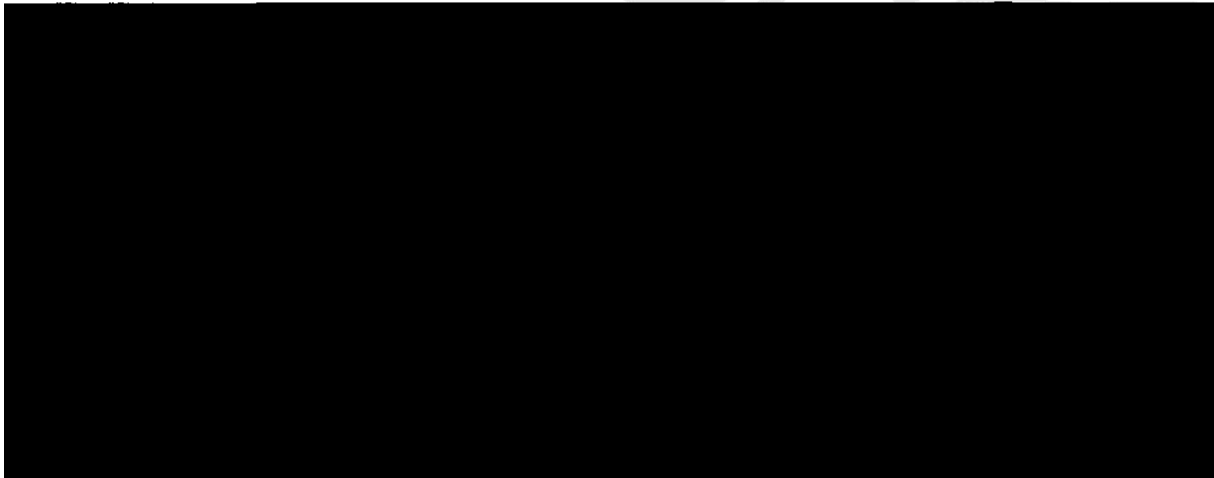




Judgment No. 2014-UNAT-410



Counsel for Respondent/Applicant:

Samson Nyaberi

Counsel for Appellant/Respondent:

Rupa Mitra/John Stompor

JUDGE MARY FAHERTY , P



12. On 22 April 2013, the Secretary-General appealed Judgment No. UNDT/2013/024. On 26 April 2013, he filed a motion for confidentiality, requesting that the Appeals Tribunal not use the names of the UN-Habitat staff members implicated in this matter and order the Dispute Tribunal to redact their names from Judgment No. UNDT/2013/024. On 24 June 2013, Mr. Igbinedion filed comments on the motion for confidentiality as well as an answer, which he perfected on 8 July 2013.

#### Submissions

##### The Secretary-General's Appeal

13. The Secretary-General submits that the UNDT erred in concluding that there was an obligation to execute UNDT Order No. 33. He maintains that the Order was clearly unlawful as the Dispute Tribunal had no authority to suspend a contested decision beyond the deadline for the completion of management evaluation.

14. The Secretary-General also submits that there is no obligation to execute an UNDT order until the period of appeal expires, if no appeal is filed. If an appeal is timely filed, this

procedures in *Igunda v. Secretary-General of the United Nations*.<sup>4</sup> The Secretary-General submits that the power to find contempt is not an inherent power of the Dispute Tribunal, and the General Assembly did not authorize the Dispute Tribunal to exercise such powers.

16. The Secretary-General maintains that, in any event, the Organization's reliance on the Appeals Tribunal's clear and consistent jurisprudence cannot constitute grounds for finding contempt. In this connection, he draws attention to the fact that the UNDT Judge who issued the Judgment under appeal also issued the Judgments in



of judicial review of the Dispute Tribunal's decision making, and the Dispute Tribunal should recognize, respect and abide by the Appeals Tribunal's jurisprudence.

25. Accordingly, the Appeals Tribunal finds that the Dispute Tribunal acted unlawfully in issuing an Order in direct contravention with the Appeals Tribunal's jurisprudence.

*Obligation to respect a UNDT Order until overturned by the Appeals Tribunal*

26. Whilst the Appeals Tribunal has ruled that the Dispute Tribunal acted unlawfully in this matter, nothing in the foregoing should be construed as limiting the validity of a UNDT order, pending a decision of the Appeals Tribunal to vacate it.

27. The Appeals Tribunal cannot accept the argument proffered by the Secretary-General that he had no obligation to execute UNDT Order No. 33 on the basis of its unlawfulness, or that his appeal stayed the Order. On the contrary, regardless of the legal analysis of the Secretary-General – or, indeed, his prediction as to the likelihood the Appeals Tribunal would overturn the Order – he was obligated to comply with Order No. 33 until such time as it was vacated by the Appeals Tribunal.

28. The Appeals Tribunal notes that, notwithstanding the Secretary-General's appeal of UNDT Order No. 30, which suspended the non-renewal of Mr. Igbinedion's appointment until 13 May 2011, he complied with that Order and kept Mr. Igbinedion in service even after the MEU decision to reject Mr. Igbinedion's request. When the Dispute Tribunal issued Order No. 33 on 12 May 2011, ordering that the "suspension [of action must] remain in force until the case is finally determined on its merits", the Secretary-General should, once again, have complied. His opinion of the legal foundation of the Order was irrelevant except insofar as it motivated his appeal to this Tribunal. From a practical perspective, maintaining Mr. Igbinedion in the employ of the Organization for the short period of time pending the appeal, which was disposed of on 8 July 2011, would have avoided a great deal of litigation.

29. It is unacceptable that a party before the Dispute Tribunal would refuse to obey its binding decision in this manner, regardless of the fact that, in the instant case, the Order was ultimately vacated by the Appeals Tribunal. To rule otherwise would undermine legal certainty and the internal justice system at its core, and would incite dissatisfied parties to consider UNDT Orders as mere guidance or suggestions, with which compliance is voluntary.

30. The Appeals Tribunal must register its surprise at having to rule on this issue. It is vexatious of the Secretary-General to continue to pursue the matter, given that the Appeals Tribunal's jurisprudence in *Igunda* and *Villamorán* is clear and decisive:

'a1od t[(a)ly,thes iregier ates ts suriste n m I I



tribunal may find contempt towards the court even in the absence of shown harm by a party before it.

34. There are, admittedly, certain limitations on the sanctions international administrative courts can impose. The issue of possible measures that can be imposed, howsoever limited, is quite distinct from the principle that the UNDT clearly enjoys the right to regulate conduct before it and the power to find disregard of its decisions as constituting contempt.

35. In any event, this issue is *res judicata*, having been settled in *Igunda*, as cited above. The Judgment in *Igunda* is clear, and the Appeals Tribunal, *en banc*, confirms it herewith.

#### *Referral for accountability*

36. The Secretary-General appeals the UNDT referral of individuals and the Office of Legal Affairs for accountability. He argues that the referrals were substantively and procedurally flawed and that they violated the due process rights of the natural and legal persons concerned.

37. The authority of the UNDT to refer cases for accountability derives from Article 10(8) of its Statute, which provides: “The Dispute Tribunal may refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability.” The Appeals Tribunal has similar powers under Article 9.5 of its Statute. Both Statutes make reference to the referral of cases, but this does not preclude the referral of individuals within the context of a case. This statutory power of referral for accountability, which is independent of inherent judicial powers relating to contempt and which is not predicated upon a finding of contempt, has been exercised, albeit sparingly, by both Tribunals.

38. A referral for accountability is made to the Secretary-General (or applicable executive head). In the event that the Secretary-General decides to take action against an official, on foot of such a referral, his action could constitute an appealable administrative decision by that official. Referrals for accountability made under Article 10.8 of the UNDT Statute may be appealed to the Appeals Tribunal by a party in the underlying case.

39. In the instant matter, the Appeals Tribunal finds that the UNDT exercised its statutory authority improperly in making Article 10.8 referrals under the guise of sanctions for contempt. In the parlance of Article 10.8, this was not an “appropriate case... .. for possible action to enforce accountability”.

40. Accordingly, the referrals for accountability as set out in the impugned Judgment are vacated.

Judgment

41. The Appeals Tribunal upholds the appeal in part.

Original and Authoritative Version: English

Dated this 2<sup>nd</sup> day of April 2014 in New York, United States.

*(Signed)*

Judge Faherty, Presiding

*(Signed)*

Judge Weinberg de Roca

*(Signed)*

Judge Adinyira

*(Signed)*

Judge Simón

*(Signed)*

Judge Lussick

*(Signed)*

Judge Chapman

Entered in the Register on this 13<sup>th</sup> day of May 2014 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar