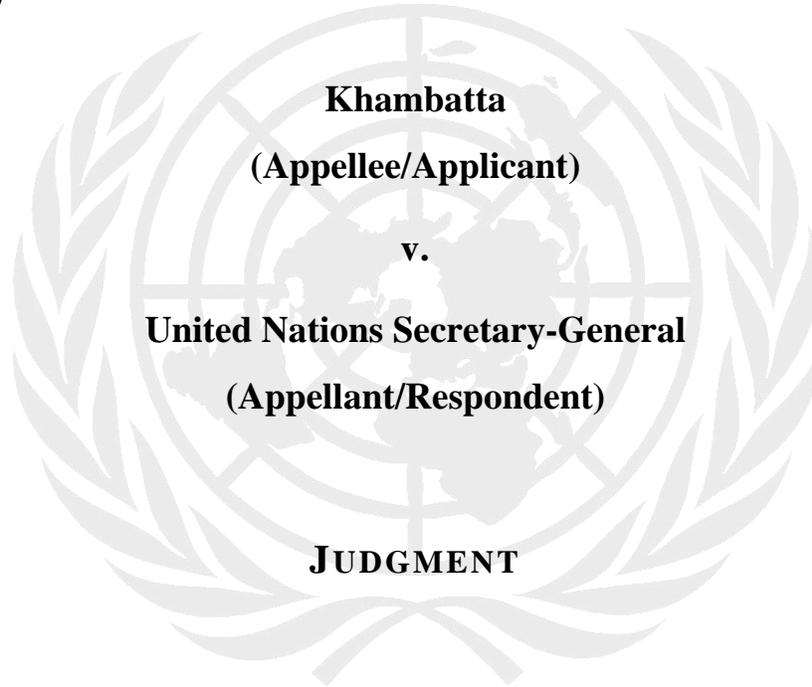




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2012-319



**Khambatta
(Appellee/Applicant)**

v.

**United Nations Secretary-General
(Appellant/Respondent)**

JUDGMENT

Before: Judge Jean Courtial, Presiding
Judge Sophia Adinyira
Judge Kamaljit Singh Garewal

Judgment No.: 2012-TANU-252

Date: 29 June 2012

Registrar: Weicheng Lin

Counsel for the Appellee/Applicant: Miles Hastie

Counsel for the Appellant/Respondent: Simon Thomas

JUDGE JEAN COURTIAL, Presiding

Summary

1. The United Nations Appeals Tribunal (“Appeals Tribunal”) is seized of an appeal dated 30 April 2012 by the United Nations Secretary-General against Judgment No. UNDT/2012/058 rendered in New York on 26 April 2012 by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT). Ms. Tanaz Khambatta filed a brief of defence on 29 May 2012.

2. This court has consistently held that as a general rule only appeals against judgments concerning matters of substance are receivable. Appeals against decisions taken during proceedings, however denominated by the UNDT (order, judgment, etc.), are non-receivable save in the exceptional cases where the UNDT has clearly exceeded its competence. However, it has become established in the jurisprudence of the Appeals Tribunal that the UNDT clearly exceeds its competence when it takes decisions on matters outside the area of jurisdiction conferred on it by its Statute and the competence inherent in any tribunal called upon to dispense justice in a system of administration of justice governed by law and respect for the rights of those within its jurisdiction.

3. In this specific case the Secretary-General is appealing on the grounds that, in ordering the suspension of the decision not to extend Ms. Khambatta’s contract without giving the respondent an opportunity to submit its observations in response to the application for suspension, the UNDT violated the rights of the defence.

4. As stated above, even where the court of first instance has committed a procedural error – which, in view of the specific nature of the interim measures, is far from certain – it did not in so doing clearly exceed its competence. Consequently the Secretary-General’s appeal is non-receivable and is dismissed.

Facts and procedure

5. Ms. Khambatta worked for the Department of Peacekeeping Operations (DPKO) from January 2010 until May 2011 on a temporary appointment. At the end of May 2011, a few days before the end of her temporary appointment, she resigned from the DPKO to enter the service of the Office of the United Nations Stabilization Mission in Haiti (MINUSTAH) as a planning specialist with effect from 2 June 2011.

6. She subsequently signed a number of letters of temporary appointment with MINUSTAH of varying durations, extending her service up to 1 May 2012. On 10 April 2012 she received a memorandum informing her that her temporary appointment would not be extended beyond 1 May 2012 and that, pursuant to Administrative Instruction ST/AI/2010/4/Rev.1, she must take a break in service of not less than three months.

7. On 20 April 2012 she filed a request for management evaluation of the decision not to extend her temporary appointment beyond 1 May 2012.

8. On 24 April 2012 she filed an application with the UNDT for suspension of action on the contested administrative decision. The Secretary-General states that the UNDT Registry served the application on him on the afternoon of 25 April 2012, stating that no response to the application was required from him, as the judgment would be rendered on the basis of the papers already before the Tribunal.

9. In Judgment No. UNDT/2012/058 the UNDT ordered suspension of the decision not to extend Ms. Khambatta's contract pending the outcome of the management evaluation, since all the conditions listed in paragraph 2 of article 2 of the Tribunal's Statute had been fulfilled. The judgment stated that article 13 of the Tribunal's Rules of Procedure did not oblige it to require a reply from the respondent before ruling on the application, but that the latter should nevertheless be served on the respondent. The Tribunal also stated that consideration of an application for suspension of action on an administrative decision must be expeditious and that it was not required to give a reasoned judgment on the facts or the law, and the parties should have no expectations in that regard; to do so would defeat the underlying purpose of a speedy and cost-effective mechanism.

Submissions

The Secretary-General

10. The Secretary-General appealed this judgment, stating that he was not contesting the findings of the UNDT on the substance of the application for suspension of action filed by Ms. Khambatta. The appeal related solely to a question of competence. In ordering suspension of action on the contested decision the UNDT had committed an error of law and exceeded its competence. By requiring the Registry to serve the application on the respondent, and requiring the Tribunal to consider the application within five working days following the date of its being served on the respondent, the Rules of Procedure gave effect to the principle of *audi alteram partem* and gave the respondent an opportunity to respond within an adequate

minimum period. In ruling on Ms. Khambatta's application for suspension of action without allowing the Secretary-General to reply, the UNDT had violated the well-established principle of *audi alteram partem* and exceeded its competence, erred on a question of law and committed a procedural error which could affect the outcome of the case. The Secretary-General contends that the Dispute Tribunal breached the principle of equality before the courts. When in the course of proceedings a judgment is rendered creating an obligation on one party or containing preliminary decisions (even on a *prima facie* basis), all parties should have an equal right of response to the submissions and evidence produced.

Ms. Khambatta

11. In her reply Ms. Khambatta states that the appeal is non-receivable and pointless, since the management evaluation had already been planned when the judgment was rendered and that consequently rescission of the judgment would have no practical effect. She also states that article 13 of the UNDT's Rules of Procedure does not provide for a systematic right of reply in cases of applications for suspension of action under the same article. The Appeals Tribunal had already indicated by implication in the *Villamorán* case that there was no need to call on the Administration to respond to every application for suspension; the Appeals Tribunal's Practice Direction did not provide for a right of reply, even with regard to interim measures, and the *audi alteram partem* principle did not systematically confer a right of reply in every proceeding. Moreover, there was no provision for a right of reply in the Statute of the UNDT; the right of reply as defined in the UNDT's Rules of Procedure was confined to responding to a reply on matters of substance and the right to attend hearings.

Considerations

12. This tribunal has consistently held that as a general rule only appeals against judgments concerning matters of substance are receivable. Appeals against decisions taken during proceedings, however denominated by the UNDT (order, judgment, etc.), are non-receivable save in those exceptional cases where the UNDT has clearly exceeded its competence.¹

13. It has become established in the jurisprudence of the UNAT that the UNDT clearly exceeds its competence when it takes decisions on matters outside the area of jurisdiction conferred on it by its Statute and the competence inherent in any tribunal called upon to dispense justice in a system of administration of justice governed by law and respect of the rights of those within its jurisdiction.

¹ *Bertucci v. United Nations Secretary-General*, Judgment No. 2010-UNAT-062 (whole Tribunal), Judge Boyko dissenting.

14. Consequently, in earlier cases where the UNDT has ordered suspension of action on an administrative decision extending beyond the end of the management evaluation, in violation of the limitation on its competence defined in article 2(2) of its Statute, the Appeals Tribunal has considered an appeal against such a finding receivable and founded.²

15. On the other hand, the Appeals Tribunal has considered that the UNDT enjoys wide powers of appreciation in all matters relating to case management and that it must not interfere lightly in the exercise of the jurisdictional powers conferred on the tribunal of first instance to enable cases to be judged fairly and expeditiously and for dispensation of justice.³ For this reason, in pursuance of the provisions of article 2(2) and 10(2) of the UNDT Statute, appeals against decisions taken in the course of proceedings - both decisions relating to procedure, the establishment of proof or the production of documents, and orders imposing interim measures - are non-receivable, even where the judge in first instance has committed an error of law or fact relating to the application of the conditions to which the grant of a suspension of action is subject or a procedural error.

16. In this specific case the United Nations Secretary-General alleges that the UNDT, in issuing its order without waiting for a response to the suspension application, has violated the rights of the respondent.

17. As stated above, even where the court of first instance has committed a procedural error – which, in view of the specific nature of the interim measures, is far from certain – it did not in so doing clearly exceed its competence. Consequently the appeal of the Secretary-General is non-receivable.

² *Tadonki v. United Nations Secretary-General*, Judgment No. 2010-UNAT-005, *Onana v. United Nations Secretary-General*, Judgment No. 2010-UNAT-008, *Kasmani v. United Nations Secretary-General*, Judgment No. 2010-UNAT-011, *Igbinedion v. United Nations Secretary-General*, Judgment No. 2011-UNAT-159.

³ *Bertucci v. United Nations Secretary-General*, Judgment No. 2010-UNAT-062 (whole Tribunal), Judge Boyko dissenting

Judgment

18. The appeal of the Secretary-General is dismissed.

Original and Authoritative Version: French

Done this 29th day of June 2012 in Geneva, Switzerland.

(Signed)

Judge Courtial, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Garewal

Entered in the Register on this 12th day of September 2012 in New York, United States.

(Signed)

Weicheng Lin, Registrar
