



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/086
Order No.: 023 (NBI/2023)
Date: 30 January 2023
Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MARUSCHAK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON CASE MANAGEMENT AND
ON THE RESPONDENT'S MOTION TO
DISMISS THE APPLICATION FOR
MANIFEST ABUSE OF PROCESS**

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Jacob van de Velden, DAS/ALD/OHR, UN Secretariat
Isavella Vasilogeorgi, DAS/ALD/OHR, UN Secretariat

Facts and Procedure

1. On 24 June 2019, the Applicant filed an application challenging his separation from service for misconduct, with compensation *in lieu* of notice and without termination indemnity.
2. The Respondent filed a reply on 26 July 2019.
3. A case management discussion (“CMD”) took place on 26 February 2021.
4. On 2 June 2021, the Counsel acting for the Applicant informed the Tribunal, by an *ex parte* filing, that they were withdrawing as Counsel for the Applicant.
5. After Counsel’s withdrawal, between 9 June and 3 August 2021, the parties filed miscellaneous motions. Relevant to this Order is the 9 June 2021 Respondent’s motion for dismissal and cost award for the Applicant’s manifest abuse of process by forgery accompanied by an *ex parte* filing of evidence of manifest abuse of process to which the Applicant responded on 26 July 2021. On 3 August 2021, the Respondent filed a motion in response to the Applicant’s 26 July 2021 submission and reiterated the same arguments in a subsequent motion filed on 31 August 2021 providing justification why the application should be dismissed summarily.

Motion to find Applicant abused process and order for costs.

6. In a 14 June 2021 motion, the Respondent requested the Tribunal to reject two motions filed by the Applicant on 12 June 2021 because if the Respondent’s motion of 9 June 2021 was granted, the application would be dismissed and the proceedings would terminate, without a ruling on the Applicant’s 12 June 2021 motions being required. Accordingly, the Respondent requested the Tribunal first to rule on the Respondent’s 9 June 2021 motion on abuse of process.

7. On 13 July 2021, the Tribunal issued Order No. 137 (NBI/2021) requesting the Applicant to respond to the allegations of abuse of process which he did on 26 July 2021. In his response, the Applicant submitted that,

[o]n 15 March, under request of his Counsel, the Applicant sent copies of multiple requested documents. All copies were unfolding the Applicant's private life after he left United Nations service and were not related to the facts under discussion in the Case UNDT/NBI/2019/086. On that day the Applicant was on humanitarian mission to Yemen with NGO and he sent the copies by titles of the documents, without checking content and while working in the field in Yemen he accidentally picked up and filed the wrong draft copies rather than intended real official documents the Applicant actually wanted to file with the Counsel. There was a mistake of fact. It was not an intentional act as the Applicant presented wrong copies by mistake without the requisite intent to file a false document and of knowing that he sent wrong copies.

8. On 3 August 2021, the Respondent filed a "Motion regarding Applicant's 26 July 2021 submission". In said motion, the Respondent reiterated his request that the Tribunal find that the Applicant manifestly abused process and award full costs to the Respondent.

9. The Tribunal convened a second CMD on 20 August 2021 where all motions were discussed and resolved. Regarding the motion to dismiss the application for manifest abuse of process, on 26 August 2021 the Tribunal issued Order No. 174 (NBI/2021) in which it observed that:

The Tribunal has considered the nature of the allegation and agrees that it is grave and would potentially undermine the justice system. The Tribunal has also considered that the Applicant on his own motion applied to withdraw the offensive documents, the Tribunal has taken into account that at the time of withdrawing the documents, it had not made any decision in reliance of those documents and the Applicant regretted his action, furthermore the documents once withdrawn had no prejudicial effect on the Respondent's case. Based on these considerations, the Tribunal rejects the Respondent's motion to dismiss the application and order costs against the Applicant for manifest abuse of process, instead, the Tribunal orders that the

offensive documents be expunged from the record.¹

10. The Tribunal made case management orders including that

11. The Tribunal orders the expungement from the case record the Applicant's submissions on an amended remedy of 15 March 2021 and 6 May 2021 and the attached Annexes 22 – 27.

11. By an email to the Registry dated 16 October 2021, the Respondent informed the Tribunal that he had appealed Order No. 174 (NBI/2021) and requested the Tribunal to stay the proceedings pending the outcome of the appeal.

12. On 26 August 2021, the United Nations Appeals Tribunal ("UNAT") issued its Judgment No. 2022-UNAT-1282 ("UNAT Judgment") partly granting the Respondent's appeal and remanded the case back to this Tribunal for consideration as per the directions issued by UNAT. The relevant parts of the UNAT Judgment for purposes of this Order are:

a. Paragraph 19.

The UNDT's decision rejecting the Secretary-General's motion for summary judgment dismissing [the Applicant's] case finally, and for costs, was not one taken by the Dispute Tribunal in excess, or in the absence, of its jurisdiction. The UNDT is empowered to make such orders. Nor is its decision effectively irremediable: if it was wrong, it is open to the Secretary-General to seek again to persuade the UNDT to dismiss [the Applicant's] case and to award costs against him. And there will be a second, appellate, opportunity to achieve that result if the Secretary-General is still unsuccessful.

b. Paragraph 21.

We turn now to what we conclude is the receivable part of the appeal, relating to the UNDT's Order for expungement of the impugned documents from its case file. This is receivable because, unless the documents are preserved for use at trial, they may be lost with the consequence that the Secretary-

¹ Paragraph 10.

General will be unfairly disadvantaged in being unable to use them to establish his allegations of forgery and fraud as he is entitled to as we have outlined above. So, the UNDT's Order is, in this respect, effectively irremediable. Further, this would be a manifestly unreasonable consequence of the Order for the Secretary-General. The circumstances are so rare and exceptional that it is just to allow this element of the Order to be appealed.

c. Paragraph 22.

We consider that the UNDT did err when it directed that the impugned documents filed by [the Applicant] be expunged from its file. Those documents filed by Mr. Maruschak will be relevant, if not to [the Applicant's] case before the UNDT, then to the Secretary-General's case in opposition to [the Applicant's] claims and, for the Secretary-General's defense to the remedies claimed by [the Applicant], and particularly in cross-examination of him. If the Secretary-General is successful in persuading the UNDT that these documents are forgeries perpetrated deliberately by [the Applicant] and/or that he has otherwise abused the judicial process, any resulting loss of his credibility and reputation may deprive [the Applicant] of remedies even if he establishes that his separation from service was wrongful.

d. Paragraph 23.

The impugned documents should have been and should now be retained by the UNDT to be available for use at the substantive hearing if required by the Secretary-General. It is for the UNDT to recover them. If they have already been returned to [the Applicant], then the Secretary-General may compel their re-production by [the Applicant], to the Dispute Tribunal.

e. Paragraph 24.

For completeness and to address [the Applicant's], submissions about how his case should be dealt with henceforth, we state that it is the role of the UNDT itself, and not of any external agency as the Respondent proposes, to determine the Secretary-General's allegations, [the Applicant's], denials of them and his document and other evidence admissibility objections. The UNDT is seized of the case and is the master of its own procedures, subject only to appeals to the UNAT.

13. On 18 January 2023, pursuant to the UNAT Judgment, the Tribunal called for a CMD where the parties discussed their understanding of the UNAT decision and its implications on the further conduct of the proceedings.

14. The Respondent was of the view that the UNAT Judgment had two implications as follows:

a. That it is open to the Respondent to again request the Tribunal to reconsider, at this stage, summarily dismissing the Applicant's case for a manifest abuse of process by his filing of forged documents, and to award costs.

This time around, the Tribunal would make such a ruling on that motion on the basis of the full record, including the alleged forged documents that the Tribunal previously expunged from the record (paragraph 19 of the UNAT Judgment).

b. That if the Tribunal were not to dismiss the case at this stage, there should be a further CMD on whether a hearing is necessary. If the Tribunal were to determine that the hearing is necessary, that CMD should address how and when that hearing should proceed, including addressing the question whether the seven witnesses called by the Applicant are relevant to the material issues in the case on the merits. Should the Tribunal find that the Applicant otherwise abused the judicial process, any resulting loss of his credibility and reputation may deprive him of remedies, even if he establishes that his separation from service was wrongful.²

15. Counsel for the Respondent then opted to resubmit the 9 June 2021 motion for the Tribunal to consider the expunged documents and find that the Applicant had abused the judicial process entitling the Respondent to a summary judgment and award costs against the Applicant. Counsel recalled that the Applicant filed forged documents in his 31 August 2021 motion in support of his application. This, Counsel

² Paragraph 22 of the UNAT Judgment.

says, further supports the conclusion that this case should be dismissed. The Respondent's Counsel stated that the relevant document supporting the motion and documents in opposition to the motion were already in the Tribunal's records and hence it was not necessary to reargue the matter and that the Tribunal should make a ruling based on the documents on the record.

16. The Applicant stated that he understood the implications of the UNAT Judgment and agreed with the Respondent's interpretation that the matter should go for another CMD to discuss further conduct of the application for purposes of a hearing on the merits. He opposed the Respondent's request to summarily dismiss the application for manifest abuse of process.

17. The Applicant further recalled that he had withdrawn his claim for moral damages through motion filed on 2 June 2021. He confirmed that he would not be pursuing the claim for moral harm the subject of the disputed documents.

Considerations

18. The Tribunal may issue a summary judgment in an application if the requirements under art. 9 of the UNDT Rules of Procedure are met. It stipulates that,

[a] party may move for summary judgement when there is no dispute as to the material facts of the case and a party is entitled to judgement as a matter of law. The Dispute Tribunal may determine, on its own initiative, that summary judgement is appropriate.

19. According to this rule, the requirements that must be satisfied are twofold, that the material facts are not in dispute and that the party seeking summary judgment is entitled to judgement as a matter of law. Applying these elements to the motion by the Respondent, the Tribunal finds that it fails on both requirements.

20. The material facts are in serious dispute although the Respondent tried to argue that the parties are agreed that the disputed documents are false documents. The Applicant filed a motion and repeated in his oral presentation that the documents were drafts and that he had filed them erroneously. When he realized that the

documents were wrongfully filed, he filed a motion to withdraw them. He has not admitted that the documents were forgeries.

21. The Respondent has not made a case that he is entitled to summary judgment as a matter of law which is the second requirement. The subject matter of the motion is remedy for manifest abuse of process. There is a clear remedy available to the Respondent as a matter of law if he proves that the Applicant has manifestly abused process. This remedy is provided in art.10(6) of the Statute of the United Nations Dispute Tribunal, and it states,

[w]here the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party.

22. The internal justice system has on several occasions dealt with this provision and in no case has it summarily dismissed an application on the ground that an applicant had abused process. The following jurisprudence is relevant to the case at hand:

23. In *Bagula*³, UNAT observed that the Appellant, Mr. Bagula, had manifestly abused process by producing,

... two impostors (Buroko and Rubangiza) as witnesses, who testified that they had lied to the investigators and also made false allegations against the Appellant. Later during a hearing at Kinshasa, the UNDT asked the real Buroko and Rubangiza whether they were the same persons who had testified via teleconference. They denied ever having done so. The Appellant was unable to provide any explanation. The Dispute Tribunal also received testimonies from Mirindi and Mulolo to the effect that the Appellant had tried to bring impostors to appear before a UNDT hearing in Kinshasa.

24. In view of that manifest abuse process, the Dispute Tribunal in *Bagula*⁴ awarded costs against the applicant. On appeal, UNAT affirmed the UNDT decision.

³ 2012-UNAT-237.

⁴ UNDT/2011/138.

25. Therefore, as the jurisprudence stands, the jurisdiction of a Tribunal to award costs is narrowly restricted by statute to cases in which it determines that a party has manifestly abused the proceedings before it.⁵ Further, it has been held that the threshold is high for a finding of manifest abuse of process,

... for an applicant party to attain and recent case law illustrates that such an order will be rarely made, and usually after the party has been fairly warned of that consequence if the party's abuse of process continues.⁶

26. In interpreting and applying art. 9(2) of the UNAT Statute, which is *pari materiae* to art. 10(6) of the UNDT Statute, UNAT held that if a party provides the Tribunal with decisive information that is wrong and misleading, this amounts to a manifest abuse of process of very serious nature. Such action puts the entire integrity of the judicial system at risk—it may not only lead to undue and costly delays, but also lead to straightforwardly incorrect decisions.⁷ Even in that case, whose facts are almost similar to the case at hand, there was no suggestion that the Respondent's case be dismissed summarily on the ground that he had manifestly abused process. Instead, UNAT observed that “(w)here the Appeals Tribunal determines that a party has manifestly abused the appeals process” ... “it may award costs against that party”.⁸

27. The Applicant has consistently argued that he filed the documents in error and that he had promptly withdrawn the documents so as not to mislead the Tribunal. In this regard, in *Abu Rabei*⁹, UNAT held,

... experience shows that errors are made by the most assiduous organisations and by the most conscientious staff they employ, and

⁵ *Machanguana* 2014-UNAT-476, para. 12, citing to *Bi Bea* 2013-UNAT-370; *Wasserstrom* 2014-UNAT-457; *Tadonki* 2014-UNAT-400; *Gehr* 2013-UNAT-328; *Gehr* 2013-UNAT-333; *Balogun* 2012-UNAT-278; *Mezoui* 2012-UNAT-220; *Kamunyi* 2012-UNAT-194; *Ishak* 2011-UNAT-152; *Andati-Amwayi* 2010-UNAT-058.

⁶ *Abu Rabei*, 2020-UNAT-1060, para. 30 and also see *Nouinou* UNAT Order No. 353 (2019), para. 3 citing to *Nouinou* Order No. 348 (2019), para. 7.

⁷ *Chhikara* 2020-UNAT-1014, para. 30, citing to *Chhikara* UNDT/2019/150, para. 46.

⁸ *Ibid.*, at para. 33.

⁹ *Op. Cit.*, at para. 29.

that sometimes these errors are repeated and not identified, at least in a timely manner. In cases of genuine errors made in good faith, even long ago, these should be able to be corrected where there is reliable and convincing evidence of such errors.

Conclusion

28. The penalty for a manifest abuse of process before the Dispute Tribunal can only be invoked after the Tribunal has decided that the Applicant has manifestly abused the process. The remedy is costs awarded against the party found to have manifestly abused the process.

29. Contrary to the Respondent's contentions, art. 9(2) of the UNDT Rules of Procedure is not applicable to the issues in the case at bar because there is a dispute as to the material facts of the case and the Respondent is not entitled as a matter of law to a summary judgment.

30. The Applicant has withdrawn his claim for moral damages the subject of the motion for manifest abuse of process, hence, neither the Tribunal nor the Respondent shall be misled nor shall any delays be caused trying to prove the authenticity of the documents at the hearing of these proceedings.

Order

31. The Respondent's motion to summarily dismiss the application for a manifest abuse of process is denied. The Tribunal shall proceed to hear the application on the merits. During the proceedings, issues relating to evidence shall be dealt with according to the UNDT Rules of Procedure.

32. A CMD will be convened on 9 February 2023 at 3.00 p.m. (Nairobi time) to agree on the further conduct of the application so that it is disposed of with justice, fairness and expedience.

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(Signed)

Judge Rachel Sophie Sikwese

Dated this 30th day of January 2023

Entered in the Register on this 30th day of January 2023

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi