



UNITED NATIONS DISPUTE TRIBUNAL

Case Nos.: UNDT/NBI/2022/097 -
UNDT/NBI/2022/107
Order No.: 154 (NBI/2022)
Date: 25 October 2022
Original: English

Before: Judge Eleanor Donaldson-Honeywell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MUTOMBO *et al.*

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON THE APPLICANTS'
MOTIONS FOR THE EXECUTION OF
ORDER NOS. 137 (NBI/2022), 138
(NBI/2022), 140 (NBI/2022) AND 142
(NBI/2022)**

Counsel for the Applicants:

Julia Kyung Min Lee, OSLA

Ana Giulia Stella, OSLA

Counsel for the Respondent:

Jacob van de Velden, DAS/ALD/OHR, UN Secretariat

Andrea Ernst, DAS/ALD/OHR, UN Secretariat

Background

1. On 12 and 29 September 2022, among others, the Tribunal received 11 applications for suspension of action (“SOA”) from former staff members of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”). The Applicants were challenging decisions made on 22 August 2022 to delay the issuance of their payroll clearance action forms until the conclusion of investigations by the Office of Internal Oversight Services (“OIOS”) against them for possible fraud.

2. On 29 September, 3 and 5 October 2022, the Tribunal granted the SOA applications vide Order Nos. 137 (NBI/2022), 138 (NBI/2022), 140 (NBI/2022) and 142 (NBI/2022).

3. On 5 and 6 October 2022, the Administration appealed said Orders before the United Nations Appeals Tribunal (“UNAT”) requesting UNAT to find that the UNDT exceeded its competence under the UNDT Statute and to annul the Orders.

4. On 17 October 2022, the 11 Applicants filed identical motions for the execution of Order Nos. 137 (NBI/2022), 138 (NBI/2022), 140 (NBI/2022) and 142 (NBI/2022). The 10 applications were assigned case numbers as set out below.

- a. UNDT/NBI/2022/097 *Mutombo*.
- b. UNDT/NBI/2022/098 *Asumani*.
- c. UNDT/NBI/2022/099 *Kalenga*.
- d. UNDT/NBI/2022/100 *Afazali*.
- e. UNDT/NBI/2022/101 *Muselemu*.
- f. UNDT/NBI/2022/102 *Kalambi*.

- g. UNDT/NBI/2022/103 *Bisimwa*.
- h. UNDT/NBI/2022/104 *Mukwamba*.
- i. UNDT/NBI/2022/105 *Kawende*.
- j. UNDT/NBI/2022/106 *Amisi*.
- k. UNDT/NBI/2022/107 *Kabila*.

5. The motions were transmitted to the Respondent on 18 October 2022 with directions to submit his replies by 19 October 2022. The Respondent was also directed to specifically address the following issues in his replies:

- a. To provide information on the progress made by the Management Evaluation Unit (“MEU”) in answering the management evaluation requests;
- b. To state any other positions for or against the immediate execution of the SOA Orders; and
- c. To indicate whether the UNAT agreed to consider the appeals against the Orders on an expedited basis, and if so, in what time frame.

6. The Respondent filed replies to the motions on 19 October 2022 as directed.

7. On 20 October 2022, the Applicants filed rejoinders to the replies.

Submissions

Applicants’ submissions

8. The Applicants’ cases are summarized below.

- a. On 30 September, 3 and 5 October 2022, Counsel for the Applicants requested the Assistant Secretary-General for Human Resources to release the

Applicants' P.35 forms based on Order Nos. 137 (NBI/2022), 138 (NBI/2022), 140 (NBI/2022) and 142 (NBI/2022).

b. The Administration never responded to the Applicants' requests. Instead, the Administration filed appeals against the Orders to evade compliance.

c. The pending appeals before UNAT on the basis that the UNDT exceeded its jurisdiction do not suspend the execution of the Orders and the Administration must comply with the Tribunal's binding decisions.

d. Articles 12.4 of the UNDT Statute and 32.2 of the UNDT Rules of Procedure provide that parties may apply to the Dispute Tribunal for an order for execution of judgements. Citing *Loto* Order No. 132 (NBI/2020), the Applicants submit that the rule contained in arts. 12.4 of the Statute and 32.2 of the Rules of Procedures, although referring explicitly only to judgments, applies to any executable decision issued by the Tribunal, this interpretation being the only one in compliance with the effectiveness of justice rendered by the Tribunal. The power to issue interim orders is intended to grant applicants measures which, although temporary, must be effective. A different interpretation would render judicial orders totally ineffective, unable to bind the Administration and therefore not juridical and completely useless.

e. The Administration's argument before the UNAT that the execution of the said Orders would be permanent and not reversible is irrelevant.

f. In consideration of the content of Order Nos. 137 (NBI/2022), 138 (NBI/2022), 140 (NBI/2022) and 142 (NBI/2022), the Administration is bound to release the Applicants' P.35 forms despite the pending appeals before UNAT. To date, the execution of the Orders has not been implemented by the Administration and its urgency is self-evident. The Applicants and their families continue to face immense financial distress and are struggling to

survive. Their pension benefits and final entitlements are being withheld indefinitely in violation of ST/AI/155/Rev. 2 (Personnel payroll clearance action) and staff rule 3.5 even though the investigation has not established indebtedness.

g. On 18 October 2022, upon receipt of the Applicants' motions, Counsel for the Respondent contacted Counsel for the Applicants to inform for the first time that progress had been made to release the Applicants' P.35 forms to the extent of the release of PF.4 forms to the United Nations Joint Staff Pension Fund ("UNJSPF") and sought for the Applicants to withdraw their motions.¹

h. On 18 October 2022, Counsel for the Applicants responded to the Respondent indicating that they did not have any instructions to withdraw the Applicants' motions.

i. Articles 7(5) of the UNAT Statute and 8(6) of the UNAT Rules of Procedure are not applicable to the appeals against the Tribunal's Orders granting the SOA applications.

j. The Respondent contends that the issue of execution of the Tribunal's Orders is moot. The Respondent faults the Applicants for not requesting expedited hearings of the appeals and for not having filed their responses to the appeals despite the Appeal Tribunal's direction to the Applicants to file their responses within 30 days.

k. If the matters has indeed become moot, as alleged by the Respondent, then the Respondent should have withdrawn his appeals of Order Nos. 137 (NBI/2022), 138 (NBI/2022), 140 (NBI/2022) and 142 (NBI/2022). However,

¹ With respect to *Mukwamba*, the Respondent informed that the revised estimation of the alleged loss to the Organization received from the OIOS was only USD3,893.002 instead of the originally estimated amount of USD22,564.70 as initially claimed by the Organization. Because this new estimate was still higher than his final entitlement, his P.35 form would continue to be retained and the PF.4 notification form to UNJSPF would be withheld, unlike the rest of the MONUSCO former staff members in similar situation.

no such actions were taken by the Respondent despite having received information from OIOS of the revised estimations of the alleged losses to the Organization on 10 October 2022 and the alleged directions from the Under-Secretary-General for Management, Strategy and Policy and Compliance (“USG/DMSPC”) to release the Applicants’ final entitlements on 14 October 2022.

l. To the Applicants’ knowledge, no other submissions have been filed by the Respondent to update the UNAT of any development described in the reply. The Applicants have also not yet received any decisions from the MEU in their cases.

m. The Respondent is effectively trying to reargue this Tribunal’s Order Nos. 137 (NBI/2022), 138 (NBI/2022), 140 (NBI/2022) and 142 (NBI/2022) in his concluding remarks by advancing the same arguments that he submitted in his appeals before the UNAT on 5 and 6 October 2022. This is not the right forum for the Respondent to raise such arguments.

9. Based on the forgoing, the Applicants request the execution of Order Nos. 137 (NBI/2022), 138 (NBI/2022), 140 (NBI/2022) and 142 (NBI/2022) and, consequently, the release of their P.35 forms without further delay.

Respondent’s submissions

10. The following is a summary of the Respondent’s case.

a. Order Nos. 137 (NBI/2022), 138 (NBI/2022), 140 (NBI/2022) and 142 (NBI/2022) are under appeal. The execution is thus suspended pursuant to art. 7(5) of the UNAT Statute.

b. In arguing the contrary, the Applicants rely on old, superseded law. Article 7(5) of the UNAT Statute was amended eight months after *Igbinedion*

2014-UNAT-410 by General Assembly resolution 69/203, adopted on 18 December 2014.

c. Instead, the Applicants could have requested expedited hearings of the appeals, like the Respondent did. To date, the Applicants have not filed responses to the appeals. UNAT is therefore unable to urgently rule.

d. The issue of execution is moot. MONUSCO has already been instructed and confirmed the processing of the Applicants' P.35 forms on 11 October 2022, based on new information received from OIOS on 10 October 2022 on the estimated losses caused by the Applicants' alleged medical insurance fraud. The associated PF.4 notifications to the UNJSPF were to be sent by 21 October 2022, following the resolution of practical issues. The MEU confirmed that its recommendations on the matters were to be submitted for approval on the week ending 21 October 2022.

e. The Applicants' suggestion that the Respondent has been idle, is far from the truth. The Respondent has been working tirelessly and in good faith to safeguard the interests of the Applicants and the Organization and has updated the Applicants' Counsel accordingly.

f. In response to the Tribunal's direction that the Respondent also address any other positions for or against the immediate execution of the SOA Orders, the Respondent submits that the Orders ordered specific performance that is permanent in nature, i.e., the release of the P.35 forms, which cannot be reversed, preventing any future financial recovery, before the management evaluation is concluded. The Orders did not order a suspension of action, temporary in nature, pending the management evaluation, to which the Tribunal is empowered. If the management evaluation results in the upholding of the contested decisions of the USG/DMSPC to temporarily delay release of the P.35 forms, these decisions need to be implemented. However,

implementation would be impossible if the P.35 forms were already released before the end of the management evaluation.

g. To allow these Orders to be executed would therefore not maintain a *status quo* but would grant final relief that would negatively impact the functioning of the Organization, resulting in detrimental consequences on its operational effectiveness.

11. The Respondent, therefore, requests the Tribunal to reject the Applicants' motions.

Considerations

12. The Tribunal takes cognizance of the underlying factor of trust and confidence duly placed by the Applicants in the enforceability of its Orders. This trust derives from the regulatory framework governing the UNDT which provides for non-appealability of certain types of Orders issued by the UNDT. There is a concern that the Respondent may be wrongly using the process of appealing "non-appealable" SOA orders to UNAT, which in effect may suspend UNDT SOA orders indefinitely, whether or not the Respondent ultimately succeeds. Such action would have serious implications in undermining the effectiveness of the SOA relief procedures for the Applicants. In essence it could render their approach to the UNDT for SOA relief futile in any event.

13. An examination of the regulatory framework sheds light on the view of the Applicants that the SOA Orders made in their favour were not properly subject to the appeals filed by the Respondent and instead ought to have been immediately enforced.

UNDT Statute

Article 2.2

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute Tribunal **to suspend, during the pendency of the**

management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. **The decision of the Dispute Tribunal on such an application shall not be subject to appeal**

Article 11.3

The judgements **and orders** of the Dispute Tribunal shall be binding upon the parties, but **are subject to appeal** in accordance with the statute of the United Nations Appeals Tribunal. In the absence of such appeal, **they shall be executable following the expiry of the time provided for appeal** in the statute of the Appeals Tribunal. **Case management orders or directives shall be executable immediately.**

UNAT Statute

Article 2

1. The Appeals Tribunal shall be competent to hear and pass judgement on an appeal filed **against a judgement** rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has:

- a. Exceeded its jurisdiction or competence

Article 7

1. An appeal shall be receivable if:

(a) The Appeals Tribunal is competent to hear and pass judgement on the appeal, pursuant to article 2, paragraph 1, of the present statute;

... and

(c) The appeal is filed within 60 calendar days of the receipt of the judgement of the Dispute Tribunal or **within 30 calendar days of the receipt of the interlocutory order** of the Dispute Tribunal...

5. The filing of appeals shall have the effect of suspending the execution of the judgement **or order** contested. [emphasis added]

14. It is clear from the foregoing that although art. 2.1 of the UNAT Statute does not specifically mention Orders as being appealable, all other relevant provisions of both the UNAT and UNDT statutes make clear by specific references to “Orders” that they can be subject to appeals to UNAT. In considering the apparent lacuna at art. 2.1, UNAT opined as follows in *Nadeau*²,

This provision does not clarify whether the Appeals Tribunal may only hear an appeal from a final judgment of the Dispute Tribunal or whether an interlocutory or interim decision made during the course of the Dispute Tribunal’s proceedings may also be considered a judgment subject to appeal. However, our Tribunal has consistently decided that “[a]n interlocutory appeal is only receivable in cases where the Dispute Tribunal has clearly exceeded its jurisdiction or competence.

15. It is clear based on the foregoing that some UNDT Orders may be appealed. On the other hand, the regulatory framework exempts certain types of Orders from being subject to appeals. In the instant cases, the Applicants cite art. 2.2 of the UNDT Statute in contending that appeals ought never to have been filed by the Respondent as they are not receivable by UNAT. The UNDT reserves comment on this point as it is currently the subject matter of appeals rightly or wrongly filed by the Respondent.

16 In addition to the regulatory framework, the Applicants rely on the jurisprudence of the UNDT in contending that the SOA Orders are immediately enforceable such that the Tribunal has jurisdiction to issue the execution Orders sought by their motions.

17. However, of the cases cited in the Applicant’s submissions, three which would have fully supported their motion i.e, *Villamorán*³, *Igunda*⁴ and *Igbinedion*⁵, have been superseded by changes to the UNAT statute. Previously art. 7.5 only provided that “the filing of appeals shall have the effect of suspending the execution of the judgement” but then later by General Assemble Resolution 69/203 adopted on

² 2020-UNAT-1072, para. 31.

³ 2011-UNAT-160.

⁴ 2012-UNAT-255.

⁵ *Op cit.*

18 December 2014, there was an amendment. Now, a pending appeal also has the effect of suspending any Order that is being contested before UNAT. On a literal interpretation of art. 7.5, the suspension is in effect and binding on the UNDT. This is so even if the Respondent's use of the appeals process to achieve such a suspension is not lawfully grounded within the regulatory framework and or lacks good faith.

18. The reliance by the Applicants on *Loto*⁶ and *Gizaw*⁷, as cases where after the 2014 amendment to art. 7.5 the UNDT reaffirmed the above three cases, is misplaced. These recent Orders issued in 2020 and 2018 respectively did not involve cases where there was a pending appeal. Some of the content of the Order in *Loto* at paras. 42 and 43 seems to support that even if there is an appeal pending, the UNDT's SOA Order remains enforceable. As there was no pending appeal to UNAT against the SOA in *Loto*, the said content was *obiter dicta*. As *Loto* and *Gizaw* addressed different circumstances from the instant cases, the Applicants' reliance on them to persuade the Tribunal to enforce SOA Orders while an appeal against the said Orders is pending is not persuasive.

19. In these circumstances the Tribunal, without endorsing the seemingly unorthodox approach taken by the Respondent in circumventing the non-appealability of SOA Orders, must treat with the SOA orders issued in favour of the Applicants as suspended until UNAT determines the appeals.

20. The Tribunal notes that while simultaneously pursuing the approach of appealing the SOA orders, thereby achieving an artificial suspension of the suspending effect of the Orders the Respondent has largely acted in good faith. The good faith aspect of this approach has resulted in expeditious compliance with the Tribunals Orders in all but one of the cases. The Tribunal commends the Respondent for the said approach and the parties for working together to achieve resolution of

⁶ *Op cit.*

⁷ Order No. 44 (NY/2018).

those cases. In those cases, there is no longer any aspect of the SOA Orders to be enforced. Accordingly, those motions are moot and will be dismissed for that reason.

21. The sole remaining motion where the SOA has not been enforced will be dismissed as it is not receivable by the Tribunal at this time there being a pending appeal.

ORDER

22. The motions are dismissed.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 24th day of October 2022

Entered in the Register on this 24th day of October 2022

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi