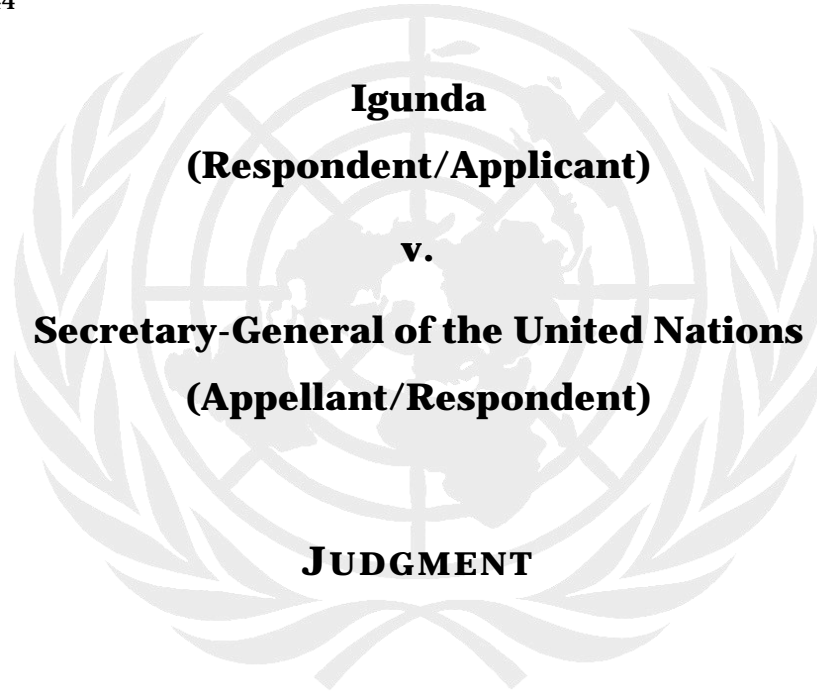




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2011-244



**Igunda
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Luis María Simón, Presiding Judge Inés Weinberg de Roca Judge Richard Lussick
Judgment No.:	2012-UNAT-255
Date:	1 November 2012
Registrar:	Weicheng Lin

Counsel for Respondent/Applicant: Katya Melliush

Counsel for Appellant/Respondent: Wambui Mwangi

JUDGE LUIS MARÍA SIMÓN, Presiding

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations on 11 August 2011 against Order No. 082 (NBI/2011) and Order No. 083 (NBI/2011), rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 29 July and 5 August 2012, respectively. Mr. Mukulutage Igunda filed his answer on 31 August 2011.

Synopsis

2. The Tribunal holds that a certain degree of discretion must be awarded to the trial court to consider and resolve urgent matters such as interim measures. The scheduling of a hearing within the time limit provided for by the Rules of Procedure becomes instrumental to the eventual adoption of a decision with regard to suspension of action and to the timely examination of the statutory requirements of merit to adopt such a decision.

3. Naturally, in any case the time limits clearly stated by the Rules must be respected: the five working days period for consideration of the application and the prohibition to suspend the implementation beyond management evaluation.

4. Thus, it would be right that the Dispute Tribunal expressly motivates this kind of decision in the need of thorough consideration of the involved issues and obligation to render a reasoned decision after examining the parties' submissions, ordering, if necessary, the suspension of action but fixing a certain date within that five working days period or until the completion of management evaluation, whichever is earlier, in order not to extend the suspension beyond the statutory time limits.

5. Accordingly, the first order under appeal is affirmed and the second one is vacated, taking into account the aforementioned five working day period.

6. This Court also reiterates its jurisprudence in *Villamoran*¹ and emphasizes that a party is not allowed to refuse the execution of an order issued by the Dispute Tribunal under the pretext that it is unlawful or was rendered in excess of that body's jurisdiction, because it

¹ *Villamoran v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-160.

is not for a party to decide about those issues. Proper observance must be given to judicial orders. The absence of compliance may merit contempt procedures.

Facts and Procedure

7. Mr. Igunda is a Supply Clerk at the GL-3 level with the United Nations Organization Stabilization Mission in the Democratic Republic of Congo. On 31 May 2011, the Chief Civilian Personnel Officer advised Mr. Igunda that his contract would not be extended beyond 30 June 2011 based on his performance ratings. His appointment was later extended for one month, to 31 July 2011, to enable the rebuttal process to be completed. On 15 July 2011, Mr. Igunda was advised that the rebuttal panel had agreed that his performance rating should remain the same. On 27 July 2011, Mr. Igunda filed an application for a suspension of action of the decision not to renew his appointment.

8. On 29 July 2011, the Dispute Tribunal held a hearing to “ascertain the facts of the case and further details of [Mr. Igunda’s] submissions”. During the hearing, the UNDT noted that Mr. Igunda was unable to further elucidate his claim and expressed concerns about his access to justice. A legal officer from the Office of Staff Legal Assistance (OSLA) joined the proceedings and informed the Dispute Tribunal that he would be willing to assist Mr. Igunda in re-filing his application, as an officer of the Tribunal. The UNDT therefore ordered the suspension of the non-renewal decision until 5 August 2011 when a further hearing would be held. On 5 August 2011, following an oral hearing on Mr. Igunda’s redrafted application, the UNDT suspended the contested decision until 12 August 2011, “until the Tribunal issues a reasoned and written decision based on all the evidence and all the submissions made by the parties on or by that date”. Mr. Igunda’s appointment was further extended until that date.

Submissions

Secretary-General’ Appeal

9. The Secretary-General submits that the appeal is receivable. The UNDT exceeded its jurisdiction in ordering the suspension of the implementation of the non-renewal decision without making a finding on whether the requirements for a suspension of action under Article 2(2) of the UNDT Statute were satisfied.

10. The Secretary-General further submits that the UNDT exceeded its jurisdiction in ordering the suspension of the implementation of the non-renewal decision on legally unsustainable grounds. The UNDT ordered the suspension of action because of, first, the “vague” nature of Mr. Igunda’s submissions and to enable him to file more “articulated” submissions; and, secondly, to enable the UNDT to issue a reasoned and written decision. These reasons do not meet the required criteria under Article 2(2) of the UNDT Statute.

11. The Secretary-General submits that the UNDT also exceeded its jurisdiction in ordering OSLA to represent Mr. Igunda.

12. The Secretary-General seeks guidance on whether the Administration is entitled to refrain from executing an order if it has filed an appeal of the order on the basis that the Dispute Tribunal exceeded its jurisdiction.

13. The Secretary-General requests the Appeals Tribunal to set aside the UNDT’s Orders suspending the decision not to renew Mr. Igunda’s appointment.

Mr. Igunda’s Answer

14. Mr. Igunda submits that the appeal is not receivable as interlocutory orders are not subject to appeal.

15. If the Appeals Tribunal finds the appeal receivable, Mr. Igunda contends that the Statute and Rules of Procedure of the UNDT do not require the Tribunal to provide reasons when issuing an interim order, and that the fact that the Tribunal did not spell out the reasons does not mean that it has not considered the matter properly or applied the criteria set out in Article 2 of the UNDT Statute.

16. The second Order suspended the implementation of the contested decision until the Dispute Tribunal could issue a reasoned and written decision. With respect to the first Order, the UNDT ordered the suspension to enable a proper assessment of the application for suspension of action to take place. The UNDT found it necessary that Mr. Igunda be represented by counsel and therefore ordered OSLA counsel to assist him. The UNDT has inherent jurisdiction to order a suspension of action where a suspension of action application is received but, where because of time pressure, it cannot be fully considered before the deadline of separation.

17. Mr. Igunda submits that the appeal against an order rendered by the UNDT should not entitle the Secretary-General to refrain from executing it, if he appeals the order on the basis that the UNDT exceeded its jurisdiction in issuing it. To find otherwise would render the ability of the UNDT to suspend the implementation of administrative decisions a “worthless” exercise.

Considerations

18. This Court holds that the appeal against Order No. 082 rendered by the Dispute Tribunal is not receivable, since that Tribunal did not exceed its jurisdiction in issuing it.

19. Quoting many precedents of this Tribunal, we stated in *Villamorán*:²

The Appeals Tribunal has consistently emphasized that appeals against most interlocutory decisions will not be receivable, for instance, decisions on matters of evidence, procedure, and trial conduct. An interlocutory appeal is only receivable in cases where the UNDT has clearly exceeded its jurisdiction or competence.

20. The quoted Judgment also reads:

Under Article 2(2) of the UNDT Statute and Article 13(1) of the UNDT Rules, the Dispute Tribunal shall order a suspension of action on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage.

21. Article 13(3) of the UNDT’s Rules of Procedure establishes that in such cases the Dispute Tribunal shall consider the application within five working days of the service of the submission on the respondent.

22. In *Onana*,³ the Appeals Tribunal held:

In order to give full effect to paragraph 28 of General Assembly resolution 63/253, when dealing with an appeal against a jurisdictional decision of the Dispute Tribunal rendered on the basis of article 2(2) of its Statute and article 13 of its Rules of Procedure, the

² *Ibid*, para. 1.

³ *Onana v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-008, para. 21.

Appeals Tribunal needs to decide, whether the Dispute Tribunal has respected the limitations of its scope of jurisdiction under those provisions. In a situation in which the Appeals Tribunal is led to observe that the Dispute Tribunal has exceeded its competence, the appeal will be judged receivable.

23. Order No. 082 under appeal was rendered on 29 July 2011, only two days after the application was filed, to ensure that during the hearing scheduled to ascertain the facts of the case Mr. Igunda would be able to elucidate his claim with the assistance of counsel. The suspension of the non-renewal decision was therefore ordered until 5 August 2011, a date within the five working day period of mandatory consideration.

24. The main motivation for ordering the suspension of action in this Order was to grant access to justice to the claimant.

25. From that point of view, the Order can be sustained, because a certain degree of discretion must be awarded to the trial court to consider and resolve urgent matters such as interim measures. The scheduling of a hearing for the consideration of the application within the time limit provided for by the Rules of Procedure becomes instrumental to the eventual adoption of a decision on the suspension of action and to the timely examination of the statutory requirements of merit to adopt such a decision.

26. Naturally, in any case, the time limits clearly stated by the Rules must be respected: the five working days period for consideration of the application and the prohibition to suspend the implementation beyond management evaluation.

27. Thus, it would be right that the Dispute Tribunal expressly motivates this kind of decision in the need of thorough consideration of the involved issues and obligation to render a reasoned decision after examining the parties' submissions, ordering, if necessary, the suspension of action but fixing a certain date within that five working day period or until the completion of management evaluation, whichever is earlier, in order not to extend the suspension beyond the statutory limits.

28. In the present case, as the five working day period since the service of the suspension of action request on the Respondent was not affected and the causes that led to the re-scheduling of the hearing were reasonable, the Tribunal concludes that the first instance Judge did not exceed her jurisdiction and affirms the first Order under appeal.

29. Turning to the analysis of the legality of Order NO. 083, which extended the suspension of action until 12 August 2011, as this was done in breach of the five working day restrictive period to render the decision, this Court concludes that the Dispute Tribunal erred in law and exceeded its jurisdiction. Then, the appeal becomes receivable and will be upheld vacating this Order.

30. With this outcome, further submissions made by the Secretary-General (i.e. the issues related to OSLA representation of Mr. Igunda) are not essential to the case and do not need to be examined in the present Judgment.

31. Finally, this Tribunal reiterates its jurisprudence in *Villamorán*⁴ as follows:

Article 8(6) of the Rules of Procedure of the Appeals Tribunal provides that “[t]he filing of an appeal shall suspend the execution of the judgment contested”. This provision however does not apply to interlocutory appeals. It falls to the Appeals Tribunal to decide whether the UNDT exceeded its jurisdiction and the Administration cannot refrain from executing an order by filing an appeal against it on the basis that the UNDT exceeded its jurisdiction.

32. This Court emphasizes that a party is not allowed to refuse the execution of an order issued by the Dispute Tribunal under the pretext that it is unlawful or was rendered in excess of that body’s jurisdiction, because it is not for a party to decide about those issues. Proper observance must be given to judicial orders. The absence of compliance may merit contempt procedures.

⁴ *Villamorán*, 2011-UNAT-160, para. 48.

Judgment

33. The appeal against Order No. 082 is dismissed and that Order is affirmed.
34. The appeal against Order No. 083 is allowed and that Order is vacated.

Original and Authoritative Version: English

Dated this 1st day of November 2012 in New York, United States.

(Signed)

Judge Simón, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Lussick

Entered in the Register on this 18th of January 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar