



**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko, Acting Registrar

MOSHA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON RECEIVABILITY**

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**Counsel for Applicant:**

Self-Represented

**Counsel for Respondent:**

Steven Dietrich, ALS/OHRM, UN Secretariat

Elizabeth Gall, ALS/OHRM, UN Secretariat

## **Introduction**

1. The Applicant is a former staff member of the International Criminal Tribunal for Rwanda (“ICTR”). She served as a Library Clerk on a fixed-term appointment at the G4 level until her separation from the Organization on 30 June 2011.

2. On 6 June 2012, she filed an Application dated 25 May 2012 contesting the administrative decision to withhold her final emoluments and the delay by the Administration to submit her pension forms for a period of nine months even after she tendered her notice of separation from the ICTR on 1 June 2011.

3. On 21 June 2012, the Respondent filed a Reply refuting the receivability of the Application and concurrently filed a Motion for Leave to have Receivability considered as a Preliminary Issue on grounds that the Applicant had failed to submit a request for management evaluation of the contested decision.

## **Factual Background**

4. The Applicant tendered her letter of resignation from the International Criminal Tribunal for Rwanda (ICTR) on 30 May 2011 and was accordingly separated from the Organization on 30 June 2011. It would appear from the record before the Tribunal that for an indeterminate amount of time until her separation from the Organization, the Applicant served in the ICTR Staff Association Executive Committee.

5. Upon the initiation of the Applicant’s check-out process on 7 June 2011, the then President of the ICTR Staff Association, Mr. Orono Orono, copied the Applicant on an email in which he indicated that in light of ongoing investigations into the finances of the ICTR Staff Association particularly with respect to former members of the ICTR Staff Association Executive Committee, he was unable to complete the Applicant’s check out procedures.

6. In protest, the Applicant responded to the email by Mr. Orono Orono of 7 June 2011 on the same day. Mr. Orono consequently informed the Applicant that only upon receiving authorization from the Office of Internal Oversight Services (OIOS) would he sign off on her check-out process.

7. On 9 June 2011, the Applicant wrote an email to Ms. Patricia O'Brien raising, *inter alia*, the issue of the investigation against the former Executive Committee of the ICTR Staff Association. This email was copied to Mr. Orono Orono amongst others. On the same date, Mr. Orono Orono responded and expressed hope that OIOS would soon issue a report of their findings.

8. On 9 June 2011, Ms. Sarah Kilemi, Chief of the Division of Administrative Support Services ("DASS") wrote in an email stating that as far as the Administration was concerned, she had already approved the Applicant's separation to enable her to take up a new assignment.

9. The Applicant then embarked on varied email correspondence to various officials at the ICTR on the subject of her stalled check out process on diverse dates between 9 June 2011 and 16 March 2012, resting with her email to the then Registrar of the ICTR, Mr. Adama Dieng on 16 March 2012.

10. Mr. Dieng responded to the Applicant vide an email dated 16 March 2012 directing her to contact the ICTR Chief of Finance, Mr. Robert Foort, whom Mr. Dieng indicated would effect payments of the Applicant's entitlements without prejudice to the outcome of the OIOS investigation into the finances of the ICTR Staff Association.

11. The Applicant and Mr. Foort exchanged emails on the subject of the processing of her final entitlements resting with Mr. Foort's email dated 22 March 2012 in which he assured the Applicant that her case was being handled as a matter of priority and that he would revert to her as soon as payment was ready to be made.

12. In the meantime, on 19 March 2012, the Applicant received a request by an OIOS investigator, Ms. Deborah Izevbizua, to provide supporting documentation in respect of funds of the ICTR Staff Association that the Applicant had allegedly spent. This email communication referenced an earlier email by the same investigator dated 13 October 2011 to the Applicant in which the said investigator requested documentation to account for funds of the ICTR Staff Association that were reportedly spent by the Applicant.

13. The Applicant sent her response to the request for the production of relevant documentation by OIOS vide an email dated 31 March 2012.

14. According to the Respondent, the Applicant was paid her final entitlements on 26 March 2012, totaling TSH. 4,864,866.16 and that on 28 March 2012, the ICTR sent a notice of separation to the United Nations Joint Staff Pension Fund with respect to Applicant.

### **Procedural Background**

15. The Applicant filed the instant Application on 25 May 2012, in response to which the Respondent filed a Motion for Leave to have Receivability considered as a Preliminary Issue on 21 June 2012.

16. The Applicant filed a response to the Respondent's Motion for Receivability to be considered as a Preliminary Issue on 3 July 2012, upon which the Respondent filed his Consolidated Reply on 11 July 2012. The Applicant then filed a Reply to the Respondent's Consolidated Reply on 24 July 2012.

### **The Applicant's Case**

17. At the core of the Applicant's case are the following contentions:

18. The decision of the Administration to delay the payment of the Applicant's final entitlements for a period of over nine months was illegal,

irregular and an abuse of the Administration's discretionary powers and a breach of United Nations Staff Regulations and Staff rules and was motivated by improper purposes.

19. The contested decision in the present Application is not centered on the payment of the Applicant's final entitlements but rather on the delay in effecting payment of her final entitlements.

20. The decision to obstruct the Applicant's check out from the Organization and withhold her final entitlements was done in violation of due process and in the absence of any proof that she was indebted to the ICTR Staff Association. In that respect, the Applicant further contends that the engagement of OIOS by the ICTR Staff Association was done in breach of the applicable Constitution governing ICTR Staff Association operations.

21. The contested decision, which was taken despite several reminders by the Applicant to the Registrar of the ICTR, caused the Applicant, who is a single parent, untold suffering, mental harm, crippling of her financial reputation and career prospects in addition to psychological torture.

22. The Applicant denies that her final entitlements were paid on 26 March 2012 and states that her pension was delayed by the ICTR. In that regard, the Applicant avers that the Respondent's allegation that all her entitlements were paid is a material distortion of facts.

23. The Applicant contends that the ICTR Staff Association in the person of the then President, Mr. Orono Orono lacked the mandate to block the checking out of staff members. She further argues that the act by Mr. Orono Orono to obstruct her check out from the Organization constitutes abuse of authority which is categorized under the relevant administrative instruction as falling under prohibited conduct.

24. The Applicant submits that the eventual payment of her separation package on an alleged humanitarian basis without completion of her checking out process which is what initially led to the delay in effecting payment of her entitlements points to bad faith, ulterior motives and abuse of power on the part of the Respondent.

25. The Applicant maintains that she made genuine attempts to resolve this matter informally but that these efforts were rebuffed by extreme delays in responding to her overtures for informal settlement.

26. The Applicant asserts that she has not filed a request for management evaluation in respect of her Application and urges the Tribunal to dispense with procedural technicalities in this matter and instead dispense substantive justice. In that regard, the Applicant urges the Tribunal to safeguard its independence from the management evaluation process which is in any event an unnecessary barrier to justice.

27. The Applicant further submits that the Administration seeks to hide under the camouflage afforded by the management evaluation process to conceal its incompetence.

### **The Respondent's Case**

28. The Respondent's response to this Application is summarized hereunder as:

29. The Application is not receivable for the reason that the Applicant failed to request management evaluation of the contested decision which is a legal imperative for filing applications before the Tribunal.

30. Without prejudice to his contention on the issue of receivability of this matter, the Respondent submits that the Application is moot as the Applicant's final entitlements were paid to her on 26 March 2012 on an exceptional basis. The

Respondent further submits that the contested decision has had no impact on the Applicant's terms of appointment and that a review of it would be academic.

31. The Organization lawfully exercised its discretion under relevant administrative issuances to withhold the Applicant's final entitlements in light of the dispute regarding the Applicant's indebtedness to the ICTR Staff Association and the investigation by OIOS into the matter.

### **Considerations**

#### *Receivability as a Preliminary Issue before the Tribunal*

32. This Tribunal and the United Nations Appeals Tribunal (UNAT) have belabored the point, *ad infinitum*, that the jurisdiction of the Dispute Tribunal to entertain applications before it is subject to the requirement which enjoins all applicants to submit a request for management evaluation save for the select category of disciplinary cases.

33. The obligation to submit a request for management evaluation prior to filing an application is to be found in Staff rule 11.2(a) rendered thus:

A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1(a) shall, *as a first step*, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

34. Staff Rule 11.2(a) is categorical and admits of no exception save for that found in Staff rule 11.2(b) which provides that a staff member contesting the decision to either impose a disciplinary measure or a non-disciplinary measure following completion of a disciplinary process is exempted from requesting a management evaluation.

35. In deliberately failing to submit a request for management evaluation, the Applicant has authored the fate of this Application herself.

*Whether this Application is an abuse of court process requiring an order for costs against the Applicant*

36. The Tribunal deems it necessary to conduct an inquiry into whether the Applicant has abused its process by filing this Application. Article 10.6 of the Statute of the Dispute Tribunal provides that upon a determination that a party before it has abused its process and proceedings, the Tribunal may award costs against that party.

37. In the words of Lord Diplock of the English Court of Appeal in *Hunter v. Chief Constable of the West Midlands Police* [1982] AC 529, the power of a Court to strike out applications which constitute an abuse of its process is imperative in order for the Court:

To prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or *would otherwise bring the administration of justice into disrepute among right-thinking people.*

38. In the present instance, the Tribunal observes that the Applicant filed this Application in defiant breach of the Statute and Rules of Procedure of the Tribunal. Not only was the Application filed almost a year after the date of the contested decision but the Applicant has asserted that she intentionally failed to submit a request for management evaluation. In that regard, the Applicant has pleaded, not that she was unaware of the requirement to submit a request for management evaluation in respect of her application, where awareness or otherwise of this obligation is not a mitigating factor, but that she distrusts the ability of the Management Evaluation Unit (MEU) to conduct the evaluation process fairly and impartially. In her own words:

...MEU has failed in totality in many cases to correct an improper decision rendered by UNICTR management and to provide tolerable remedies by not been[sic] keen enough in analyzing the submitted supporting documentation presented before them and has been fanatical in favoring the decisions of UNICTR management.

39. The Applicant accordingly filed before the Tribunal exchanges between MEU and parties not before the Tribunal in an unrelated matter as support for her contention that the integrity of the MEU has been compromised. The Applicant has further submitted in so far as she considers that the management evaluation process is an impediment to justice that the Tribunal should overlook her failure to submit a request for management evaluation in the interests of safeguarding its own independence and in keeping with the principle of separation of powers and has referred the Tribunal to its Judgment in *Igbinedion* UNDT/2011/110.

40. It behoves any applicant, present or in the future, who approaches the Tribunal to be cognizant of the fact that proceedings before the Tribunal are not the proper forum to canvass issues of what the law should be vis-à-vis what it actually is. The management evaluation process is not on trial before this Tribunal. In refusing to request a management evaluation of the contested decision, the Applicant has essentially expressed contempt for the applicable law and procedures necessary to access the Tribunal. Notwithstanding the Applicant's vehement protestations against the applicability of the requirement to submit a request for management evaluation to her case, the reasons adduced for her failure to do so are misconceived and completely unacceptable in light of the express provisions in the Statute of the Dispute Tribunal and the combined jurisprudence of both the Dispute and Appeals Tribunal. The blatant and utter disregard for the procedural requirements shown by the Applicant in this case can only speak to her underlying motive in filing this Application.

41. In *Golden International Navigation SA v. Zeba Maritime Company Limited* [2008] JOL 21330 (C), the High Court of South Africa found that an action may be held to be vexatious if it is "obviously unsustainable, or frivolous,

improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant.”

42. Notwithstanding that she considered herself beyond the ambit of requisite procedural requirements, the Applicant still sought the following as remedies: grant of a ‘disturbance allowance’[sic] for the alleged nine-month period in which her final emoluments were withheld, the payment of compensation equivalent to two years’ net base salary on the assumption that her entitlements as withheld would have attracted a handsome interest rate if they had been deposited into a bank on the day she was checked out from the Organization and finally the payment of compensation equivalent to two years’ net base salary for moral and psychological damage wrought upon her by the contested decision.

43. Within the particular confines of this case and with reference to the totality of the submissions filed by the Applicant in this matter, the Tribunal is not persuaded that the Applicant filed the present Application for any reason other than to vex the Respondent. The Tribunal accordingly finds that the Applicant has abused its proceedings and that costs should be awarded against her pursuant to article 10.6 of the Statute of the Tribunal.

44. Whereas the right to access to justice is sacrosanct and is treated as such by this Tribunal, the Tribunal will nevertheless not hesitate to punish the misuse of its procedures by any party. The conduct of proceedings before the Tribunal considerably taxes both its resources and those of parties appearing before it. Where the Tribunal determines that any applications before it are frivolous, vexatious and/or an abuse of the Court’s process, it will sanction the offending party accordingly.

45. In that respect, the Tribunal is cognizant that the Applicant in this case has been separated from the Organization from June 2011 and that it may well be logistically difficult if not impossible, in the interests of economy, to recover costs against her. However, the Tribunal concurs with the finding in *Balogun*

UNDT/2012/026 that where it encounters a glaring abuse of its process, the offending litigant must pay an award of costs to balance the scales of justice.

**Conclusion**

46. This Application is vexatious and frivolous. It is not receivable and is accordingly dismissed in its entirety. For the abuse of process of the Tribunal, the Applicant is ordered to pay USD600.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 19<sup>th</sup> day of June 2013

Entered in the Register on this 19<sup>th</sup> day of June 2013

*(Signed)*

Abena Kwakye-Berko, Acting Registrar, Nairobi