Appellant must equally be permitted to rely on the same Constitution to show that the point was curable. On the basis of Mr Esteves' majority shareholding, and in particular his 96% shareholding if the corporate extract is admitted or included in the Record, he could have procured shareholder action to regularise the position. That could have been done, for example, by appointing another director pursuant to clause 19.1, by passing an ordinary resolution under clause 19.5, or by passing a special resolution under clause 17.2 confirming the Appellant's decision to commence and continue the Application. The alleged defect therefore did not show any absence of corporate will. At highest, it was an internal and curable irregularity.

(iv) ENL Limited confirms that defects in authority are curable

89. ENL Limited (*supra*) confirms that where proceedings have been commenced in the name of a company without proper authority, the proceedings are not for that reason void *ab initio*. The defect is capable of being cured by subsequent ratification, even if the deponents had no authority at the outset.

90. ENL therefore treats the absence of prior formal authority as a procedural or internal defect capable of cure, not as a jurisdictional defect which destroys the proceedings. That principle is important in company matters. In practice, the internal process of authority may not always be complete, contemporaneous or perfectly aligned with the step taken in litigation. If every omission, discrepancy or imperfection in internal authority were treated as fatal, company litigation would too readily become collateral litigation about internal corporate mechanics rather than a determination of the real dispute between the parties.

91. The law therefore sensibly distinguishes between a true absence of corporate will and an internal defect in the manner in which that will has been recorded or evidenced. Where there is a genuine contest as to whether the company wishes to bring or defend proceedings, or where there are competing directors, shareholders, receivers or liquidators, the Court may properly require strict proof. But where, as here, there is no competing corporate voice,

no prejudice, and no suggestion that the proceedings were brought against the company's wishes, an alleged defect in formal authority should be treated as capable of confirmation or ratification.

92. The same analysis applies if the Respondent now seeks to put the point higher by relying on clause 19.4 of the Constitution. If the alleged defect is that Egallys should have had two directors, that too was not a reason to dismiss the Application outright. It was, at highest, an internal defect which could have been regularised under the Constitution itself because the Constitution provides mechanisms for shareholder action to confirm the course already adopted by the Appellant.
93. The point is therefore not that every internal irregularity is irrelevant. It is that, following ENL, an alleged defect in corporate authority should not be treated as automatically fatal where it is capable of ratification or regularisation. The proper course was to permit the Appellant to cure the alleged defect, not to dismiss the Application without any determination of its merits.
94. *Runciman v Walter Runciman plc [1992] BCLC 1084* is consistent with that approach. Its significance is that it recognises that, in company matters, substance may prevail over internal formality where the relevant corporate assent is clear. Simon Brown J held that directors, provided they act unanimously, may act informally, and that informal acquiescence by board members may bind the company. The decision also illustrates why courts should be slow to permit technical internal defects to be used opportunistically where there is no real prejudice or absence of corporate will. On the Appellant's primary case, there were no other directors whose concurrence was required because Mr Esteves was the sole director and therefore the Board. Alternatively, if the Respondent's constitutional argument is entertained, the issue remained one of internal regularity and possible regularisation, not a basis for dismissing the Application outright.

(v) The state of the authorities made ratification far from obvious

95. The other difficulty with the Court of Civil Appeal's approach is that it treated ratification as a possibility but this was not a course which the Appellant could fairly be expected to have taken earlier in the proceedings.

- a. When the Application was entered on 28 August 2020, there was no settled *cursus* requiring a director, let alone a sole director, to produce a Board resolution. The line of cases on which the Respondent later relied upon to found its objection developed during the life of the proceedings.
- b. ***Meaders Feeds*** (*supra*) was delivered on 8 December 2020, after the Application had been entered, while ***Jyoti's Clinic*** (*supra*), ***Laser Informatics*** (*supra*) and ***Barachois Villas*** (*supra*), which adopted the stricter approach, and which the Respondent relied upon for its objection to Mr Esteves' authority, were delivered in 2021 and 2022.
- c. Those cases did not make ratification an potential cure. On the state of the authorities as matters then stood, there was at least serious doubt as to whether a subsequent resolution could retrospectively validate steps already taken. In ***Jyoti's Clinic*** (*supra*) and ***Barachois Villas*** (*supra*), the Court held that a Board resolution could not be passed retrospectively to validate steps already taken by a director on behalf of the company.
 - i. In ***Jyoti's Clinic*** (*supra*), the Court found: "*The next question is whether the requisite mandate can have retrospective effect. It is abundantly clear in view of the observations made in Hassamal, Group Five International Ltd and Mahé (supra) that a Board resolution giving the power to a specific director to institute legal proceedings must already have been passed before any initiative is taken on behalf of the company by that director. The Board resolution cannot be passed by the Board of directors to validate the acts done by a specific director on behalf of the company. In other words, it cannot have retrospective effect*" (emphasis added).
 - ii. In ***Barachois Villas*** (*supra*), the Court stated: "*The case of Mahé P L J & Ors v Mayer A & Ors [2017 SCJ 421] also finds its application inasmuch as it illustrates the fact that a power of attorney is a contract which can only take effect as from the day it is given in order to authorise the designated mandataire to step in for the mandant and that a power of attorney cannot*

have retrospective effect in relation to a mandataire who has already undertaken certain steps on behalf of the mandant. The Board resolution of 08 February 2021 cannot, therefore, be held to be a valid one for the purposes of representing the applicant in the present matter and the application cannot stand”.

- d. The position was only clarified by the Full Bench in **ENL Limited** (*supra*), which itself recorded that the matter had gone before the Full Bench because of the “*confusion*” created by the existing authorities on company representation. However, by the time **ENL Limited** (*supra*) clarified that the lack of a formal resolution does not render proceedings void and that ratification remains open, the Bankruptcy Division had already delivered judgment. The Bankruptcy judgment was delivered on 4 May 2023. ENL was delivered on 19 May 2023. The Court of Civil Appeal was therefore wrong to criticise the Appellant for not having taken a course which, before ENL, the authorities had made at least doubtful.

(vi) The objection was belated

96. The Respondent’s objection itself came belatedly. The matter had been fixed for hearing on its merits on 15 June 2022, with written submissions to be filed one week before that date. [EB/179] The Respondent then raised the preliminary objection in its written submissions dated 7 June 2022. The Appellant’s written submissions expressly recorded that the preliminary objections were being raised “*for the very first time*” by way of written submissions. [EB/180]

(vii) The Appellant did ask for a fair opportunity

97. The Court of Civil Appeal stated: “*It was never the case of the appellant before the trial court that Mr. Esteves should be afforded an opportunity to produce evidence of his authority to represent the company. Nor was it at any stage precluded from doing so*” [EB/261/1-3].

98. This is incorrect. In written submissions before the trial court, the Appellant had submitted that, in all fairness, it ought to be allowed to adduce evidence where the matter had not been

made a fact in issue. The Appellant state: “*It is thus submitted that, in all fairness, the Applicant ought to be allowed to adduce evidence, if any, in that regard*”. [EB/181/7-8]

99. Further and more directly, in oral submissions, the Appellant submitted: “*So, in relation to that what I would say is if it is the case that Your Ladyship would find that it is required that the applicant produces or must have produced a Board Resolution, then we need to give in all fair:ness some time for the applicant to come forward*”. [EB/193]

100. The Court of Civil Appeal was therefore wrong to state that it had never been the Appellant’s case before the Bankruptcy Division that Mr Esteves should be afforded an opportunity to produce evidence of his authority.

(viii) No prejudice

101. No prejudice would and could be caused to the Respondent. The Appellant had been a licensee of the Respondent since 2013, the Respondent having granted it a 15-year ILD licence on 27 August 2013. [EB/107; EB/111; EB/251] The Respondent had also, in the course of its dealings with the Appellant, addressed correspondence to “*The Director, EGALLYS Limited*” for the attention of “*Mr Jose ESTEVES*”, including in relation to the proposed revocation of the Appellant’s licences and the rejection of its application for a Dealer’s Licence. [EB/123; EB/127] The Application also disclosed ongoing litigation between the same parties, including the judicial review proceedings bearing SCR No. 119215 (SA/273/19), in which the Respondent had initially objected to leave but later withdrew its objections, following which leave was granted and the matter was to proceed to the merits. [EB/117; EB/121-122] This was therefore not a case where the Respondent was taken by surprise by Mr Esteves’ role, or where any real prejudice was caused by the absence of a further document confirming his authority.

(ix) Uneven application of the principle

102. The principle was not applied even-handedly. The Appellant took the same objection to the Respondent’s own deponent, Mr Bhoolah, on the basis that he too had produced no document showing that he was authorised by ICTA’s Board to affirm affidavits on its behalf. The Bankruptcy Division recorded that submission. [EB/204] Yet the Application was

dismissed on the objection against Mr Esteves, while no comparable consequence was attached to the alleged absence of documentary authority for the Respondent's deponent.

(x) The existence of the Appellant's claim

103. The Appellant's Application was not a bare technical challenge to the Statutory Demand. The Appellant's case included that there was a substantial dispute, that it had a counterclaim against ICTA, and that ICTA's own conduct was contrary to its legal and regulatory obligations. [EB/109; EB/263-264] The existence of that claim was plainly material to the section 181 inquiry. If the Court was satisfied, or if the parties accepted, that there was a counterclaim, set-off or cross-demand sufficient to meet the statutory threshold, that issue could have disposed of the Statutory Demand on its merits. It was therefore all the more unjust for the Application to be dismissed on a curable authority point without the statutory grounds for setting aside the demand ever being determined.

104. Ultimately, the insistence on a Board authorisation, in the circumstances of this case, elevated form over substance. It may be understandable to insist on strict proof of authority where there is a genuine internal conflict, competing representatives, or some real question as to who is entitled to speak for the company. This was not such a case. The requirement, if it existed, was capable of being cured immediately by a document in which the sole director confirmed his own authority. To dismiss the Application for the absence of that document was to treat a curable internal formality as fatal to access to the statutory remedy under section 181.

105. The result was therefore disproportionate. Egallys' Application to set aside a Statutory Demand for Rs 14,066,666.68 was never heard on its merits. The Bankruptcy Division held that, because the first preliminary objection succeeded, the Application could not proceed, and ordered Egallys to pay the amount claimed by the end of November 2023, failing which ICTA could apply to put Egallys into liquidation. [EB/207] The Court of Civil Appeal maintained that outcome, merely amending the date for payment to the end of November 2024. [EB/261]

106. The Appellant respectfully submits that this was a severe and unjust consequence for what was, at highest, a curable evidential or formal defect. The Court did not determine

whether the Statutory Demand was disputed, whether there was a counterclaim or cross-demand, or whether there were other grounds to set it aside. The proper course was either to reject the objection or, if the Court considered documentary confirmation necessary, to afford the Appellant a short opportunity to produce it.

107. For those reasons, the Appellant respectfully submits that Grounds 5 and 6 should be allowed.

H. DISPOSAL

108. For these reasons the Appellant respectfully submits that the judgment of the Court of Civil Appeal ought to be set aside.

109. The ordinary course would be for the matter to be remitted to the Bankruptcy Division of the Supreme Court, sitting in the Commercial Division, with a direction that the Appellant's application under section 181 of the Insolvency Act be heard and determined on its merits.

110. The Board is further respectfully invited to find that, if the existence of the Appellant's counterclaim or cross-demand is sufficiently established or accepted, there is no useful purpose in remitting the matter merely for the Bankruptcy Division to determine that threshold point. The Record shows that the Application was brought on the basis, among other matters, that there was a substantial dispute, that the Appellant had a counterclaim against the Respondent, and that the Respondent's actions were contrary to its legal and regulatory obligations. The Record also shows that the Appellant has since entered a claim against the Respondent in the sum of MUR 162 million [EB/267-271], with interest and costs, arising inter alia from the Respondent's alleged failure to fulfil its regulatory objectives.

111. In those circumstances, if the Board considers that the counterclaim or cross-demand is properly before it as an established fact, the proper course may be to set aside the Statutory Demand, leaving the parties' respective claims to be determined in the pending proceedings on their merits.

112. Alternatively, the Appellant respectfully submits that the matter should be remitted to the Bankruptcy Division with a direction that the Appellant be permitted, if necessary, to produce the Board resolution or other confirmation, ratification or regularisation of Mr Esteves' authority, and that the Application should then proceed to be determined on its merits.

I. CONCLUSION

113. The Appellant asks that the appeal be allowed, with costs, for the following reasons, among others:

REASONS

1. Because the Court of Civil Appeal wrongly held that a sole director, who is the Board for the purposes of section 128(7)(b) of the Companies Act, required a further Board resolution authorising himself to act.

2. Because the Court of Civil Appeal wrongly treated the absence of a Board resolution or other documentary record as determinative of authority.

3. Because the Court of Civil Appeal wrongly assimilated the institution of proceedings, representation in Court, and affidavit evidence.

4. Because the Respondent had not properly traversed Mr Esteves' authority as sole director in the exchange of affidavits.

5. Because any alleged defect was, at highest, capable of being cured or ratified.

6. Because the dismissal of the Application without any determination of its merits was disproportionate and unjust.

7. Because the Statutory Demand ought not to stand where the alleged debt is disputed and where there is, or is accepted to be, a substantial counterclaim or cross-demand between the parties.

8. The Appellant therefore respectfully asks that the judgments and orders below be set aside, and that the Board either set aside the Statutory Demand or remit the Application to the Bankruptcy Division for determination on its merits, with such directions as the Board considers appropriate.

Vimalen Reddi
Ashvan Luckraz