



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

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Judgment No. 2021-UNAT-1080

**Mathieu Mukeba Wa Mukeba  
(Appellant)**

**v.**

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

**JUDGMENT**

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| Before:    | Judge Sabine Knierim, Presiding<br>Judge Graeme Colgan<br>Judge Kanwaldeep Sandhu |
| Case No.:  | 2020-1425   |
| Date:      | 19 March 2021   |
| Registrar: | Weicheng Lin  |

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| Counsel for Appellant:  | Self-represented |
| Counsel for Respondent: | Maryam Kamali    |

**JUDGE SABINE KNIERIM, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal by Mr. Mathieu Mukeba Wa Mukeba (Appellant), a former staff member serving at the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO). On 6 November 2018, the Appellant filed an application with the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) challenging the Administration's decision to impose the disciplinary measure of separation from service. On 29 June 2020, the UNDT issued Judgment No. UNDT/2020/103,<sup>1</sup> dismissing the application for want of prosecution. For reasons set out below, we affirm.

**Facts and Procedure**

2. The Appellant commenced service with the Organization on 1 December 2007. Prior to his separation, he held a fixed-term appointment at the G-3 level, performing the functions of a Driver at the Office of the Director of Mission Support, MONUSCO.

3. On 16 August 2018, the Assistant Secretary-General (ASG) for Human Resource Management imposed upon Appellant the disciplinary measure of separation from service, with compensation in lieu of notice and without termination indemnity. The ASG imposed such measure after establishing by clear and convincing evidence that Appellant had engaged in serious misconduct by misappropriating and taking supplies belonging to the Organization to an undisclosed location, namely 1,050 archive boxes, 50 green permanent markers, 50 red permanent markers, and 10 brown tapes.

4. On 6 November 2018, Appellant filed an application with the Dispute Tribunal in Nairobi, challenging the imposition of the disciplinary measure of separation from service.

5. On 19 July 2019, the case was transferred to the UNDT New York Registry. On 31 January 2020, by way of Order No. 18 (NY/2020), the Dispute Tribunal decided to hold a hearing on the merits and requested the parties to confirm their availability.

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<sup>1</sup> *Mukeba Wa Mukeba v. Secretary-General of the United Nations*, Judgment No. UNDT/2020/103 dated 29 June 2020 (Impugned Judgment).

6. On 3 March 2020, by way of Order No. 39 (NY/2020), and upon consultation with the parties, the UNDT scheduled the hearing for 26 March 2020. However, on 18 March 2020, by e-mail from the Registry, the UNDT informed the parties that due to technical difficulties caused by the COVID-19 lockdown, the hearing was postponed until further notice.

7. Having overcome technical difficulties associated with COVID-19, the Registry contacted the Appellant on 10 June 2020 asking him to confirm his ability to attend a virtual hearing via Microsoft Teams.

8. Having received no response from the Appellant, the Registry e-mailed him again on 15 June 2020 regarding his ability to attend a hearing on Microsoft Teams. During that time, the Registry also attempted to reach the Appellant via the phone number on record but was unsuccessful.

9. Having received no response, on 18 June 2020, the UNDT issued Order No. 103 (NY/2020) ordering the Appellant to contact the Registry by 4:00 p.m. on Friday, 26 June 2020, and cautioning him that his case would be dismissed for want of prosecution if he failed to do so. The Appellant did not contact the Registry within the prescribed deadline of 26 June 2020.

10. By Judgment dated 29 June 2020, the UNDT dismissed the application for want of prosecution. The UNDT ruled that the Appellant had been directed on three separate occasions (10 June 2020, 15 June 2020 and 18 June 2020) to make the necessary submissions for the continuation of his case. The UNDT also noted that the Registry had made several phone calls to reach the Appellant but was not able to do so. The UNDT reasoned that the Appellant was given sufficient time to comply with the Order and was clearly warned of the consequences of non-compliance. As of the date of the Judgment (29 June 2020), the Appellant had still not made any submissions or contacted the Registry. The UNDT concluded that the Appellant was no longer interested in the pursuit of his proceedings, which, as a consequence, must be deemed abandoned.

11. On 30 June 2020, the Appellant e-mailed the Registry, requesting the UNDT to reconsider the Judgment and to proceed with the hearing in his case, without giving any reasons for his failure to comply with the UNDT's previous directions. On the same day, by way of Order No. 110 (NY/2020), the UNDT ordered Appellant to provide the tribunal with

any justifications, along with supporting evidence, as to why he did not comply with the requests for information.

12. On 2 July 2020, the Appellant responded that he understood the Registry's communication of 18 March 2020 to be a suspension of the hearing until the COVID-19 crisis had abated. He added that he thought writing to the tribunal during the COVID crisis would be a distraction for the UNDT, which is why he thought about waiting for the end of the pandemic to pursue his case.

13. Not finding Appellant's explanation compelling, the UNDT, on 7 July 2020, by Order No. 114 (NY/2020) rejected Appellant's request to reconsider its Judgment on dismissal for want of prosecution.

14. On 10 August 2020, the Appellant appealed the UNDT Judgment to the Appeals Tribunal, and on 3 September 2019, the Secretary-General filed his answer.

### **Submissions**

#### **Mr. Mukeba Wa Mukeba's Appeal**

15. The Appellant submits that the alleged acts for which he was separated from the Organization are unfounded because he was merely following orders of a Dispatch Manager, Mr. Mboyo Camille. He argues and that he picked up materials from where Mr. Mboyo indicated and delivered them per his instructions. He must not be penalized for the acts of his superiors and asks the Appeals Tribunal to reconsider the separation action taken by the Organization.

16. The Appellant further contends that he was very surprised when he learned that the Nairobi Registry had transferred his case to the New York Registry. He explains that he provided a "litany of reasons" as to why he could not communicate with the New York Registry, but the UNDT did not understand him and wanted to render fruitless all his efforts since the beginning of his case.

### **The Secretary-General's Answer**

17. The Secretary-General argues that the UNDT was correct to (a) dismiss the Appellant's application and (b) to maintain this disposition in its 7 July 2020 Order denying Appellant's request for reconsideration, after the latter had failed to provide any compelling reasons for his failure to respond to the UNDT's various requests for information. The only explanation provided by the Appellant was that he "had understood the UNDT's 18 March 2020 e-mail to mean that his case had been suspended until the COVID-19 crisis had abated."

18. However, the 18 March 2020 e-mail clearly stated that due to "technical difficulties caused by the COVID-19 lockdown, the hearing was postponed until further notice." After those technical difficulties were resolved, Appellant was contacted three times (on 10 June 2020, 15 June 2020 and 18 June 2020), but he did not respond even after the 18 June 2020 Order cautioned him that failure to respond could result in dismissal of his application.

19. Even if Appellant's argument that he had misunderstood the UNDT's communication of 18 March 2020 to mean that his case was postponed until the COVID-19 pandemic would subside, the UNDT's subsequent communications could not be clearer. These subsequent communications were not open for misinterpretation. In fact, the Appellant did respond two days after the UNDT issued its Judgment, providing a new explanation regarding his non-responsiveness and urging the UNDT to reconsider his case for a second time. Therefore, it appears that the Appellant was in receipt of the communications from the UNDT but nonetheless chose not to respond to the UNDT's previous orders.

20. The Secretary-General reiterates that the record does not show any reasons on the part of the Appellant, other than his own thinking that he could wait until the end of the pandemic, as to why he did not respond to the Dispute Tribunal's multiple requests.

### **Considerations**

#### *Request for oral hearing*

21. The Appellant requests an oral hearing. Oral hearings are governed by Article 8(3) of the Appeals Tribunal Statute (Statute) and Article 18(1) of the Appeals Tribunal Rules of Procedure (Rules). Under Article 18(1) of the Rules, a request for an oral hearing may be

granted when it would “assist in the expeditious and fair disposal of the case.” The Appeals Tribunal rejects Appellant’s request for an oral hearing finding that the matter does not require further clarification.

*The Appeal*

22. The instant appeal is defective as Appellant has failed to identify any of the five grounds of appeal set out in Article 2(1) of the Statute.

23. Article 2(1) of the Statute provides that:

The Appeals Tribunal shall be competent to hear and pass judgement on an appeal filed against a judgement rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has:

- (a) Exceeded its jurisdiction or competence;
- (b) Failed to exercise jurisdiction vested in it;
- (c) Erred on a question of law;
- (d) Committed an error in procedure, such as to affect the decision of the case; or
- (e) Erred on a question of fact, resulting in a manifestly unreasonable decision.

24. These provisions are supplemented by Article 8(2) of the Rules, which provides, in part, that “[t]he appeal form shall be accompanied by (...) [a] brief that explains the legal basis of any of the five grounds for appeal set out in article 2.1 of the statute of the Appeals Tribunal that is relied upon”.

25. This Tribunal has consistently held that it is the appellant’s burden to demonstrate that the Dispute Tribunal erred on a question of law or fact, resulting in a manifestly unreasonable decision. It follows that the appellant must identify the alleged defects in the judgment and state the grounds relied upon in asserting that the judgment is defective.

26. In *Ilic*,<sup>2</sup> we stated:

When the Appeals Tribunal hears an appeal, it does not simply re-try the case. The function of the Appeals Tribunal is to determine if the Dispute Tribunal has made errors of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction, as prescribed in Article 2(1) of the Statute. The appellant has the burden of

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<sup>2</sup> *Ilic v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-051, para. 29.

satisfying the Appeals Tribunal that the judgment rendered by the Dispute Tribunal is defective. It follows that the appellant must identify the alleged defects in the judgment and state the grounds relied upon in asserting that the judgment is defective. It is not sufficient for an appellant to state that he or she disagrees with the outcome of the case or repeat the arguments submitted before the Dispute Tribunal.

27. And in *Krioutchkov*,<sup>3</sup> we accordingly held:

17. According to Article 2 of the Appeals Tribunal’s Statute, the competence of this Tribunal is limited to certain issues. For a first instance decision to be vacated or overturned, an appellant must provide proof that the first instance tribunal, in rendering its judgment, exceeded its jurisdiction or competence, failed to exercise jurisdiction vested in it, erred on a question of law, committed an error in procedure such as to affect the decision of the case, or erred on a question of fact, resulting in a manifestly unreasonable decision.

18. It follows that it is not enough for an appellant to disagree with the findings of fact or the conclusions of law made by the trial court. Rather, for an appeal to succeed, an appellant must persuade this Tribunal that the contested decision fulfills the objective criteria of its competence.

28. In his appeal, Appellant neither raises any ground of appeal enumerated in Article 2(1) of the Statute nor does he explain why the Appeals Tribunal should overturn the UNDT Judgment. He only alleges that “he was very surprised when he learned that the Nairobi Registry had transferred his case to the New York Registry” and that he provided a “litany of reasons” as to why he could not communicate with the New York Registry, but the UNDT did not understand him and wanted to render fruitless all his efforts since the beginning of his case.

29. The UNDT dismissed Appellant’s application for want of prosecution because he did not respond to its inquiries dated 10 and 15 June 2020, and Appellant did not even respond to the 18 June 2020 Order cautioning him that failure to contact the tribunal could result in the dismissal of his application. Appellant has failed to explain to this Tribunal why the dismissal of his application was erroneous.

30. For this reason alone, the appeal must fail.

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<sup>3</sup> *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-707, paras. 17-18.

*The UNDT Judgment*

31. Further, we find no error in the UNDT Judgment dismissing the application based on Article 19 and 36 of the UNDT Rules of Procedure.

32. Article 19 (Case management) of the UNDT Rules of Procedure provides:

The Dispute Tribunal may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.

33. Further, Article 36 (Procedural matters not covered in the rules of procedure) of the UNDT Rules of Procedure reads:

1. All matters that are not expressly provided for in the rules of procedure shall be dealt with by decision of the Dispute Tribunal on the particular case, by virtue of the powers conferred on it by article 7 of its statute.

2. The Dispute Tribunal may issue practice directions related to the implementation of the rules of procedure.

34. We do not find fault with the practice and jurisprudence of the Dispute Tribunal to dismiss an application for want of prosecution when there is sufficient reason to assume that the applicant is no longer interested in the litigation.<sup>4</sup> We point out, however, that great care needs to be taken in exercising this power, and an application may not be dismissed without evidence that an applicant has failed to meet his obligations.

35. In the present case, the Appellant did not respond to multiple requests for information from the UNDT, dated 10, 15, and 18 June 2020. Even if he was confused as to the meaning of the 18 March 2020 e-mail regarding postponement of the hearing, the subsequent communications on 10, 15, and 18 June 2020 were clear and unambiguous. On 10 June 2020, the Registry contacted Appellant and asked him to confirm his ability to attend a hearing via

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<sup>4</sup> *Duverné v. Secretary-General of the United Nations*, Judgment No. UNDT/2019/157, para. 8; *Zhang-Osmancevic v. Secretary-General of the United Nations*, Judgment No. UNDT/2015/034, paras. 12-14; *Saab-Mekhour v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/047, paras. 6-8; *Bimo and Bimo v. Secretary-General of the United Nations*, Judgment No. UNDT/2009/061, paras. 13-14.



Microsoft Teams. Having received no response from Appellant, the Registry e-mailed him again on 15 June 2020 regarding his ability to attend a virtual hearing.

36. On 18 June 2020, the UNDT issued Order No. 103 (NY/2020) which stated:

5. By 4:00 p.m. on Friday, 26 June 2020, the Applicant shall contact the Registry of the Dispute Tribunal to confirm whether he wishes to pursue the present case;

6. In the event that the Applicant fails to respond to this Order, his application will be dismissed for want of prosecution in its entirety.

37. The Appellant does not allege in his appeal, and there is no reason for us to assume that he was not in receipt of the communications from the UNDT, particularly the 18 June 2020 Order.

38. The Appellant did not provide any reason as to why he did not respond to the Dispute Tribunal, other than it was his thinking that he could wait until the end of the pandemic.

39. After the UNDT Judgment was issued on 29 June 2020, the Appellant again failed to provide any compelling reason as to why he did not communicate with the Dispute Tribunal, except contending that he understood that his case would be postponed until the COVID-19 pandemic would come to pass.

40. In his appeal, the Appellant provides no compelling reason as to why he did not prosecute his case.

**Judgment**

41. The appeal is dismissed and Judgment No. UNDT/2020/103 is hereby affirmed.

Original and Authoritative Version: English

Dated this 19<sup>th</sup> day of March 2021.

*(Signed)*

Judge Knierim, Presiding  
Hamburg, Germany

*(Signed)*

Judge Colgan  
Auckland, New Zealand

*(Signed)*

Judge Sandhu  
Vancouver, Canada

Entered in the Register on this 6<sup>th</sup> day of April 2021 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar

**Concurring Opinion of Judge Graeme Colgan**

1. I agree with the result and the reasoning supporting it in this case, although for reasons that may become apparent from my following observations, it is in my view a marginal case. Because this is apparently the first occasion on which the Appeals Tribunal has been asked to determine a question of dismissal of UNDT proceedings for want of prosecution, in addition to confirming, as we do, that the power exists to be used by the UNDT in appropriate cases, it may be useful to provide some guidance as to the relevant factors to be applied in such cases.

2. Dismissing or striking out a party's case for want of prosecution is a very serious and final step. It deprives the party of ever having the merits of that party's case considered and decided. The UNDT should take considerable procedural care to ensure that a litigant whose case may be dismissed for want of prosecution is treated justly. Sufficient time should be allowed. There should be a high level of certainty of receipt of communications. Possible reasons for a lack of response or action should be considered by the UNDT itself. Assumptions should not be lightly made in the absence of evidence. I will use Appellant's circumstances to illustrate these principles.

3. The Appellant was unrepresented. He had lost his employment and so, I infer, was no longer within the United Nations email or telephone system. Rather, it appears that he had what I assume was a private telephone number which was known to the UNDT and a private e-mail address which was the primary means of communication between the UNDT and him. It appears that his preferred language of communication was French although it is unclear whether the UNDT communicated with him in that language or in English. The Appellant had participated in preliminary directions conferences convened by the UNDT for the purpose of moving his case to a hearing. It may be assumed, at least at that stage which was a significant time after his dismissal, that the Appellant was participating in the prosecution of his appeal against his dismissal. The three attempts to contact the Appellant all occurred within a reasonably short period, 10 June 2020, 15 June 2020 and 18 June 2020. When the Appellant had not contacted the UNDT registry by 26 June 2020 the judgment dismissing his proceedings for want of prosecution was prepared and sent on 29 June 2020.

4. It would be wrong to draw the sole inference from the lack of response by the Appellant, that he therefore was no longer interested in pursuing his proceedings. The timeline reveals that the communication attempts were made by e-mail on the 10 June 2020 and 15 June 2020, and via the issuance of Order No. 103 (NY/2020) on 18 June 2020. This happened over a period of only about eight days amidst a global pandemic. There is no indication from the impugned judgment as to whether any checks were undertaken by the Registry to try to ascertain whether the e-mails and the Order had been received. Similarly, there was no information in the judgment about the telephone calls that were made to the number, that is whether anyone answered, whether the number appeared to be a live number or whether it had been discontinued. This is the sort of detail that the UNDT should expect to have before dismissing for want of prosecution in cases such as this.

5. There were, in these circumstances, a number of other inferences that the UNDT could equally have drawn rather than assuming that the Appellant was no longer interested in prosecuting this case. He may, for example, have been ill, unable to receive communications by e-mail and or phone or in other circumstances which precluded prompt response. It is significant, also, that an assumption that he was no longer keen to prosecute this case was in contrast to his earlier participation in directions hearings.

6. So while I agree that it is open to the tribunal below to dismiss cases for want of prosecution, the absence of communication over a relatively short period and in very abnormal circumstances means that the tribunal needs to take care to ensure that its assumptions are likely to be correct. It is significant, also, that it appears that the UNDT dismissed the proceeding on its own motion rather than having been requested to do so by the Secretary-General. Although I do not suggest that in this case, such procedures must not have the appearance of a tribunal seeking to clear its docket but doing so prematurely and in a way that was final and irremediable.

7. Ultimately, the UNDT was right to allow Appellant an opportunity after its judgment was issued to persuade it why he had not prosecuted his case between 10 and 18 June 2020. It is the giving of that opportunity to him and Appellant's failure to provide any, let alone convincing, reasons for his inaction, that justified the dismissal of his case. That is why I agree that his appeal must be dismissed.

Original and Authoritative Version: English

Dated this 19<sup>th</sup> day of March 2021.

*(Signed)*

Judge Colgan  
Auckland, New Zealand

Entered in the Register on this 6<sup>th</sup> day of April 2021 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar