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Case No.: UNDT/NBI/2011/023

Judgment No.: UNDT/2013/024

Date: 18 February 2013

## **Introduction**

1. This case stems from the Respondent's decision to separate the Applicant in violation of Order 033 (NBI/2011), which was issued by the Tribunal on 12 May 2011.

## **Procedural History**

2. On 9 April 2011, the Applicant, a staff member of the United Nations Human Settlements Programme (UN-Habitat) requested management evaluation of the decision not to extend his appointment beyond 18 April 2011.

3. On 11 April 2011, the Applicant filed a motion for suspension of action with the United Nations Dispute Tribunal ("the Tribunal"), seeking suspension of the contested decision.

4. On 15 April 2011, the Tribunal issued Order No. 030 (NBI/2011) suspending any non-renewal decision until 13 May 2011. The Respondent appealed this order on 29 April 2011.

5. On 10 May 2011 the Management Evaluation Unit (MEU) determined that the Applicant's request for management evaluation was time-barred, as the



15. On 13 and 16 August 2012, the Tribunal issued Orders No. 108 and 109 (NBI/2012) calling for testimony of the Executive Director of UN-Habitat, Joan Clos. The latter Order also set the matter down for hearing on 9 October 2012. On the Respondent's motion, this hearing was postponed to 25 October 2012.

**Applicant's submissions**

16. In his Application to Commit the Management of UN-Habitat for Contempt of the Tribunal and Disobedience of the Order of the Tribunal under the Inherent Jurisdiction of the Tribunal, the Applicant specifically asked that the following staff members of UN-Habitat be committed individually and collectively for contempt and disobedience of the Tribunal:

- a. Dr. Joan Clos, Executive Director;

19. The Respondent contends that “judgments as well as orders impose no immediate obligation on the parties to execute them once they are issued.” The Respondent argues that as the appeal of a judgment has “the effect of suspending the execution of the judgment contested”, an order is likewise suspended when appealed. The Applicant therefore fails to establish that the named officials of UN-Habitat “willfully and without just cause failed to execute the order”.

20. The Respondent further stated that as General Assembly Resolution 63/253 declared that the Tribunal “shall not have any powers beyond those conferred under its **statute**”, the Tribunal is precluded from delivering a judgment on contempt; contempt is not explicitly mentioned in the Tribunal’s Statute, nor its Rules of Procedure.

#### **Applicant’s further submissions**

21. The Applicant’s Reaction to the Contemnor’s Reply challenged the propriety, in law, of the Respondent’s appeal of an order of the Tribunal and his interpretation that the fact of that appeal suspends his duty to execute the order. “An ‘order’ is not a ‘judgment’ [sic] and, therefore, not subject to appeal.”<sup>1</sup>

22. On the question of jurisdiction, or contempt powers, of the Tribunal, the Applicant argues that Article 2(6) of the **Statute** of the Tribunal permitted the Tribunal to reach a decision on contempt as part of its inherent power, as it states:

In the event of a dispute as to whether the Dispute Tribunal has competence under the present statute, the Dispute Tribunal shall decide on the matter.

23. The Applicant also asked, in conjunction with his earlier-sought remedies, that the named individuals representing the management of UN-

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Habitat be declared “unfit to hold their various offices for gross misconduct unbecoming of international civil servants.”

## **Issues**

### *Mr. N’Dow as Counsel and Witness*

24. Mr. Saidou N’Dow, who was initially counsel in the case, gave evidence from the Bar while examining witness Ms. Hilda McHaffie, who was called by the Respondent on 28 September 2011.

25. During the course of Ms. McHaffie’s testimony on the email she sent the Applicant notifying him of the decision to separate him following the issuance of Order No. 033, the witness told the Court that she acted on legal advice of Counsel for the Respondent, who was in turn acting on the advice of the Office of Legal Affairs at UN Headquarters.

26. Counsel asked the witness the following questions:

Were you advised that the lodging of the appeal would have the effect of suspending the implementation of the order?

When the legal officer in the person of myself advised you that, you know, the instructions of the advice from OLA is for us to proceed with the separation of Mr. Igbinedion, did you hold any consultations with Mr. King or any other person?

And were you not told that my interpretation of the rules was premised on the fact that the rules provided for the suspension of orders once an appeal is lodged?

27. At the start of the same hearing, on 28 September 2011, Counsel also made submissions from the Bar seeking to correct the Applicant’s summary of Mr. King’s evidence. Counsel told the Court that Mr. King’s testimony had been “misread by the Applicant,” and that Mr. King had in fact “received

instructions” from Counsel himself, who was, in turn, relying on the advice of the Office of Legal Affairs.

28. It was these questions that prompted the Tribunal to call Mr. N’Dow as a witness. The purpose of this decision was to give Counsel an opportunity to explain his role, if any, in the process leading to the disobedience of the court order.

29. In Order No 128 (NBI/2011), the Tribunal said:

In light of counsel’s statement from the Bar, and the Applicant’s motion naming counsel himself as a possible contemnor, the Tribunal finds it necessary to hear Mr. N’Dow and re-call Mr. King.

Messrs N’Dow and King are therefore ordered to appear before the Tribunal to testify on the issues arising out of the Applicant’s motion.

The Respondent is directed to make such arrangements as is necessary to ensure adequate legal representation for the conduct of his case during the course of Mr. N’Dow’s and Mr. King’s testimony on the matter of contempt.

The Tribunal notes from Mr. N’Dow’s submissions in court that arrangements have/will be made to ensure representation for himself in respect of this matter.

30. On 8 November 2011, when the Court sat to hear the two witnesses, Mr. N’Dow appeared at the Bar Table and sought to address the court.

31. The following exchange then took place:

Mr. President:

No, you are not counsel for the Respondent, Mr. Nd'ow I am sorry because you have been summoned the order is clear as a witness in this case, and this is why we made an order. And we also gave more time to Respondent to make proper arrangements in the light of the letter we obtained that, as of the last hearing, proper arrangements could not be made for the Respondent. And in fairness to the Respondent, the Court adjourned the matter to today for arrangements to be made.

And further, I have a letter from the Respondent, Dr. Joan Clos, the ED of Habitat, dated 5th November [appointing Ms. Kariuki] [...]

So I would kindly request you, Mr. Nd'ow, to take your place in the audience, and then I will hear you as a witness in this case. And, of course, you will be, no doubt, ably represented by Ms. Nana Kariuki.

Mr. N'DOW:

Your Honour, my understanding –

Mr. PRESIDENT:

No, no, no. I don't want to hear you anymore. Either you comply with what I just said or I will make an appropriate order. That's all I have to say. [...]

And the reason I called you, Mr. N'Dow, is, in fairness to you, so that you will have full latitude to explain your stand, to explain your position in regard to the chain of events that led to the disobedience of the Court order.

Either you comply or I will make an appropriate order. I don't want any confrontation. Let's follow proceedings and let good sense prevail. Thank you.

Mr. N'DOW:

Your Honour, I am most obliged with your order.

32. In his testimony, Mr. N'Dow told the court that when he received the order he consulted with Mr. Antoine King, the Director of Programme Support Division, UN-Habitat and he formed the view that the order was appealable. He added that some of the facts in the order were “misconstrued.” He consulted with counsel in OLA, New York and together they formed the view that “failing to execute the order would not constitute contempt or disobedience.” The premise for that view was Article 11.5 of the Statute of the UNDT that stipulates that judgments are only executable following the expiry of the time for appeal. According to Mr. N'Dow, OLA advised him that “it was not necessary to obey the order.” He was just transmitting the advice he had obtained from OLA as his role was simply to convey the advice of OLA to



UN-Habitat. He was an interface as it were but his role as counsel was still “intact.”

33. Mr. King testified that having discussed the matter with Mr. N’Dow, he instructed Ms. McHaffie to proceed with the separation of the Applicant. Mr. N’Dow briefed him on the implications of the Order and advised that OLA should be consulted. Following the advice of OLA, which was in an email, Mr. King had consultations with Mr. N’Dow, Ms. Kariuki, and Mr. Paul Taylor (Chief of Staff, Office of the Executive Director, UN-Habitat) and then advised Ms. Mc Haffie to proceed with the separation of the Applicant.

34. He was asked by the Bench whether the case of contempt had been discussed with the Executive Director of UN-Habitat, Mr. Joan Clos and his answer was “I think he has been briefed.” When asked to explain who advised

decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. **The decision of the Dispute Tribunal on such an application shall not be subject to appeal.** (Emphasis added)

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interlocutory appeals. It falls to the Appeals Tribunal to decide

it is argued that the absence of an express contempt provision proscribes the Tribunal from admitting and deciding on matters of contempt. The argument is that international tribunals cannot have more powers than those conferred upon them by their respective Statute. On the other hand, it is argued that a court by its very nature have the inherent power to punish for contempt or disobedience of its authority. The justification for this approach is that this power is essential not so much:

[T]o buttress the dignity of the judges or to punish mere affronts or insults to a court or tribunal; rather, it is justice itself which is flouted by a contempt of court, not the individual court or judge who is attempting to administer justice.<sup>3</sup>

47. In the case of *Gilbert Ahnee v The Director of Public Prosecutions*,<sup>4</sup> the Privy Council held that the Supreme Court of Mauritius has an inherent power to punish for contempt in the absence of any law that conferred such a power on the court.

48. In the case of *Prosecutor v Dusko Tadic*<sup>5</sup> the Appeals Chamber of the ICTY held:

A power in the Tribunal to punish conduct which tends to obstruct, prejudice or abuse its administration of justice is a necessity in order to ensure that its exercise of the jurisdiction which is expressly given to it by its Statute is not frustrated and that its basic judicial functions are safeguarded. Thus the power to deal with contempt is clearly within its inherent jurisdiction. That is not to say that the Tribunal's powers to deal with contempt or conduct interfering with the administration of justice are in every situation the same as those possessed by domestic courts, because its jurisdiction as an international court must take into account its different setting within the basic

The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as "implied" powers.<sup>6</sup>

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pending any judicial avenues for a remedy if the situation so warrants. In *Luvai* UNDT/2010/166, Izuako J. observed that the UNDT “has the ability, inherent to all courts and tribunals, to imply powers to prevent abuses of process.”<sup>10</sup>

53. In the case of *Gilbert Ahnee v The Director of Public Prosecutions*,

Article 7(2) (1) of the Statute of the UNDT reads:

Subject to the provisions of the present statute, the Dispute Tribunal shall establish its own rules of procedure, which shall be subject to approval by the General Assembly.

2. The rules of procedure of the Dispute Tribunal shall include provisions concerning:

...

(1) Other matters relating to the functioning of the Dispute Tribunal.

56. The function of the Tribunal necessarily requires that its orders would be obeyed and not jettisoned overboard. In the words of the Appeals Chamber of the ICTY stated in *Tadic*, the Tribunal finds that Article 7(2)(1) of the Statute read together with Article 36 of the Rules of Procedure enables the Tribunal

to adopt rules of procedure and evidence for the conduct of matters falling within the inherent jurisdiction of the Tribunal as well as matters within its statutory jurisdiction earlier...[T] he content of these inherent powers may be discerned by reference to the usual sources of international law, but not by reference to the wording of the rule.<sup>12</sup>

57. The UNDT is further inspired by the United Nations Appeals Tribunal who, in its most recent sitting, held thus:

## **Findings**

58. Following the decision not to renew his contract the Applicant filed a management evaluation on 9 April 2011, and applied for suspension of action of the impugned decision 11 April 2011. The Respondent's Reply was received on 13 April 2011. On 15 April 2011, the Tribunal granted the suspension of action and set the matter down for hearing on 4 May 2011.<sup>14</sup>

59. On 27 April 2011, counsel for Respondent moved for an adjournment and the hearing was rescheduled for 9 May 2011. On 6 May 2011, MEU requested additional information from the Applicant.

60. On the day of the hearing on 9 May 2011, counsel for the Applicant informed the Tribunal that an application on the substantive merits of the case had been filed. Counsel also stated that attempts to file all the documents by email were not successful. The Registry's record verifies that some documents were received on 8 May 2011.

61. On 10 May 2011, the Applicant's request for management evaluation was rejected as being time barred.

62. On 11 May 2011, counsel for the Respondent moved that the suspension order be vacated. The Respondent's motion was premised on the MEU's finding on the receivability of the Applicant's grievance.

63. On 12 May 2011, the Tribunal issued a short Order (Order No. 033) staying the decision to separate the Applicant "until the case is finally determined on its merits." The Tribunal held that it was satisfied that the Applicant had met the test for suspension of action, and that a reasoned judgment was to follow.

64. On 13 May 2011 the Respondent filed an appeal against the order and proceeded to separate the Applicant from service.

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<sup>14</sup> Order 030 (NBI/2011).



65. On 24 June 2011, the Tribunal issued its Decision on an Application for Suspension of Action Pursuant to Articles 13 *and* 14 of the UNDT Rules of Procedure (UNDT/2011/110). This judgment was *not* appealed by the Respondent.

66. Suspension of action *during* the pendency of the management evaluation applies to actions brought under Article 13. Article 14 does not provide for such

70. It is obvious then that a violation of such an order would necessarily result in a situation in which the aggrieved litigant suffers harm which cannot be retrieved or compensated for. In the particular case of an applicant who faces being separated from service, the violation of an order suspending that decision results, quite simply, in the loss of that person's livelihood.

71. It forms, more often than not, a point of no return. Even where litigation against the offending institution is successful, very rarely is reinstatement possible or even advisable. And in the specific situation of the present Applicant, who was two years away from retirement, the consequences of the violation of this Order must be patently obvious.

72. The importance therefore of a court order being obeyed requires little explanation. Quite apart from the question of why it is important to obey an order, one generally assumes that organisations of integrity and those who counsel them must themselves be aware of their duties and responsibilities within the ambit of a judicial mechanism. The system can scarcely be expected to function without its officials being sufficiently apprised.

73. It is therefore as disappointing as it is surprising that the decision to baldly violate Order No. 033 (NBI/2011) was taken *on the advice of* counsel for the Respondent, who was in turn advised by the Office of Legal Affairs who, for all intents and purposes, also serves as counsel

the aggrieved party to use the appellate process to challenge the decision he or she is unhappy with. The solution is not a disobedience of a judicial order.

76. The Executive-Director (ED) of UN-Habitat whose name was repeatedly mentioned in the course of the proceedings was eventually called as a witness of the Court. When asked whether he was aware that there was a court order suspending the separation of the Applicant and if he was aware that the order was not complied with, he told the Court that much of the events in this case transpired while he was away on mission but that he was briefed on it upon his return. By that time, the Applicant had already been separated. He added that issues of staff management were delegated to Mr. Antoine King, which

head of UN-Habitat, Mr. Clos must bear full responsibility for the actions of his managers.

80. As for OLA, there is undisputed evidence that it specifically advised disobedience of Order No. 033 9NBI/2011). That the Tribunal has grave concerns over the conduct of the Office of Legal Affairs in this case would be an understatement.

81. The Tribunal must unfortunately also refer to a course of events that betray the disrespect that both counsel for the Respondent, Mr. N'Dow and OLA displayed vis-à-vis the Tribunal.

82. The Tribunal's decision to call the Executive Director to testify was based on its careful review of the record of proceedings so as to allow him the opportunity to explain his conduct during the course of the events leading up to the decision to separate the Applicant. A request was forwarded to the Director for him to appear before the Tribunal on 9 October 2012.<sup>16</sup> On 8 October 2012, Mr. N'Dow informed the Registry that he would be acting as counsel during the ED's testimony.

83. The Tribunal issued Order 127(NBI/2012) on 8 October 2012 directing the Respondent to make appropriate arrangements for legal representation. The matter was then fixed for 25 October 2012 by Order No. 132 (NBI/2012). Following yet another motion for adjournment, this time on grounds that Orders No 127 and 132 have been appealed, Order No. 135 (NBI/2012) was issued ordering that the matter will proceed on 25 October 2012 as scheduled.

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91. The Tribunal also recommends the referral of the Office of Legal Affairs to the Secretary-General under the same accountability provisions. The cloak and dagger manner in which the Respondent has sought to shield the identities of those involved in this case makes it difficult for the Tribunal to refer any particular officer. The Tribunal therefore leaves it up to the Secretary-General to enquire into the identities of those involved and take the action he deems appropriate.

*(Signed)*

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Judge Vinod Boolell

Dated this 18<sup>th</sup> day of February 2013

Entered in the Register on this 18<sup>th</sup> day of February 2013

*(Signed)*

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Jean-Pelé Fomété, Registrar, Nairobi