



**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Jean-Pelé Fomété

MASRI

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON AN APPEAL AGAINST  
SUMMARY DISMISSAL**

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**Counsel for Applicant:**

Edwin Nhliziyo

**Counsel for Respondent:**

Stephen Margetts, ALU/OHRM

## **1. *Employment History***

1.1 The Applicant joined the Organization in March 1982 on mission with the United Nations Disengagement Observer Force in Syria (UNDOF), as a local buyer in Procurement. In 1994, the Applicant was assigned to the United Nations Assistance Mission for Rwanda (UNAMIR) as a Procurement Assistant. Between 1996 and 1997, the Applicant was reassigned to UNDOF but resigned in 1997. In March 2000, the Applicant joined the United Nations Mission in the Democratic Republic of the Congo (MONUC) as a Procurement Assistant at the FS-4 level.

## **2. *Background and Facts***

2.1 Between February and June 2007, the Procurement Task Force (PTF), an ad hoc investigative unit of the Office of Internal Oversight Services (OIOS), conducted an investigation into allegations it had received about corruption within MONUC's procurement systems. The PTF focused on the activities of the Applicant in addition to four other staff members within MONUC's Procurement Section. Under cover of a memorandum dated 6 July 2007, the PTF issued a report entitled "Interim Report on MONUC and Five United Nations Procurement Officials," dated 5 July 2007 ("PTF Report").

2.2 The PTF interviewed the Applicant on 27 February and 16 May 2007 and the afforded him an opportunity to present relevant documentation and information. The PTF further stated that all staff members implicated in the allegations of misconduct, including the Applicant, reviewed and signed the records of interviews with the PTF. In specific regard to the Applicant, the following were the PTF's findings:

## **3. *The PTF's Investigation Report and Conclusions***

### **3.1 *Cement Contract***

3.1.1 By memorandum dated 15 May 2006 addressed to MONUC's Director of Administration, the owner of a Congolese company, Etablissement Ekima ("Ekima"), supplying cement and other construction materials to MONUC, reported that the

Applicant had been in the habit of meeting with company officials privately at his home where the Applicant would disclose internal information about MONUC's bidding exercises. In addition, the company stated that the Applicant had invited one of its officials to his home to inform him that the company was to be blacklisted for having accepted internal information on MONUC's bidding exercises. The owner of Ekima further stated that, in the context of the bidding exercise for the provision of construction material valued at US\$ 170,000, the Applicant had approached him offering to help the company to right some problems, which offer of help he perceived as an implicit solicitation for a payment. In response to this complaint, the Officer-In-Charge (OIC) of the Procurement Section cautioned the Applicant against meeting privately with vendors.

3.1.2 When interviewed by the PTF, the owner of Ekima stated that even though the Applicant had never explicitly requested the payment of a bribe in return for his help, it was clear that the Applicant's only intention in falsely claiming that the company was involved in corrupt practices was to receive some form of monetary payment. In addition, the owner of Ekima told the PTF investigators that the company had repeatedly provided free painting services to the Applicant at his private apartment and swimming pool. In an interview with the PTF, another MONUC staff member stated that she was aware that the Applicant had repeatedly requested favours from the company. The Applicant has consistently and categorically denied any wrongdoing in respect of his dealings. The Applicant told the PTF investigators that he had every intention to pay for the services he received from Ekima noting that he had requested Ekima to quote to him the amount due.

3.1.3. Based on these reports, the PTF concluded that although the Applicant signed off as buyer on only three Ekima purchase orders totaling US\$ 46,050, the Applicant was in a position to and did unduly influence the procurement exercises involving Ekima.

### **3.2 Catering Service Contracts**

3.2.1 The PTF investigated allegations of the Applicant's wrongful dealings with Societe Matina Sprl. ("Matina"), a Kinshasa company that provided catering services to MONUC's four cafeterias, which bidding process was handled by the Applicant. The

Applicant and the owner of the company were friends.

3.2.2 In respect of Contract No. Con/MON/03/02, which was issued for bidding in 2002, the owner of one of the unsuccessful bidders for the cafeteria contract stated to PTF investigators that he believed that the contract had been wrongfully awarded to the successful bidder citing irregularities in the bidding process. In particular, the unsuccessful bidder claimed that after submitting his bid he was approached by the Applicant's friend, a Greek national, who assured him that he would be awarded the contract if only he would rent his villa to the Applicant for a good price. The unsuccessful bidder stated that the said friend never directly asked him to make a payment to the Applicant in exchange for the contract, but that this was his implicit understanding. When the unsuccessful bidder refused to rent the villa to the Applicant at a price below market, he found his bid rejected during the re-bidding process on the cafeteria contract.

3.2.3 Similarly, in respect to the cafeteria contract denoted as Con/MON/05/002, the PTF noted that the contract was awarded to Matina and to another company notwithstanding the fact that the Technical Evaluation Report had concluded that none of the fourteen bids submitted had met all the requirements of MONUC.

3.2.4 In addition, certain irregularities were said to come to light in respect to the Applicant's handling of request for proposals denoted as Ten/MIOM/06-066. It was noted that, although some twenty-five companies received the Request for Proposal (RFP), only Matina and another company took part in the site visit where key requirements of the contract were to be discussed. For this reason, a new site visit date and a new deadline for the tender of bids was established. However, five days after the closing date, 13 September 2006, a file was created on the Applicant's UN-assigned computer which contained Matina's technical proposal for the provision of cafeteria services to MONUC. One day later, on 14 September 2006, a file entitled "Financial Capability" containing a letter from Matina to the Tender Opening Committee was created on the Applicant's computer. In addition, for no known reason, the deadline for the submission of proposals was extended for two additional days. Upon opening the

twelve bids received, only Matina was found to have been technically compliant for all nine cafeteria and snack bar locations set forth in the Request for Proposals (RFP).

3.2.5 When interviewed by the PTF, the Applicant confirmed that the owner of Matina had been a long-time friend of his and that he had borrowed money from him “once or twice”. The Applicant offered no explanation in respect of the apparent irregularities in the bidding process for MONUC's cafeteria services. In respect of Matina's documents found on his computer, the Applicant stated that the only assistance he had provided to the company was to print out the documents.

### ***3.3 Engineering Services Contract***

3.3.1 The PTF report detailed that the investigators uncovered an incomplete documentary record in connection with certain contracts. They took statements from several witnesses, including a confidential witness referred to as CW 1 and the then Chief of the Engineering and Transportation Unit, who alleged that the Applicant had received kickback payments in respect of the contract awarded to AVC Construct (“AVC”), a Kinshasa-based company supplying engineering services in respect of MONUC's rehabilitation of the Bunia runway. An AVC official had contacted the Chief of the Engineering and Transportation Unit in 2005 complaining that the Applicant had approached him during the bidding for the Bunia runway project requesting, on behalf of his “Chief”, that his company pay to him 15% of the contract price amounting to US\$ 824,097 in return for the Applicant ensuring that his company was awarded the contract.

3.3.2 However, in his written account of his dealings with the Applicant, the company official did not repeat the allegation that the Applicant had solicited a kickback from his company and from another contractor.

### ***3.4 Civil Engineering Service Contract***

3.4.1 In respect to his dealings with Societe de Transport de Bens Sprl. (“SoTraBen”), a Kinshasa-based civil engineering company that was awarded the MONUC contract to rehabilitate the Bukavu airfield, the Applicant was alleged to have received a kickback in exchange for his having steered the contract to SoTraBen. In addition, SoTraBen itself

was the subject of rumours that it regularly used bribes to obtain contracts. The MONUC Deputy Chief, Engineering Section, stated to the PTF that notwithstanding the fact that he was not the case officer on the Bukavu project, the Applicant had shown an unusual interest in the Bukavu airfield contract by calling him on several occasions to inquire about its status.

3.4.2 A Procurement Clerk, in her statement to the PTF, indicated that she had once witnessed an incident at a local restaurant where a representative of SoTraBen, stated that “he had a man [the Applicant] on the inside who gave him information so that he could win the contract.” When interviewed by the PTF, however, the owners of SoTraBen denied that they had paid money to the Applicant to win the Bukavu contract. In his interview with the PTF, the Applicant likewise denied that he had received anything of value from the successful bidder or that he had anything to influence the contract award.

### ***3.5 Payments to vendors characterized as repayments of loans***

3.5.1 In the course of its investigation, the PTF uncovered some bank transfers that were made from the Applicant’s bank account to Belgian bank accounts of two Congolese companies, UAC Sprl. and Panache Sprl. that had done business with the United Nations. The owner of UAC Sprl. stated to the PTF that the Applicant had remitted to him US\$ 839 in 2003 to pay for some merchandise that the Applicant had purchased from his company in 2001. Similarly, when interviewed by the PTF, the owner of Panache Sprl. stated that the Applicant had transferred US\$ 1,000 to his Belgian bank account to repay money that he had advanced to the Applicant.

3.5.2 The Applicant, while initially denying having borrowed money from any UN vendor, later stated to the PTF that he had indeed borrowed money from Panache Sprl. in order to purchase medication and a washing machine.

### ***3.6 Boat Chartering Contracts***

3.6.1 The PTF further stated that the Applicant had solicited and received cash payments totaling US\$ 10,000 from Transport Fluvial et Commerce (“TFCE”), a Kinshasa-based company that had been providing pushers, barges, fast boats and pier

facilities to MONUC since 2001. In that connection, the MONUC Chief Procurement Officer stated to the PTF that the owner of TFCE had told her that he had paid the Applicant US\$ 1,000 in order to obtain payment of his invoices from MONUC. When interviewed by the PTF, however, the TFCE's owners were unwilling to discuss the issue of having been solicited for or having paid bribes to UN staff members to receive MONUC contracts.

### **3.7 *Witness CW-4***

3.7.1 The PTF stated that a confidential witness referred to in the report as CW 4 contradicted the owners of TFCE stating that TFCE had, in fact, repeatedly paid bribes to MONUC procurement staff members from 2000 to 2003. CW 4 stated that approximately five years before, a MONUC procurement staff member, whose name he could not recall, came to his office stating,

“[y]ou'll have the contract but it is necessary to pay commission, if you don't pay the commission you don't get the contract.”

CW 4 further stated that when he informed TFCE's owner of this conversation, the latter stated that he would find a way to obtain the contract without paying the requested bribes. CW 4 then stated that he related TFCE's owner's response to the MONUC staff member and indicated that TFCE would not accede to making cash payments but could give the procurement staff benefits such as car rentals or money for travel and accommodation instead.

3.7.2 According to the PTF report, CW 4 stated that the Applicant and two other MONUC Procurement staff members had visited TFCE's offices on different occasions to discuss the boat contracts. CW 4 indicated that during such meetings the MONUC staff members, including the Applicant, would inform him about their pending travel plans and other financial issues. CW 4 further stated that the Applicant requested and received payments totaling US\$ 10,000 from TFCE in exchange for the award of contracts for barges and pushers.

3.7.3 According to the PTF report, TFCE did not make payments on each of the staff

members' visits to TFCE's office. CW 4 stated that a number of payments were, nevertheless, made in cash to the MONUC staff members, including payments to the Applicant. In support of this last statement, at his interview with the PTF investigators, CW 4 displayed an index card containing his own handwritten notations listing dates and amounts he stated had been paid to MONUC staff members from 2000 to 2003. The card referred to four individuals receiving payments by their initials, including the Applicant, who was represented by the initials "KM". The PTF investigators recorded the information on the index card because CW 4 had stated that TFCE's owner had directed him not to provide a copy of the card to the PTF.

3.7.4 When interviewed by the PTF, the Applicant stated that he could not recall anything in respect to MONUC boat contracts or with TFCE as he had only handled such contracts on a substitute basis during the absence of the procurement staff member responsible for such contracts.

3.7.5 On 19 June 2007, the PTF informed the Applicant that as a result of its investigation, evidence gathered showed that he was in violation of Staff Regulations and Staff Rules and that he had committed corrupt acts through bribery in connection with the United Nations procurement exercises and in his interaction with various vendors.

3.7.6 On 22 June 2007, the Applicant requested documentation from the PTF regarding its findings. On 25 June 2007, the PTF accorded the Applicant an opportunity to review his records of conversations with the PTF and non-confidential documents. In addition, the PTF states that the Applicant was provided an opportunity to comment on the findings of the investigation and to provide any additional document or information he believed to be relevant by 29 June 2007.

3.7.7 By letter dated 28 June 2007, the Applicant submitted his comments on the PTF Report. The Applicant denied the allegations that he had received bribes, kickbacks, loans, or any other item of value from MONUC vendors in return for having allegedly improperly assisted them in obtaining contracts with the Organization. In reference to the allegations contained in the report arising from his

tenure at UNDOF and UNAMIR, the Applicant stated that he found it disturbing that such stale claims had been resurrected as he had since that time received good reviews of his performance and had been promoted from the G-6 to the G-7 level. In addition, the Applicant explained that the bank transfers from his accounts were in payment for cholesterol-lowering medication that vendors would bring for him from Europe.

3.7.8 Based on information it had gathered during the investigation, and inferences it drew therefrom, the PTF concluded overall that the Applicant commencing as early as 1986, had,

“engaged over many years in an extensive pattern of bribery and a scheme to solicit payments from a number of MONUC vendors and companies doing business in Kinshasa, and unlawfully and improperly received and accepted sums of money and other tangible benefits from numerous vendors doing or seeking to do business with the Organization in the Congo”.

3.7.9 Specifically, the PTF made the following seven findings, stating that the Applicant had:

- (i) Solicited payments of bribes from Ekima in exchange for favourable treatment on various cement contracts;
- (ii) Assisted Matina and its owner in preparing and obtaining the contract for MONUC’s cafeteria services;
- (iii) Requested payment from AVC in return for having assisted AVC in securing the contract for the rehabilitation of the Bunia runway;
- (iv) Solicited and received from TFCE payments totaling US\$ 10,000 in return for securing for TFCE boat and barge pushers contracts;
- (v) Solicited a bribe, kickback payments, and other tangible benefits from SoTraBen in exchange for steering to them a contract for the rehabilitation of the Bukavu runway;

(vi) Accepted, in the guise of “loans”, sums of money in excess of US\$ 4,200 from three MONUC vendors; and

(vii) Made false, misleading and inaccurate material statements to the investigators of the PTF.

3.7.10 The PTF further concluded that the Applicant's denials and other explanations were not credible because they were,

“belied by overwhelming evidence to the contrary, including forensic evidence gathered from his computer and by a plethora of witness statements”.

Moreover, the PTF found the statements of CW-4 to be credible and reliable as his statements were found to have been corroborated by the surrounding circumstances including the fact that the information s/he provided inculcates him and is consistent with the well-known environment then prevalent at MONUC where paying money to MONUC Procurement Staff was a condition to doing business with the Organization.

#### **4. *Charges and Applicant’s comments on the Charges***

4.1 By memorandum dated 13 July 2007, the Director, Administrative Services Division, Office of Mission Support, Department of Field Support, referred the case of the Applicant to the Office of Human Resources Management (OHRM), recommending that appropriate disciplinary action be taken.

4.2 Effective 16 July 2007, OHRM placed the Applicant on special leave with full pay.

4.3 By memorandum dated 24 July 2007, the Director of the Division of Organizational Development, OHRM, formally charged the Applicant with,

“having engaged in a pattern of bribes and a scheme to solicit payments from a number of MONUC vendors and companies doing or which did or sought to do business in Kinshasa, and with having knowingly made false, misleading and inaccurate statements to PTF Investigators”.

4.4 By memoranda dated 16 September 2007, the Applicant and his counsel each submitted comments in respect of the charges. The Applicant categorically denied the charges stating that none of the allegations appearing in the PTF Report is based on fact. Moreover, the Applicant impugned the validity of the PTF's findings and conclusion stating they were based entirely on hearsay and on the subjective beliefs of witnesses rather than on factual evidence. In addition, citing the PTF's recitation of allegations arising in the context of the Applicant's various assignments before MONUC, the Applicant submitted that it was unfair for the PTF to seek to resurrect such stale allegations as such previous investigations had been closed because the underlying allegations had been found to be unsubstantiated. Moreover, the Applicant submitted that he is at a concerted disadvantage in responding to the stale allegation because witness memories have faded with the lapse of time.

4.5 By memorandum to the Administrative Law Unit, dated 5 November 2007, the PTF submitted observations in respect of the Applicant's comments on the charges.

## ***5. Administrative Decisions and JDC Review***

5.1 By letter dated 11 January 2008, the Secretary-General notified the Applicant that he had decided to summarily dismiss him for serious misconduct in accordance with Staff Regulation 10.2. By memorandum dated 3 April 2008, filed with the Joint Disciplinary Committee on 4 April 2008, the Applicant requested review of the decision to summarily dismiss him.

5.2 A JDC hearing was held on 21 January 2009 at which the Applicant's counsel appeared in person. The Applicant participated in the hearing via telephone. The Representative of the Secretary-General participated in the hearing via telephone conference from the United Nations in Geneva. An additional hearing was held on 12 February 2009, at which an Investigator with the PTF, and an OIOS staff member gave testimony in person. The Applicant's counsel likewise appeared

in person to represent the Applicant who was not present. The Representative of the Secretary-General appeared in person.

5.3 On 26 March 2009, the Panel met in executive session to deliberate about the case and to conclude its report. The JDC Panel adopted its report and concluded that based on its consideration of the entirety of the evidentiary record, including the PTF Report and the evidence adduced at the hearing that the Secretary-General properly concluded, based on the evidence then on the record, that the Applicant had engaged in acts of serious misconduct warranting his summary dismissal by having:

- (i) Assisted Matina and its owner in preparing and obtaining the contract for MONUC's cafeteria services;
- (ii) Engaged in improper monetary transactions, in the guise of "loans", sums of money from two MONUC vendors UAC and Panache) and
- (iii) Made false, misleading and inaccurate material statements to the investigators of the PTF.

5.4 As to the portion of the charges grounded in allegations that the Applicant had received payments or items of value in return for his alleged improper dealings with Ekima, AVC, TFCE and SoTraBen, the Panel unanimously concluded that they are not substantiated by the evidence on the record.

5.5 The Panel unanimously concluded that the Administration should not have included in the record material relating to prior unsubstantiated investigations and that the present charges were not worded with specificity. While such issues raise concerns about the Applicant's due process rights, based on its review of the entirety of the record, the Panel unanimously recommended that the summary dismissal of the Applicant should, nevertheless, be upheld in regard to the charges arising out of his dealings with Matina, UAC, and Panache, as such conduct did, in fact, constitute instances of serious misconduct warranting summary dismissal.

5.6 On 25 June 2009, the Deputy Secretary-General informed the Applicant that the Secretary-General had examined his case in the light of the JDC's conclusions and recommendations, as well as the entire record and the totality of the circumstances and that the Secretary-General had accepted the conclusion of the JDC that the Applicant had engaged in acts of serious misconduct warranting his summary dismissal. The Applicant was also informed that in accordance with staff rule 110.4(d), he could appeal the decision directly to the Administrative Tribunal or, as a result of the reforms to the United Nations internal justice system, to the newly established United Nations Dispute Tribunal.

5.7 On 18 August 2009, the Applicant filed this Application dated 10 August 2009 with the Nairobi UNDT. The Respondent's Reply was filed on 11 September 2009. On 26 September 2009, the Applicant filed "Comments on the Respondent's Reply" dated 25 September 2009. A status conference was held on 16 December 2009 following which the Tribunal held a hearing on 11 January 2010. The Parties filed their closing statements on 19 January 2010.

## **6. *Applicant's Submissions***

6.1 The Applicant's principal contentions are:

- (i) That the preliminary investigation by the PTF violated his rights to due process and fair treatment and was tainted by extraneous considerations and racial bias.
- (ii) That there was never any evidence that the Applicant ever solicited or received a bribe and that the allegations against him were based on unverified hearsay that was rife in Kinshasa against MONUC procurement personnel and were directed at one point or another at all internationally recruited procurement personnel.
- (iii) That there were more senior procurement personnel with more serious issues to answer for who were never investigated as part of the PTF

investigation of procurement abuses in MONUC and that this is a factor that suggests the Applicant and his colleagues were targeted.

6.2 In light of these submissions, the Applicant requests the Tribunal:

“...Pleas

1. With respect to competence and procedure...
  - (a) to find and rule that it is competent to hear and pass judgment upon the present application under Article 2 of its Statute;
  - (b) to consider the present application receivable under Article 7 of its Statute;
  - (c) to decide to hold oral proceedings on the present application in accordance with Article 8 of its Statute and Chapter IV of its Rules;
2. On the merits, the Applicant respectfully requests the Tribunal:
  - (a) to rescind the decision of the Secretary-General finding that serious misconduct occurred and imposing the disciplinary sanction of summary dismissal on the Applicant;
  - (b) to order that the Applicant be reinstated and paid his salary and benefits retroactively from the date of his summary dismissal;
  - (c) to find and rule that the arguments that formed the basis for the Secretary-General's decision erred in matters of law and fact in its conclusions;
  - (d) to find and rule that the conclusions and recommendations of the JDC Panel to uphold the decision of the Secretary-General were not supported by sufficient evidence and therefore were invalid;
  - (e) to find and rule that the decision of the Secretary-General and his actions during the course of the case were improperly motivated by prejudice and other extraneous factors;
  - (f) to award the Applicant 5 years' net base salary as compensation for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof; in view of the special circumstances of the case;

(g) to award as cost, the sum of \$6,500 in compensation to cover the expense incurred to defend this case.”

## **7. Respondent's Submissions**

7.1 The Respondent's principal contentions are that:

(i) The investigation into the allegations against the Applicant was not improperly motivated, and the Applicant's due process rights were respected.

(ii) As a result of the Applicant's involvement, procurement exercises with six companies were severely tainted by fraud and corruption and goods and services were procured for the Organization through corrupt and illegal acts and without the use of fair, transparent, objective and truly competitive processes.

(iii) The record shows that the facts underlying the charges have been properly established and that the findings are reasonably justifiable and are supported by the evidence.

(iv) There have been no failures to consider significant facts and no irrelevant facts were unduly considered.

(v) The established facts legally amount to serious misconduct.

## **8. Considerations**

### **8.1 What is the standard of proof of evidence required to support a summary dismissal of a staff member?**

8.1.1 The standard of proof of evidence required to institute disciplinary proceedings appears to have been well set down in the UNAT judgment of *Araim*<sup>1</sup> where it was stated as follows:

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<sup>1</sup> UNAT Judgment No. 1022, (2001).

“The Tribunal has repeatedly stated that disciplinary proceedings are not of a criminal nature, but rather they are administrative proceedings, regulated by the internal law of the Organization. (See Judgment No. 850, Patel 1997). As stated correctly by the JDC in its report, the Administration is not required to prove its case beyond reasonable doubt. It has only to present adequate evidence in support of its conclusions and recommendations. Adequate means “reasonably sufficient for legal action” (the Random House College Dictionary, revised edition 1982), in other words sufficient facts to permit a reasonable inference that a violation has occurred”.

8.1.2 Under former staff rule 110.3, sanctions against a staff member found guilty of misconduct range from a written censure to summary dismissal. While it is accepted that disciplinary proceedings are more in the nature of civil matters than criminal ones due to the simple fact that its consequences do not attract custodial punishment; can it be said that it accords with the principle of fairness that a horizontal standard of proof on the balance of probabilities would do for all categories of misconduct?

8.1.3 To this question my answer would be No! Certainly the ends of justice will not be served by a “one-size-fits-all” approach. It does not bear restating that some types of misconduct are more serious than others. In fact some acts of misconduct are properly categorized as serious misconduct. The common thread running through acts which constitute serious misconduct is the element of quasi-criminality. In other words, such acts would usually have a criminal element. For instance, the act of accepting payments or bribes from vendors on the part of a Procurement Officer carries a criminal element whereas the act of habitual absence from work without good reason does not, in spite of both acts being acts of misconduct.

8.1.4 Even though the jurisdiction of the UNDT is in fact a civil rather than a criminal one, matters which give rise to summary dismissal by the Secretary-General, being the most severe sanction that may be applied, must be subjected to a higher standard of proof even though such a standard would still find itself somewhat below the beyond reasonable doubt standard required in criminal cases. There are thus applications before the Tribunal which a careful consideration as to a separate standard of proof is called for.

8.1.5 In the English case of Miller v Minister of Pensions<sup>2</sup>, Denning LJ explained the general standard of proof in civil cases as adopted in *Araim* thus:

“That degree is well-settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: “we think it more probable than not”, the burden is discharged but, if the probabilities are equal, it is not.”

8.1.6 There is in fact a third standard of proof which Alan Taylor in his book *Principles of Evidence*, 2<sup>nd</sup> edition, has labelled “a floating standard”. This third standard of proof is well illustrated by Denning LJ in the later case of Bater v Bater<sup>3</sup> where he stated:

“It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case...So also in civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter”.

8.1.7 Denning LJ went further to clarify this third standard thus:

“A civil court when considering a charge of fraud will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but still it does require a degree of probability, which is commensurate with the occasion”.

Clearly, from the foregoing, it is easy to see that the more serious the allegation and attendant sanction, the higher the degree of proof required.

8.1.8 In Blyth v Blyth<sup>4</sup>, Lord Pearson lent support to the idea of a third standard of proof when he stated:

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<sup>2</sup> [1947] 2 All ER 372.

<sup>3</sup> [1950] 2 All ER 458.

<sup>4</sup> [1966] AC 643.

“The degree or quantum of proof required by the court before it comes to a conclusion may vary according to gravity of the subject matter to which the conclusion relates...”

8.1.9 In Hornal v Neuberger Products Ltd<sup>5</sup>, Morris LJ reiterated:

“Though no court and no jury would give less careful attention to issues lacking gravity than to those marked by it, the very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities”.

8.1.10 In the instant case, the Applicant came before the Tribunal because he was summarily dismissed on allegations of being engaged in what amounts to criminal conduct. In fact, the PTF investigators at paragraph 336 of their report came to the conclusions that,

“the aforementioned acts, namely the solicitation of bribes and kickbacks, the receipt of sums of money in exchange for favourable treatment in official bidding exercises, are clearly criminal acts and can be prosecuted in a court of law. In that regard, [Applicant] has committed criminal acts of bribery, conspiracy and solicitation and acceptance of unlawful gratuity.”

Establishing criminal liability in investigations and judicial proceedings even in the context of a civil matter such as this must necessarily require that a standard higher than the ordinary one of a balance of probabilities must be attained. Did the investigators meet this standard?

## 8.2 *Allegations concerning Ekima*

8.2.1 The Applicant is alleged to have solicited bribes and benefits from the owner of Ekima. He is also alleged to have had Ekima paint his apartment and swimming pool for free.

8.2.2 According to the PTF Report, the owner of Ekima had on 15 May 2006 submitted a written complaint to MONUC’s Director of Administration. In that complaint, he

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<sup>5</sup> [1957] 1 QB 247.

reported that on 8 April 2006, the Applicant had invited him to his house where he told him that his company would be blacklisted by MONUC because Ekima had an improperly close relationship with another Procurement Assistant. The complainant also reported that the Applicant repeatedly provided him with internal information on MONUC's bidding exercises. At a meeting of the Procurement Section where the Applicant was given an opportunity to comment on the allegations, he confirmed that he had met the owner of Ekima in private and preferred to wait for meeting with the Director of Administration to comment on the allegations.

8.2.3 The PTF Report stated that the Task Force interviewed the owner of Ekima on 2 May and 4 May 2007 who told them that the Applicant called him unofficially and offered to help in connection with a bid for a steel contract but he declined the offer. Subsequently in 2001 the Applicant saw him by coincidence in a Greek Restaurant and made another similar offer which he again declined. Again in 2006, the owner of Ekima met the Applicant at a night club where he told him that he learned Ekima had problems over ongoing biddings on a cement contract and offered to help. He then invited the owner of Ekima to his house to continue the discussion. The owner of Ekima stated that although the Applicant did not explicitly ask for bribes on any of the three occasions, it was clear that the Applicant's only intention was to receive some form of monetary payment.

8.2.4 At the second interview with the owner of Ekima two days later, the latter told the investigators that he wanted to provide additional information off the records. He then told the investigators that he had provided free painting services for the Applicant's private apartment and swimming pool. The first painting service, he said, was the one for the swimming pool after which the Applicant requested a fake receipt to present to his landlord for reimbursement and the owner of Ekima complied. He said the market value for the service was US\$ 1,000.

8.2.5 The second painting service for the apartment was an average value of US\$ 1,500 but he could not recall the dates on which these services were given. He said that he complied with the Applicant's request because he feared the Applicant could cause him

problems with his future contracts. According to the owner of Ekima, the Applicant on a third occasion requested Ekima to perform a complete renovation of a restaurant owned by his friend free of charge and the value for this would be about US\$ 30,000 but he refused to grant services to the Applicant for the first time. Shortly afterwards, the Applicant started to spread rumours about Ekima that led to the owner of Ekima writing the letter of complaint of 15 May 2006 to MONUC's Director of Administration.

8.2.6 When, on 16 May 2007, the Applicant was confronted with these accusations, he denied them. He confirmed that he had a private swimming pool between 2001 and 2005 and recalled that Ekima painted it for him but took only US\$ 50 out of US\$ 150 he was told it cost and refusing to take the full amount. He recalled also that the owner of Ekima had painted his apartment for which he paid US\$ 350 and obtained a receipt from Ekima which he could produce. He vehemently denied receiving Ekima's services for free or requesting a fake invoice from the owner of Ekima.

8.2.7 The PTF in their finding at paragraph 327 (i), and (ii), of their report stated that the Applicant's unlawful and corrupt activities included:

“Solicitation of bribery from Ekima, a MONUC vendor, in exchange for favourable treatment with various cement contracts which [the Applicant] handled on behalf of MONUC procurement...Efforts to secure painting services for his private apartment and swimming pool for him by Ekima, a United Nations vendor participating in a series of bidding exercise handled by [the Applicant]”.

8.2.8 Also at paragraph 95 of the said report, it was stated that “based on findings it is evident that [the Applicant] was also in the position to unduly influence procurement exercises handled by his colleagues”. In his closing address, the Applicant's Counsel had submitted that it was the losing bidders who gave statements that the Applicant had asked for bribes and that this factor was not taken into account by the Investigators.

8.2.9 Was it established in investigations that the Applicant had asked the owner of Ekima for payments or bribes? The only evidence on this score before the Tribunal is the testimony of the owner of Ekima to the investigators to the effect that the Applicant offered on three occasions to help him with contracts but never directly asked for bribes

although according to the witness he understood that the Applicant wanted bribes or payments. On his own part the Applicant denied soliciting for payments. The Tribunal had no opportunity to hear the owner of Ekima or the Applicant's testimony. I do not find that a case for solicitation of bribes or payments from Ekima was made out at all.

8.2.10 Did the Applicant solicit for painting services from Ekima? In making this report to the PTF investigators about the Applicant requesting and receiving free painting services from Ekima, it is curious that Ekima's owner would want to make this report "off the record". The same vendor had sent a written complaint to the Director of Administration about the Applicant and contracts awarded to him, told investigators about the same contracts and the Applicant's negative role but would not want to be recorded on the matter of free painting services. What was Ekima afraid of? It is not clear why the investigator's did not ask the owner of Ekima why he did not want his information about painting services to be placed on the record. Was it because Ekima's owner was not telling the whole truth about the painting services? While both the Applicant and the owner of Ekima agreed that Ekima provided painting services, the Applicant claimed that he paid for them and would provide a receipt. His account, in the circumstances, is to be preferred to that of the owner of Ekima whose story was that he gave the Applicant a fake receipt for the painting of the apartment he painted for free.

8.2.11 It is important not to lose sight of the fact that the vendor had claimed and was convinced that the Applicant had spread rumours on each of the three occasions, of which he complained that the Applicant approached him, resulting in contracts he had bid for being split or cancelled and re-bid. The same vendor had also told investigators that the Applicant and not another procurement officer gave him inside information on bids. What bids were those? Did he use the said information? Clearly the evidence tendered by this witness cannot be relied upon. He believed that the actions of the Applicant led to big contracts he expected to get being split or cancelled. In a 9 June 2006 memorandum to the Director of Administration, the Officer-In-Charge of Procurement Section stated in explanation of split contracts awards in these words:

"a. In originally submitting its requisition for 15,000 bags of cement for works in Kinshasa, Engineering had requested that two awards results from the bid process, to enable it to meet

multiple, concurrent requirements. In the past, an award to one cement contractor only had been problematic and had caused considerable delays in key construction works when the vendor did not have the capacity to handle MONUC's full requirements concurrently. Given that cement is a commodity with a limited shelf-life, MONUC typically requests it via task-order once a contract is in place, prior to its need for the commodity.

b. Accordingly, the invitation to bid resulted in three (3) offers, which in turn resulted in awards to the two lowest-priced companies, following vetting through the LCC.

c. This arrangement is not usual for engineering commodities in MOUNUC and is well in line with the provisions of the UN procurement manual. The Mission's demands for some commodities is so great that its concurrent requirements can exceed the capacity of any one (1) vendor to provide its needs in full. Therefore, where problems have been experienced and Mission goals had been detrimentally affected as a result, the Mission endeavours to put at least two contracts in place to provide multiple sources from which it can draw. In such arrangements, priority is given to the lowest-priced vendor. The Mission will first draw from the lower-priced vendor and reverts to the second lowest when the first vendor is unable to provide the full requirement to make up the balance".

8.2.12 I have no doubt that the owner of Ekima believed that the splitting of contracts he had bid for was engineered by rumours spread by the Applicant. To the extent that his claims of seeking favours and requesting payments on the part of the Applicant are made in a situation suggesting that he had scores to settle with the Applicant, such claims cannot, without other proof, be taken as established.

### ***8.3 Allegation that the Applicant drafted Matina's technical proposal for a catering contract***

8.3.1 Société Matina Sprl (Matina) is a Kinshasa –based company owned by a Greek national. Matina had been providing catering services to some MONUC cafeterias and snack bars since February 2003.

8.3.2 Matina's latest contracts were to expire on 30 June 2007 and a new bidding exercise for the provision of catering services to nine MONUC locations was initiated in July 2006. The Applicant had handled the previous procurement exercises and was known to be a friend of the owner of Matina.

8.3.3 On 21 July 2006, a request for Expression of Interest (EOI) was issued by MONUC in a local Congolese newspaper for catering services. Twenty-five companies responded to the request and a RFP was issued to these twenty-five companies on 26 July 2006. Following certain developments, a new RFP was issued in August 2006 with an amended list of fifty-three vendors. The closing date was extended first to 8 September and on 14 September it was again extended to 15 September 2006.

8.3.4 According to the investigation report, forensic computer evidence revealed that on 13 September 2006 a file was created on the applicant's computer entitled "Proposal [Applicant]+ [NK] doc". The file contained Matina's technical proposal for catering services to MONUC. The following day, 14 September 2006, another file was created on the Applicant's computer titled "financial capability doc." which contained a letter from the owner of Matina to the chairperson of the Tenders Opening Committee (TOC).

8.3.5 The technical proposals were opened on 16 September 2006 by MONUC's TOC and twelve bids were received and forwarded for technical evaluation. The only company found to be technically compliant for operating all nine cafeterias and snack bars requested by MONUC was Matina.

8.3.6 When on 16 May 2007 the investigators interviewed the Applicant a second time, he told them that he knew the owner of Matina and that they had been friends before the latter became a MONUC vendor. He also told them that he and NK were part of a group of friends from the Greek community.

8.3.7 When informed that the investigators had found Matina's proposal for the cafeteria contract saved as a file on his computer, the Applicant explained that the day before the proposal was due, the owner of Matina had come with a CD and requested to use his computer to print out the proposals because his computer was broken. As to why he saved the document under the file name "Proposal [Applicant] + [NK] doc" onto his computer, the Applicant said he had to save it under a name in order to print the document from the CD which had been damaged. The Applicant denied having provided any other assistance for the contract award to the owner of Matina. An unsigned record of interview of the owner of Matina by the investigators shows that the vendor denied any

suggestion that the Applicant drafted the proposal for him. He also denied having any business ventures jointly with the Applicant.

8.3.8 Again, according to the PTF report, forensic examination of the electronic evidence revealed that on 12 September 2006 the Applicant received an email from another Greek national whom he had in a prior email addressed as NK and that attached to the email was a compressed file named “[Matina’s owner].zip”. In this compressed file were three documents named “OLD [Matina’s owner]-table.XLS”, “Corporate capability.doc”, and “OLD [Matina’s owner].doc”. The word document “Corporate capability doc” contained a rough draft of Matina’s technical proposal. The report continued that the Word document “Proposal [Applicant] + [NK] doc” mentioned above and said to have been created on the Applicant’s computer on 13 September 2006 contained a final, edited version of this draft technical proposal. This final version of the Word document was submitted as Matina’s technical proposal on 15 September 2006.

8.3.9 At paragraph 150, the PTF report concludes that the forensic examination thus demonstrates that the Applicant’s explanation that the document was merely printed from his machine and that the file name “Proposal [Applicant] + [NK] doc” did not have any significance is absolutely false. The report continued at paragraph 151 that “it is evident that the applicant himself drafted Matina’s technical proposal.”

8.3.10 The PTF report thus has two accounts of the forensic computer evidence they recovered from the Applicant’s computer. The first is that on 13 September 2006 a file was created on the Applicant’s computer titled “Proposal [Applicant] + [NK] doc”. This file contained Matina’s technical proposal.

8.3.11 The second account is that on 12 September 2006 the Applicant received an email from another Greek national with an attachment “[Matina’s owner].zip.” One of the three documents in that attachment was a word document titled “Corporate Capabilities.doc”. The said document contained a rough draft of Matina’s technical proposal.

8.3.12 The PTF report then states that the file created on 13 September 2006 on the Applicant’s computer contained a final, edited version of this draft technical proposal

sent as part of an attachment to the Applicant by NK on the day before - 12 September 2006.

8.3.13 In other words, NK sent a rough draft of the technical proposal to the Applicant on 12 September 2006. On 13 September 2006 a file was created on the Applicant's computer containing a final edited version of the rough draft he had received only the day before. Is it based on this that the investigators asserted that "infact, it is evident that the applicant himself drafted Matina's technical proposal"? Is this assertion borne out by the facts as set out by the investigators?

8.3.14 My answer is No. If someone sent a draft of a document to another person by email and then a final, edited version of the said document is "created" on the recipient's computer, does it stand to reason to claim that that final, edited version is "evidently drafted" by the recipient? At the very best, the recipient has edited the document sent to him, he has not drafted it!

8.3.15 The PTF report had claimed that the forensic examination demonstrated that the explanation that the document was merely printed from the Applicant's machine was "absolutely false". How has forensic examination demonstrated that the document was not merely printed from the Applicant's machine? It is elementary knowledge that computer documents originally created by author X can be copied into a new blank document created by author Y thus changing the author of the original document from X to Y. Though the real author is X, the computer would cite the author as Y because the document has been copied and saved by Y. If in this case the Applicant had copied the document onto a new blank page in order to save and print it, then the explanation given about merely printing the document may be plausible and ought to be further investigated. It would in the light of this scenario be wrong to dismiss the Applicant's explanations as "absolutely false".

8.3.16 While the PTF report at paragraph 149 stated that the Word document "Proposal [Applicant] + [NK] doc" found on the Applicant's computer contained a final edited version of a proposal submitted as Matina's technical proposal on 15 September 2006; the investigators have not exhibited the signed proposal by Matina which they claim was

submitted to MONUC. The submitted proposal ought to bear MONUC's stamp or marking showing that it was received on that date by MONUC. How then can a visual comparison be made between "Proposal [Applicant] + [NK] doc" and the document Matina submitted to MONUC as its technical proposal on 15 September 2006?

8.3.17 My finding on this score is that the investigation has not established that the Applicant drafted any proposal for Matina in connection with on-going bidding exercises at the time. If, as the Applicant explained, he merely printed a proposal for his friend from the Applicant's own computer, is it misconduct on his part to do so? Nothing placed before this Tribunal makes the mere printing of a proposal for a vendor by a Procurement Officer a misconduct.

#### ***8.4 Allegations concerning AVC Construct***

8.4.1 According to the PTF report, the then OIC of the Procurement Section recorded a note to file on 30 November 2005. The contents of that note were that a staff member had told the OIC that one MONUC contractor whose company AVC Construct had been awarded the contract for the rehabilitation of the Bunia Airfield Project informed her that the Applicant approached him during the bidding exercise to ask for 15% of the contract price which amounted to US\$ 824,097 in return for ensuring that AVC Construct was awarded the contract. The Applicant was said to have told the vendor that he was soliciting the money for his "Chief".

8.4.2 In a later memorandum the OIC reported the allegation to the Chief Resident Investigator and in the report stated that the amount requested by the Applicant according to the staff member who told her was US\$ 150,000. When the OIC asked the owner of AVC to submit a written complaint, he did so but omitted the detailed and specific information he was said to have reported to the staff member.

8.4.3 The Task Force interviewed the staff member ("CW1") on 21 February 2007 who confirmed that the owner of AVC had told him/her that the Applicant had invited him to his house and told him that if the vendor wanted things to go smoothly with the contract, he should pay 15% of the contract value for his cooperation claiming that the money was

for the “Chief”. CW1 added that the owner of AVC had also told him/her that the Applicant had approached another contractor “SoTra Ben” who was handling the Bukavu runway contract with similar request for payments.

8.4.4 In an interview with the Task Force, the owner of AVC said the Applicant invited him to his house and then provided a detailed description of the Applicant’s house. The owner of AVC said that during the meeting, the Applicant said he could “arrange” his problem but did not specify any amount of money to be paid although it was clear he was requesting monetary payment. The Applicant claimed that he did not request the money for himself but on behalf of his “Chief” whom he did not identify. The vendor stated that he did not understand how the Applicant could help as he was not the Procurement Officer in charge of the project.

8.4.5 The Applicant denied the allegations and explained that he was the Case Officer for the project during the first bid which was cancelled and the AVC did not even put in a bid at that time. The Applicant admitted that the owner of AVC came to his house but denied inviting him. He said the vendor wanted information on the contract and that he never asked the vendor for any payments or offered assistance in getting the Bunia contract.

8.4.6 At paragraph 185 of the PTF Report, the investigators stated that although they found nothing to show that the Applicant interfered with the contract award for Bunia and that the Applicant was not the Case Officer for the second bid in which AVC was involved, it was clear that the Applicant had relevant information and access to the case files with which he could request payments from vendors. Again at paragraph 327 (iv) of the report, the investigators “find” that the Applicant had,

“request[ed] for payments “sometime between in or about October 2004 and July 2005 from AVC Construct and its owner [the owner of AVC] in exchange for securing the contract for the company for the rehabilitation of the Bunia runway contract no CON/MON/05/075 worth approximately US \$ 5.5 Million”.

8.4.7 The question that arises from these assertions and findings are: How are they established? How did the Applicant have access to a case file which was being handled

by other Procurement Officers as to have relevant information that he could use to extort money? What relevant information did he have with which he could ask for payments from the vendors in the Bunia runway contract? How has it been established that the Applicant did ask the vendor for money over the Bunia contract?

8.4.8 The vendor, the owner of AVC had made oral complaints but when requested by the OIC to put them in writing had sent a very vague letter according to CW1 that did not contain the same detailed and specific information he had given to CW1. Why did the vendor find it difficult to repeat to the investigators what he told CW1 about the Applicant asking for a 15%, or as CW-1 later told the OIC for the sum of US\$ 150,000 in his written complaint? Again after his first interview with the investigators, the vendor never showed up to review and sign the record of conversation. There is therefore no authenticated evidence by the owner of AVC before the Tribunal or any that was placed before the Secretary-General.

8.4.9 It is important to bear in mind that AVC Construct in regards to the contract for the Bunia runway ran into problems. The contract was cancelled a year after its award and before it could take off due to performance issues. In the unauthenticated interview granted to the investigators by the owner of AVC, the vendor had claimed that his not making a payment to the Applicant may have been responsible for the cancellation of the contract and the refusal to approve the bank guarantee by MONUC. The vendor still made this claim in spite of being awarded the contract after he allegedly refused to pay the Applicant any money.

8.4.10 Clearly the AVC Construct allegation is another allegation by an unsuccessful vendor. Still, in his unsigned record of interview, he told investigators that another vendor, SoTra Ben, who had executed a similar Bukavu airfield contract successfully, told him that the company had an insider in MONUC and the owner of AVC said he was certain that the said insider was the Applicant. Even CW1 in her interview with investigators stated that she was not sure if the vendor complained because of the problem he had with the contract. The case of requesting for bribes or money payments

from AVC against the Applicant is not established. Any disciplinary action against the Applicant on this score is not maintainable.

**8.5 *The allegations that payments to vendors were described as repayment of loans***

8.5.1 Through forensic computer evidence, the Task Force investigators discovered that there were bank transfers made from the Applicant's UNFCU account to the Belgian bank accounts of two companies namely UAC and Panache.

***UAC***

8.5.2 On 6 June 2003, the Applicant transferred the sum of US\$ 839 to the bank account of the owner of UAC, (a local Congolese electronic and furniture store that sold furniture, air-conditioning units, videos and other types of electronic goods), in Banque Belgoise, Belgium.

8.5.3 The ledger account statement of UAC produced by its owner revealed that the money represented payment for items purchased by the Applicant sometime in 2001. According to the OIOS/PTF report, MONUC procurement records showed that UAC was issued fourteen purchase orders for approximately the sum of US\$ 195,000 from 2000 and up till the time of the investigation in 2007. The Applicant however was not involved in any purchases made from UAC by MONUC.

***Panache***

8.5.4 On 20 January 2004, the Applicant transferred the sum of US\$ 1,000 to the bank account of the owner of Panache also at Banque Belgoise in Belgium. Panache is a local Congolese plumbing company that sells tiles, plumbing materials and equipment. The owner of Panache confirmed that he knew the Applicant and that his wife and the Applicant's wife were friends.

8.5.5 When asked about money paid into his account by the Applicant, the owner of Panache recalled that he had lent the sum of US\$ 1,000 on two occasions to the Applicant who always repaid him by bank transfer. He also told investigators that whenever the Applicant purchased any of his products, he paid in cash. According to him, bank

transactions were sometimes difficult in DRC and people loaned each other money. MONUC records showed that Panache goods were purchased by MONUC on only four occasions with a total value of US\$ 88,381 and that none of these purchases had any involvement of the Applicant.

8.5.6 What is clearly established in the transactions of the Applicant with UAC and Panache is that the Applicant either borrowed money which he repaid in the case of Panache or bought goods on credit from UAC only to pay up later. In the case of UAC, it took the Applicant two years to settle his account with the store. Both UAC and Panache are stores which sell either electronic household goods or plumbing materials and had on some occasions sold goods to MONUC. The total purchases made by MONUC from both UAC and Panache stores over the seven-year period it had been in the DRC were worth less than US\$ 285,000. The Applicant was not linked to any of the two stores or companies through MONUC contracts or purchases.

8.5.7 Does a Procurement Officer who has no official dealings with a UN vendor breach any rules by borrowing money from such a vendor and repaying the money in a post-conflict DRC where due to difficult banking transactions, people borrowed money from each other? Does the fact that a Procurement Officer who has made purchases on credit from a vendor, with whom he had no official dealings and repays after a long period constitute misconduct?

8.5.8 To answer these questions, I turn for guidance to the provisions of section 4 of the United Nations Procurement Manual 2004, particularly section 4.2(1) and (2) which are referred to in the charge against the Applicant. The said section and subsections are reproduced below:

“4.2 (1) It is of overriding importance that the staff member acting in an official procurement capacity should not be placed in a position where their actions may constitute or could be reasonably perceived as reflecting favourable treatment to an individual or entity by accepting offers or gifts or hospitality or other similar considerations. The staff member should have regard not simply as to whether they feel themselves to have been influenced, but to the impression their actions will create on others.

4.2 (2) in principle, UN staff members shall not accept any honours, decorations, favour, gift or remuneration from any source without first obtaining the approval of the Secretary-General”.

8.5.9 The Applicant in asking the owner of Panache, whom he knew through his wife, to lend him US\$ 1,000 and repaying the said money did not breach any UN procurement rules even though MONUC had at some times made purchases from Panache. The transaction was a private one between the Applicant and Panache and entered into in the personal capacity of the Applicant who had never dealt with Panache officially. What the Applicant got from Panache can by no stretch of the imagination be described as an offer, a gift, hospitality or a favour in the context of the rules referred to.

8.5.10 As this Tribunal had decided in the case of *Sanwidi*<sup>6</sup>, there existed the possibility that sometime in the future, the Applicant could in an official procurement capacity find that he had to deal with bids from Panache. Others may then be prone to labour under the perception, wrong as it might be, that since he had a previous personal dealing with the vendor, the Applicant might be inclined to favour him in an official capacity. But then, unlike in the *Sanwidi* case, there is no evidence that at the time of the loan transaction, Panache had on-going purchase orders with MONUC and going by his educational attainments and official position the Applicant was not likely to occupy a managerial or supervisory position ever at MONUC. By the same token, buying goods on credit from UAC and settling his account two years later was not misconduct on the part of the Applicant. The latitude allowed the Applicant by UAC to settle his accounts two years later was not traced to his position as a Procurement Officer by the investigators. I totally disagree with the investigators who in paragraph 197 of their report expressed their views on the interpretation of the rules in this way:

“It should be noted at the outset that regardless of the purpose of these payments, the fact that they were made in and of itself violates a number of rules and regulations of the Organisation, including financial, procurement and staff rules.”

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<sup>6</sup> Judgment No. UNDT/2010/036.

8.5.11 Where are these financial, procurement and staff rules that prohibit a Procurement Officer from buying their own personal property or goods from a store or company that supplies goods to the Organization? Which rules require that a Procurement Officer cannot take a friendly loan from a person he knew in friendly circles because that person sometimes supplied goods to the Organization for which the Officer was not responsible?

8.5.12 Although the possibility that the Applicant could find himself in a position to do official procurement duties involving UAC in the future existed, where such a situation arose, the Applicant would be right to declare a conflict of interest. The Applicant's transactions with UAC and Panache did not constitute the breach of any rules.

8.5.13 In their conclusions, the investigators state, at paragraph 327 (vii) of their report, that the Applicant's activities included,

“[t]he solicitation for, and the acceptance of, sums of money from three individual vendors doing business with MONUC characterised as “loans” albeit without interest and any accompanying formal documentation, in excess of US\$ 4,200.”

8.5.14 It is simply antithetical and a contradiction in itself that money “solicited” and corruptly “accepted” can be paid back by the staff member. It is logical that money borrowed is meant by the parties to the transaction to be paid back. Why do the investigators refer to monies paid back by the Applicant to those he owed as payments characterised as repayment of “loans”? The investigators' apparent confusion about these borrowed sums of money stem from the fact that the Applicant described them as loans. For a layperson it is common parlance to describe such monies as loans without appreciating the legal implications of the word “loan”. The Tribunal does not agree with the conclusion arrived at by the investigators that these monies were corruptly obtained because no interest was charged and they were not formally documented.

8.5.15 The ends of justice would not have been entirely served in this case if the post-conflict situation of the DRC at all times material to this application is not taken into account. It is in evidence and it was confirmed also in the conversation record of the owner of Panache that bank transactions were sometimes difficult in DRC and people loaned each other money. The owner of Panache also stated that being a trading

company, Panache had more access to cash than individuals and was in a position to grant loans to people.

## **8.6 *Alleged TFCE payments to the Applicant***

8.6.1 About thirty two purchase orders totalling at least US\$ 2,406,239 had been issued to TFCE from 1 July 2002 until 31 December 2006 for the boat contracts.

8.6.2 The Chief Procurement Officer told the investigators on 7 March 2007 that during a social event, a TFCE official told her that he had paid the Applicant US\$ 1,000 to get his invoices paid. He also stated that his brother, owner of TFCE, paid bribes to procurement staff as well. When contacted, the owner of TFCE would only meet with investigators to discuss MONUC's inefficiency but was not willing to discuss the matter of bribes.

8.6.3 The PTF investigators then interviewed an employee of the company, a confidential witness ("CW4") who admitted that TFCE had paid repeated bribes to procurement staff of MONUC in order to receive and maintain contracts between 2000 and 2003. In the course of the interview, CW4 reportedly showed the investigators an index card with handwritten notes listing dates and amounts paid to MONUC's staff members. One of those said to be listed on the said index card as receiving payments was the Applicant. CW4 said that an amount of US\$ 10,000 was paid to the Applicant. CW4's index card listed the letters "KM" and he/she told investigators that this stood for the names of the Applicant. CW4 was said to have refused to provide a copy of the said index card to the investigators.

8.6.4 CW4 further told the investigators that when money was requested by the MONUC procurement staff members which included the Applicant, they each came to CW4's office to talk about the TFCE boat contracts and in the process would tell CW4 that he or she was going on holiday or travelling and then ask for a present for the travel.

8.6.5 Based on the interview with the said CW4, the PTF investigators found at paragraph 327 (v) of their interim report that the Applicant solicited and received US\$

10,000 from TFCE in exchange for his assistance in securing contracts on behalf of the company with MONUC.

8.6.6 The story of the said CW4 as related by the investigators did not include that the Applicant helped TFCE to secure any contracts for which the Applicant demanded and was paid the sum of money. In fact, there are huge gaps in what this witness is said to have told investigators concerning the Applicant rendering the entire account incomprehensible. An index card with handwritten notes listing dates and amounts paid to MONUC staff was said to have been shown to investigators. The card listed initials of four persons and the initials KM stood for the Applicant's name. While the index card is said to have shown that the Applicant received US\$ 10,000, it did not show the date of the receipt of this sum of money except that CW 4 said that the payments were for the period 2000-2003.

8.6.7 The index card did not show whether it was a lump sum payment or an instalment. The card did not show what the payment was for. The record of interview with the CW4 prepared by the investigators did not state for what reason the Applicant asked for and received the US\$ 10,000. It is noteworthy that while CW 4 stated that the payments were made between 2000 and 2003, the same CW4 had told investigators, according to the interview notes, that TFCE began doing business with MONUC in 2001. Why then was TFCE paying money since 2000?

8.6.8 More importantly, why was CW4 who evidently is a staff of TFCE afraid of being identified? The information he was said to have provided did not lead to any new findings by the investigators. Neither the Applicant nor the Tribunal was told the identity of this witness. The investigators and the Respondent decided to shield this witness from any appearance before this Tribunal. Such an appearance would have afforded an opportunity to test the veracity of the witness. The power to confer anonymity to a witness in judicial proceedings lies with the Tribunal only, not with the investigators or a party to an application. The Respondent cannot without good cause shield his witness from judicial scrutiny. Such good cause would be for the Tribunal to decide. Open justice is the cornerstone of judicial work the world over and the United Nations Organisation

has fathered instruments and conventions that entrench openness and transparency as some of the hallmarks of judicial enquiry.

8.6.9 The reported interview of CW4 clearly shows that his company TFCE was unhappy over its inability to have monopoly over MONUC boat contracts and the leasing of a port. At paragraph 21 of the interview recorded by the investigators, CW4 was reported as stating that individuals in the procurement section of MONUC had created liaisons all over town with the local Congolese vendors because, according to him, it is more difficult for the European companies to pay bribes. CW4 was also of the opinion that it would be difficult for the PTF to break or get information from the local vendors. He is reported to have also stated that the Senegalese people in procurement were afraid of business with whites because they know business is not done by making payments.

8.6.10 I have no doubt in my mind that CW4 was unhappy that local Congolese vendors were winning MONUC contracts. The only reason these local vendors would win contracts, in his view, was because they were corrupt whereas those he characterised as European companies had difficulties because they would not make corrupt payments to MONUC staff. CW4 makes these assertions in spite of admitting that his company TFCE had been paying bribes to MONUC staff.

8.6.11 I find that the statements allegedly made by CW4 to investigators were largely self-serving, unreliable, racist and malicious and that no reasonable Tribunal would admit or rely on them. I am even more shocked that the investigators would take the stories of this character so seriously as to make them the basis for the conclusions that MONUC procurement staff solicited and received bribe payments and would even go further to shield CW 4 from answering any questions from the Applicant and the Tribunal.

## **8.7 *The OIOS/PTF Investigation Report***

8.7.1 Pursuant to General Assembly Resolution 48/218B at paragraph 5(c)(iv), the Office of Internal Oversight Services (OIOS) was mandated to:

“Investigate reports of violations of United Nations regulations, rules and pertinent administrative issuances and transmit to the Secretary-General the results of such

investigations together with appropriate recommendations to guide the Secretary General in deciding on jurisdictional or disciplinary action to be taken.”

8.7.2 This mandate is further incorporated and reproduced in paragraph 16 of the Secretary-General’s Bulletin ST/SGB/273 – “Establishment of the Office of Internal Oversight Services”. Further, the OIOS Investigations Manual 2005 and 2009 in describing the fact-finding nature of an OIOS investigation states that:

“The role of the/OIOS is to establish facts and make recommendations in the light of its findings.”

8.7.3 The Investigations Manual requires that investigators approach matters with an “open mind” and emphasises that their task is to “establish facts” and draw “reasonable conclusions” from those facts. It is a “dispassionate professional exercise” which shall be conducted with strict regard for “fairness” throughout the investigative process.

8.7.4 Under the provisions of the Investigations Manual, the OIOS report must be “impartial” and “objective” and must demonstrate that conclusion drawn and recommendations made are “rational and sustainable”. The reports must be factually “accurate” and each piece of evidence relied upon must be supported by documentation in the investigation case file. Reports should where available, include “exculpatory and mitigating” evidence. Investigators must bear in mind that allegations from an informant or programme manager are simply allegations.

8.7.5 The procedure for taking action following an investigation is that the preliminary investigation report, as provided for by ST/AI/371 – “Revised Disciplinary Measures and Procedures”, is sent to the programme manager who may send it to the Assistant Secretary-General (ASG), OHRM who in turn decides if the case is to be pursued. The staff member concerned may then be sent a charge listing the allegations against him in writing and requesting a response. The entire dossier which includes the staff member’s response is again placed before the ASG, OHRM, who may decide to recommend the summary dismissal of the staff member to the Secretary-General.

8.7.6 The OIOS in view of their mandate, the functions they perform and the singular weight attached to their investigation report must therefore be alive to the awesome and enormous responsibility they bear. Since disciplinary action such as summary dismissal of a staff member would often depend mostly on an investigation report, OIOS investigators must exercise their functions and power with a high sense of accountability and responsibility.

8.7.7 As the Investigations Manual provides, their conclusions and recommendations must be seen to be both rational and sustainable. This is even more so when in their report, they arrive at a conclusion that a staff member's actions are enough to found criminal liability.

*Allegations dressed up as facts*

8.7.8 At paragraph 207 of the OIOS/PTF interim investigation report in this case, it is stated as follows:

“The investigation revealed that [Applicant] solicited, received and accepted cash payments of \$10,000 from a company named Transport Fluvial of Commerce (TFCE) in return for his assistance in getting contracts for the provision of boat charter services for MONUC's riverine operations”.

How did this revelation come about? According to the same report, the owners of TFCE said that if they did not pay bribes they would not have received contracts. They then refused to provide any information about payments made to procurement staff members. The investigators then interviewed an employee of TFCE whose identity they kept secret and whom they described as confidential witness 4 (CW 4).

8.7.9 This CW 4 showed them an index card with handwritten notes. CW4 then proceeded to explain his notes telling investigators that the letters “KM” on the said index card stood for the name of the Applicant who according to him received US\$ 10,000 for one year. CW 4 refused to provide the investigators with a copy of the index card. The year and date of the payment of the said US\$ 10,000 to the Applicant are not stated. It did not state either if the money was paid to the Applicant on one occasion or in instalments.

It did not state why and for what contracts the money was solicited and given to the Applicant. There was no opportunity to question the CW4 provided to the Applicant or even the Tribunal and neither was it stated what assistance the Applicant rendered TFCE to deserve the money.

8.7.10 In the light of these, can an open-minded, impartial investigator claim that the fact of collecting a US\$ 10,000 bribe by the Applicant from the TFCE had been established? Can the conclusions drawn by the investigators based on this tale by a shrouded witness be said to be reasonable? Certainly not! These are merely allegations dressed up as facts.

*A report that exceeds the scope of its assignment*

8.7.11 The OIOS Investigations Manual describes an investigation report as an issued report which contains information about the reported misconduct, applicable legal norms, and employment history of implicated personnel, investigative methodology and details, subjects' comments on investigative details, finding and conclusions.

8.7.12 Quite to the contrary, the OIOS/PTF interim report on MONUC procurement exceeded its assignment of investigating the Applicants' alleged misconduct as a Procurement Officer in MONUC. The investigations exhibited unusual zeal and uncommon interest in seeking to mine and dig for information unrelated to their assignment. Not content with the extent of their brief, they spent time and resources of the United Nations Organization in 2007 investigating the Applicant's activities while he was employed some twenty-one years before with UNDOF and later UNAMIR.

8.7.13 Still unable to establish any facts with regard to the Applicant's "illegal activities" in these places, the investigators in their report found and concluded that,

“the investigations identified that the Applicant commenced these illegal activities as early as 1986 at UNDOF and UNAMIR and continued uninterrupted and impeded...”

It is clear that these kinds of findings and conclusions are not the results of an investigation conducted with an open mind, objectivity or with strict regard to fairness.

*A report that is tendentious and speculative*

8.7.14 The Investigations Manual rightly requires that reports should, where available, include exculpatory and mitigating evidence. It continues that some issues involving conduct may not necessarily constitute a contravention of United Nations regulations, rules and administrative issuances: but rather show poor management or judgment.

8.7.15 Both the OIOS/PTF interim report and the PTF response to the Applicant's defence to the charges against him are overly tendentious. Not only do these documents exhibit unbridled bias in presenting allegations made against the Applicant as established facts, they choose also to discountenance every explanation or position that supports the Applicant's case as false. For instance, these documents conclude that the Applicant drafted the Matina proposal because the proposal was found on his computer. They refuse the explanation that the Applicant merely printed the proposal for the vendor who was his friend. Even where forensic evidence does reveal that the proposal was sent to the Applicant by another person, the PTF report and response claim that forensic evidence clearly established that the Applicant had drafted the proposal. How could the Applicant have drafted a proposal which the PTF discovered in their investigations was sent to him by e-mail by someone else?

8.7.16 The investigation report further claims at paragraph 327 (iii) that the Applicant gave assistance to Matina in not only preparing but also "submitting" bidding documents. Nowhere in the interviews of witnesses by investigators or records of MONUC was it said or suggested that the Applicant also "submitted" the Matina proposal by himself to MONUC. How do the investigators come about these fallacious conclusions? Is this an example of factual accuracy or an invention of the investigators? Why did the PTF investigators find it difficult to exhibit the Matina proposal which was submitted to MONUC? This would be necessary to enable a visual comparison of the submitted copy with the copy found on the Applicant's computer in order to establish that what Matina submitted to MONUC was indeed a copy of what was found on the Applicant's computer.

8.7.17 Again, with respect to allegations of soliciting for bribery payments made by the owner of AVC against the Applicant, the PTF report states as follows:

“Although the Task Force did not find indications that [Applicant] had interfered with the contract award for Bunia or was the responsible case officer for the second bid, it is clear that [Applicant] had access to the case files as well as relevant information regarding the bid that could have been used to request payments from a vendor”.

8.7.18 The report went on to make the following finding of guilt against the Applicant at paragraph 327(iv):

“Request for payment sometime between in or about October 2004 and July 2005 from AVC Construct, and its owner,[ ] in exchange for securing the contract for the company for the rehabilitation of the Bunia runway, contract no. CON/MON/05/075, worth approximately \$5.5 million”.

It is difficult to determine on what premises, the investigators concluded that the Applicant had relevant information regarding the bid and that he could have used such information to request payments from a vendor when the Applicant was not the officer assigned to the said project. Nowhere in the conversation records or written records of MONUC was this suggested. Clearly the investigators were speculating on the possibility that the Applicant may have approached the vendor AVC for bribes. This cannot form the basis for a finding that the Applicant actually asked for a bribe from AVC.

8.7.19 In their report, at paragraph 190, the investigations and findings are shown not to be as transparent as they ought to be. Lines 5-7 of that paragraph state that the Applicant was to be removed from all aviation projects around March 2006 but the OIC did not because,

“she was advised in a conversation with OIOS to keep him in place until he was proven guilty by an investigation.”

One is forced to ponder whether the inability of OIOS to prove that the Applicant is guilty even when he was kept on the Bukavu project for this purpose led them into

making findings of guilt against him even where they admit that he did not interfere with the contract award for the Bunia runway project.

***OIOS/PTF findings on false statements by the Applicant are subjective and inaccurate***

8.7.20 The OIOS report arrived at the conclusion that the Applicant knowingly made false, misleading and inaccurate material statements to the PTF investigators in five different instances. These conclusions are reproduced at paragraph 64 of the memorandum setting out the charge against the Applicant. I here below examine these findings on making false statements and provide my comments/observations:

- (i) “64(a) When questioned about solicitation of bribes of Ekima, you initially stated that you never dealt with [the owner of Ekima], then later conceded that such interaction was a possibility”.

8.7.21 I find from a perusal of the interview record prepared by the investigators that the above representation is inaccurate. It is wrong to state that the Applicant later conceded. The Applicant merely continued the conversation without prompting from the investigators. The relevant interview record is here reproduced as follows:

- (ii) “KM was then asked about Ets Ekima. KM stated that he was not the case officer on those cases and never dealt with the man. KM then stated that he might have done some purchase orders.

(b) Your denials that you received anything of value from Mr. The owner of Ekima are unpersuasive. This statement is contradicted by the evidence that Mr. The owner of Ekima painted your residence and swimming pool, facts you later conceded”.

8.7.22 Throughout the records of conversations with investigators, it was clear that the Applicant never conceded receiving anything of value from the vendor at any stage. He actually said that he paid for the painting services of Ekima and had receipts to prove it.

- (iii) “(c) You falsely denied offering and providing any assistance to [the owner of Matina] in connection with MONUC’s catering contracts. Your statement is directly contradicted through forensic retrieval of [Matina’s] technical proposal which was created on your computer”.

8.7.23 There is no evidence on record that proves this assertion. The Applicant told investigators that he helped the owner of Matina print his technical proposal from his work computer. Forensic evidence did not prove that the Applicant drafted the proposal. The same investigators have shown by forensic evidence that the proposal was sent to the Applicant by email.

- (iv) “(d) You falsely asserted that [the owner of AVC] had not been to your house to discuss payments of sums of money to secure the contract for the rehabilitation of the Bukavu runway project. Your statement is contradicted by [the owner of AVC], who provided a detailed description of the event, and an accurate description of your home and family. You later conceded to the meeting when confronted with conflicting information by the PTF investigators”.

8.7.24 From the interview records, the Applicant when told that investigators had information that he had invited and met with the AVC representative in his apartment, stated that the vendor called him and said he was near his house and wanted to talk to him. He said that he then allowed the man to come as he was not involved with the vendor’s contract.

- (v) “(e) You falsely denied payments of any sums of money to the UN vendors. Your claim is contradicted by electronic evidence gathered from your computer which reflects that payments were made to two UN vendors, UAC and Panache”.

8.7.25 The Applicant, from the interview records, did not deny payments of money to any UN vendors. When asked about his money transfer to the owner of Panache, he told the investigators that he was only paying back money he had borrowed. When asked about money payments he made to UAC in 2003, he said he was paying for a washing machine he had bought in 2001.

8.7.26 From the culture of oral conversations, it goes without saying that questions put to a person in conversation rarely get a “yes” or “no” answer. In answer to a question put, a person may start by saying something and without any prompting add another piece of information. Sometimes a person thinks along as he answers a question and may say one

thing first and while still continuing his answer uninterrupted, says something else which clarifies or qualifies what he had earlier said.

8.7.27 The tendency to characterise answers given by the Applicant to questions posed by the investigators as falsehood without taking human characteristics in conversation into account, points unfortunately to the bias and subjective state of mind of the investigators. This is even more so given that the conversation records are not even taped and then transcribed, but are manually recorded by the investigators themselves and usually not in language that is neutral.

***8.8 Facts properly established by OIOS/PTF investigators and the charge against the Applicant***

8.8.1 The investigators were able to establish on a higher standard of probabilities as demanded by the nature of this case that at least five MONUC vendors made complaints during the investigations against the Applicant. Some procurement staff members of MONUC who were the Applicant's work colleagues and supervisors were suspicious of the manner in which he handled procurement exercises. At least two written complaints against the Applicant were received by MONUC management.

8.8.2 However, bad reports without more are not sufficient to prove allegations made, nor does suspicion, however strong, provide proof that the Applicant had engaged in acts that constitute misconduct or serious misconduct.

8.8.3 The investigation also established that the Applicant was a member of the Greek and Lebanese communities in the Democratic Republic of Congo at the times material to this investigation and mingled freely with vendors from these communities, some of whom were his friends. I have found nothing in the rules, regulations and issuances of the Organization that put such associations in the realm of misconduct.

8.8.4 It is also established that the Applicant was in the habit of meeting with some vendors at his home outside working hours and discussed MONUC contracts with them. He also discussed MONUC contracts sometimes with vendors he met at the club or in restaurants. This was clearly unprofessional, reckless and exhibited poor judgment on the

part of the Applicant. On the part of his supervisors, it was certainly very poor management. Did it amount to misconduct? I think not. The Tribunal considers that, in line with the United Nations Administrative Tribunal case of *Huzeima*<sup>7</sup>, that the appropriate disciplinary sanction in this respect should be a demotion of four steps within his job level at the time of his summary dismissal.

8.8.5 It is established that on 8 June 2006 the Applicant signed a memorandum sent to all procurement staff of MONUC by the then Chief Procurement Officer stating that he had read section 4 of the Procurement Manual, noted in particular section 4.1.5 and agreed to abide by its contents. The said section 4.1.5 provides that procurement activities be carried out with complete impartiality and with no preferential treatment. Procurement staff must maintain fairness in the treatment of all vendors. Staff must not give information to a vendor on a particular acquisition before such information is given to the business community at large nor should they restrict or discourage competition. Procurement staff should not have a financial interest in any UN vendors and must not be involved in the procurement action if they do, they must not solicit or accept any promise of future employment with a UN vendor. Staffs are prohibited from disclosing proprietary and source information to any person not authorised to receive such information.

8.8.6 Under section 4.2.1, the matter of conflict of interest is dealt with while section 4.2.2 prohibits the acceptance of gifts. None of the prohibited conducts forbidden in section 4 of the procurement manual has been established by the investigators against the Applicant.

8.8.7 The memorandum of 24 July 2007 from OHRM to the Applicant charged him with,

“having engaged in a pattern of bribery and a scheme to solicit payments from a number of MONUC vendors and companies doing or which did or sought to do business in Kinshasa,

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<sup>7</sup> United Nations Administrative Tribunal Judgment No. 745, (1995).

and with having knowingly made false, misleading and inaccurate material statements to PTF investigators.”

8.8.8 The said memorandum referred to violations of “regulations governing standards of conduct expected of international civil servants” by the Applicant. The regulations cited require staff members to “uphold the highest standards of efficiency, competence and integrity.” Does such lofty language amount in practice to any properly spelt-out rules for the benefit of procurement staff or their managers? Adams J in *D’Hooge*<sup>8</sup> answers this question as follows:

“The vice is that everyone knows that the highest standards of integrity and efficiency are neither possessed nor actually applied. The objection to the posited standard is that it does not mean what it says. In the real world there simply cannot be an absolute standard. Moreover, it is manifest that not every failure to meet the highest standards could justify termination. The failure must be a substantial one that significantly affects the staff member’s effectiveness as an employee. The basic problem with the use of terms with little or no discernible or applicable content is that they yield no real information either to the decision-maker or, just as important, to the staff member as to what material facts can justify termination and thus they permit – indeed, render inevitable – arbitrary and inconsistent decision-making”.

**8.9 *The tendency of the drafter of the charge to fabricate and supplement evidence***

8.9.1 Within sixty-six paragraphs of the memorandum stating the charge against the Applicant, parts of the OIOS/PTF investigation report is reproduced. It is worrisome that in an effort to restate the contents of that report, the author of the memorandum has in some instances tended to fill up gaps and padded, supplemented and fabricated certain accounts in the report. I will point out three instances of these efforts to supplement the evidence.

8.9.2 At paragraph 60 of the memorandum, reference is made to a letter written by the Applicant on 28 June 2007 to the PTF in reply to the PTF’s draft findings of 20 June 2007. In the said letter, the Applicant is alleged to have submitted as follows:

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<sup>8</sup> Judgment No. UNDT/2010/044.

“the theoretical part of bribe is based on 10 per cent, give or take. None of the allegations raised even suggests that [Applicant] took anything close to these amounts”.

8.9.3 I have searched for this letter in the mountain of documents presented to this Tribunal as exhibits by the Respondent and placed before the Secretary-General to guide him in taking disciplinary action against the Applicant. The said letter, if it exists, claims by implication that the Applicant admitted to taking bribes below 10 percent of the value of the contracts in question. Where then is this letter? Does it exist? Why isn't it produced? I am inclined to believe that there is no such letter written by the Applicant.

8.9.4 Again at paragraph 46 of the memorandum, the story of CW 4 to the investigators is revisited. In restating this story, the drafter of the charge supplements it by stating at lines 5 and 6,

“you would inform CW 4 about your pending travel plans or other financial issues”.

8.9.5 On the contrary, at paragraph 18 of the investigators' conversation record with CW 4, the following is recorded by the investigators at lines 1-6:

“CW 4 was asked to provide further details about how and when money was requested by [..., Applicant]. CW4 stated that these individuals would come to the office of CW4 about 1x per month to talk about the contract and during these meetings would remind CW4 all the time that he or she was going on holiday or going to visit his/her family. He/she would say, “I am traveling, how about a bon voyage present”.

8.9.6 From the unsigned conversation record of this anonymous witness, it is inaccurate to add that the Applicant would inform CW 4 about “other financial issues” in a bid to collect illegal payments. Still at the same paragraph 46 of the memorandum at lines 10-11, it is stated that,

“CW 4 showed the PTF investigators an index card with handwritten notes that listed the dates and amounts paid to you...”

8.9.7 I observe that these statements when compared with the unsigned conversation records are inaccurate. At paragraph 7 of that conversation record, the investigators' notes read:

“CW 4 stated that an amount of US\$ 10, 000 was paid to Karim Masri. Mr. Masri received payments for only one year because he was later withdrawn from the boat contracts.”

It is thus evident that CW 4 did not give any dates on which he allegedly made the payments to the Applicant.

### ***8.10 Apparent authority exercised by the Applicant***

8.10.1 Accusations made against the Applicant ranged from efforts at extorting money in connection with a contract for the reconstruction of an airfield worth nearly US\$ 5.5 million to collecting thousands of dollars over boat contracts and other sums of money to ensure the payments of vendor’s invoices. The Applicant was said to have been in charge of not only of catering contracts and to have issued several purchase orders, but also the Bukavu airfield contract.

8.10.2 In the PTF investigators’ conversations records with the OIC Procurement Section at MONUC on 15 May 2007, the latter is reported to have stated, when asked about contracts at the mission, that:

“ a number of lease contracts, for which [Applicant] had been the responsible case officer needed a rework too in 2003. He stated that they couldn’t believe their eyes when they saw that some clearly long term lease contracts were awarded piece by piece only for six months periods between the break of the calendar year and MONUC’S financial year. Some of the cases had already been presented to the HCC, others had to be post facto presented to either the LCC or HCC since the aggregate contract amount exceeded again the LCC’s authorised limit.”

8.10.3 Further in the same conversation records, the same Officer related what had gone wrong with another bidding process and that,

“it was decided to withdraw [Applicant] from the case and assign it to another case officer. However, later the case somehow ended up again with [Applicant]”.

Why did the case end up with the Applicant again? Who was responsible for this state of affairs?

8.10.4 The OIOS/PTF at its paragraph 95 stated,

“yet based upon the findings, it is evident that [Applicant] was also in the position to unduly influence procurement exercises handled by his colleagues.”

8.10.5 Considering that the Applicant was a Procurement Assistant and one of the most junior of the staff in the Procurement Section, it is curious that the authority he exercised was quite extensive. He appeared to handle all manner of contracts no matter the financial value. Did this mean that as an FS4 level staff member, there was no limit as to what contracts he could be assigned to deal with? What was the role of the managers and the Applicant’s supervisors in the Procurement Section in allowing and condoning this state of affairs for about seven years?

8.10.6 In spite of allowing a very junior staff member to handle sensitive procurement tasks with heavy cost implications, the Applicant at the end of the day became the soft target and whipping boy at whose door so many wrong doings in the section were laid. The Tribunal is not told that the Applicant had any performance issues in his yearly performance reviews. I have no doubt that there was a massive failure of supervision and management at MONUC’s Procurement Section at the times material to this application.

8.10.7 At paragraph 172 of the investigation report, it is stated that the OIC of the Procurement Section, in or about December 2005 had requested the vendor AVC to submit a written complaint against the Applicant following information received about him requesting payments on the Bunia runway contract from the said vendor. The AVC was said to have submitted a complaint which did not contain the same detailed and specific information previously reported to a staff member. What is quite curious and disturbing is that the OIC told the investigators that she did not keep a copy of the letter from the AVC. Was the letter destroyed and binned? Why was this letter not preserved as part of the records especially as about the same time, the said OIC was reporting her suspicions about the Applicant to the Chief of OIOS’ Investigations Division following “persistent rumours”? It is easy to see that the habit of not keeping comprehensive records was not only a problem with the junior Procurement Section staff members on the boat contracts, it was also a problem with some Managers at MONUC.

**8.11 Allegations that the Applicant threatened the Respondent's witnesses**

8.11.1 The Applicant was not charged with threatening any witnesses but in the course of the proceedings, a witness told the Tribunal that the Applicant sent her an email which was tendered before this Tribunal. I have examined the contents of the said email which is reproduced hereunder:

“If you know how big God can be, then you should know how big is your bill which you will be paying soon, VERY SOON. In life everybody has his own days, presently it is yours, but don't be surprised it turn against you. Have a nice Easter.”

8.11.2 I do not find any threats against the witness. I however find that the Applicant exhibits a certain level of immaturity in sending this unnecessary email. I have wondered at the value of this piece of evidence in the proceedings. Was it meant to prove bad character on the part of the Applicant? The proceedings were not a criminal trial and evidence of the Applicant's bad character is irrelevant and even inadmissible.

8.11.3 The Tribunal was also told that the Applicant sent an identical email to a confidential witness CW1. It is rather unfortunate that the Respondent's Counsel tried to mislead the Tribunal here. Who is this CW1? I find that the Applicant did not send the said email twice. It stands to reason, taking all the circumstances of this case into consideration, that CW1 is one and the same staff member mentioned above. (See paragraph 8.11.1).

8.11.4 An employee of a vendor, TFCE, who was granted anonymity by the investigators and the Respondent and referred to as CW4 was also alleged to have been threatened by the Applicant through telephone calls. Again, I wonder at the relevancy or admissibility of this report. Is it testimony given from the Bar by the Respondent's Counsel or testimony given by the investigator who was a witness during the proceedings? At the very best, this piece of information is hearsay. The person allegedly threatened has been shielded from appearing before the Tribunal. He is unable to tell us the nature of this threat. Even if the alleged report of threatening of the witness mentioned above goes to any issue assuming that such evidence would be relevant if properly tendered, it is absolutely useless coming from a “ghost witness” such as CW4.

## **8.12 *Late filing of Respondent's Exhibits***

8.12.1 The UNDT Statute and Rules of Procedure are silent on the issue of when Exhibits to be relied upon by parties during the hearing should be filed in the Registry and served on the other party. That having been said, it is reasonable to expect, in accordance with Articles 8(2) (g) and 10 of the UNDT Rules of Procedure, that a party to the proceedings must file all the documents he or she intends to rely upon at the hearing in a timely manner. Article 8(2) (g) provides that:

“2. The [Applicant's] application should include the following information:

... (g) Any supporting documentation (annexed and numbered, including, if translated, an indication thereof).”

8.12.2 Article 10 provides that:

“The respondent's reply shall be submitted within 30 calendar days of the date of receipt of the application by the respondent. The signed original reply and the annexes thereto shall be submitted together. The document may be transmitted electronically. A respondent who has not submitted a reply within the requisite period shall not be entitled to take part in the proceedings, except with the permission of the Dispute Tribunal.”

8.12.3 In the present case, the Respondent filed a Reply on 11 September 2009. The Reply did not contain any annexes or any other supporting documentation. The parties attended a status conference on 16 December 2009, following which they were required to disclose and to file with the Registry any documents they intended to rely upon at the hearing. The parties were served a Hearing Notice by the Registry on 17 December 2009. On 11 January 2010, the day of the hearing, the Respondent filed a total of 19 documents with the Registry by email and copied to the Applicant's counsel. The documents were marked as Exhibits 1 to 16.

8.12.4 In view of this state of affairs, the Tribunal notes with concern and strongly discourages this sort of thinly-veiled “ambush tactic” by the Respondent's counsel and considers it to be detrimental to the objective of a fair hearing of the case.

## **9. Findings**

9.1 In light of the foregoing, the Tribunal makes the following findings:

- (i) The allegation that the Applicant solicited bribes and payments from the owner of Ekima has not been established.
- (ii) The investigation did not establish that the Applicant drafted any proposal for Matina in connection with on-going bidding exercises at the time. The printing of a proposal for a vendor by a Procurement Officer does not amount to a misconduct.
- (iii) The case of requesting for bribes or money payments from AVC against the Applicant is not established. Any disciplinary action against the Applicant on this score is not maintainable.
- (iv) The transaction between the Applicant and the owner of Panache was a private one and can by no stretch of the imagination be described as an offer, a gift, hospitality or a favour in the context of the rules referred to. However, there existed the possibility that sometime in the future, the Applicant could in an official procurement capacity find that he had to deal with bids from Panache. Others may then be prone to labour under the perception, wrong as it might be that since he had a previous personal dealing with the vendor, the Applicant might be inclined to favour him in an official capacity.
- (v) The statements allegedly made by CW4 to investigators were largely self-serving, unreliable, racist and malicious and no reasonable Tribunal would admit or rely on them.
- (vi) The OIOS/PTF Report is based on findings and conclusions following an investigation conducted with bias, subjectivity and with no regard for fairness. The report consists of mere allegations dressed up as facts, exceeded the scope of its assignment, is tendentious and speculative.

(vii) The OIOS/PTF findings on the alleged false statements by the Applicant are subjective and inaccurate.

(viii) The Applicant was in the habit of meeting with some vendors at his home outside working hours and discussed MONUC contracts with them. He also discussed MONUC contracts sometimes with vendors he met at the club or in restaurants. This was clearly unprofessional, reckless and exhibited poor judgment on the part of the Applicant but does not amount to misconduct. On the part of his supervisors, there is no documentation before the Tribunal to show that any action such as a written reprimand was taken against the Applicant. This was certainly an example of very poor management.

(ix) Considering that the Applicant was a Procurement Assistant and one of the most junior of the staff in the Procurement Section, it is curious that the authority he exercised was quite extensive. He appeared to handle all manner of contracts no matter the financial value. There was a massive failure of supervision and management at MONUC's Procurement Section at the times material to this application.

(x) The Respondent has failed to substantiate the charges against the Applicant to the required standard of proof.

(xi) The sanction of summary dismissal under the circumstances of this case was disproportionate.

## **10. Remedy**

10.1 In the light of the above, the Tribunal:

- (i) Orders rescission of the decision to summarily dismiss the Applicant;
- (ii) Orders the Respondent to reinstate the Applicant and to make good his lost earnings from the date of his summary dismissal to the date of his reinstatement with interest at 8%;

(iii) Orders that the Applicant be demoted by four steps within his job level at the time of his summary dismissal;

(iv) Fixes the compensation to be paid to the Applicant, should the Secretary-General decide, in the interest of the Administration, not to perform the obligation to rescind the decision, at two years' net base salary at the rate in effect on the date of the Applicant's separation from service, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgment until payment is effected; and,

(iv) Rejects all other pleas.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 7<sup>th</sup> day of April 2010

Entered in the Register on this 7<sup>th</sup> day of April 2010

*(Signed)*

Jean-Pelé Fomété, Registrar, UNDT, Nairobi