



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

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Judgment No. 2022-UNAT-1289

**Lolo Mkhabela  
(Appellant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Martha Halfeld, Presiding Judge John Raymond Murphy Judge Dimitrios Raikos
Case No.:	2021-1625
Date of Decision:	28 October 2022
Date of Publication:	15 December 2022
Registrar:	Juliet Johnson

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Counsel for Appellant: Self-represented

Counsel for Respondent: Francisca Lagos Pola

**JUDGE MARTHA HALFELD, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal or UNAT) has before it an appeal by Lolo Mkhabela, a former staff member at the United Nations Resident Coordinator Office (RCO), United Nations Development Programme (UNDP), Mbabane, Eswatini. Ms. Mkhabela appeals the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) Judgment on Receivability No. UNDT/2021/103 (impugned Judgment), issued on 2 September 2021, dismissing her application in which she contested the decision by the Resident Coordinator (RC) to deviate from the agreed Transition Plan for restructuring the RCO Eswatini (contested decision), as not receivable both *ratione materiae* and *ratione temporis*.

2. For the reasons set out below, we dismiss the appeal.

**Facts and Procedure**

3. Ms. Mkhabela, at the time of the events at issue served as Coordination Specialist, National Officer, C level, holding a fixed-term appointment, at the ROUNDP, Mbabane, Eswatini.

4. During April-May 2019, Ms. Mkhabela was informed by the UNDP RC, about the change in the Transition Plan for restructuring the RCO Eswatini, and the impact it would have upon the position she encumbered. Initially, the Transition Plan included a position of RCO Team Leader at the NOD level which Ms. Mkhabela felt was most in line with her skills and experience, but later, the RC decided against including that position in the plan, in favour of a position at the P4 level, open for international recruitment, for which Ms. Mkhabela was not eligible to apply.

5. On 20 October 2019, Ms. Mkhabela wrote to the RC in relation to how to resolve her grievances related to the changes to the Transition Plan. On 21 October 2019, the RCO suggested that since a managerial decision was being challenged, the matter should be sent to the Management Evaluation Unit (MEU).

6. On 29 November 2019, the Resident Representative, UNDP, notified Ms. Mkhabela of the non-renewal of her appointment, effective 31 December 2019.

7. On 30 December 2019, Ms. Mkhabela requested management evaluation of what she termed an “irregular change in the Transition Plan”. On 11 February 2020, the MEU informed Ms. Mkhabela that her request was submitted outside the statutory timeframe set out in

Staff Rule 11(2)(c), and thus, was time-barred. In her management evaluation request, she claimed that this irregular change in the Transition Plan deprived her of her “right to compete in the recruitment process”, which was “contrary to the principles of transparency, accountability and the spirit of the transition” as communicated by senior officials. The MEU responded that even if a timely challenge of the decision not to renew her appointment had been submitted, and assuming her request had been receivable, they would have been unable to recommend that the non-extension of her fixed-term contract be rescinded, for a number of reasons, namely: they could not find any procedural violation in the contested decision; the inclusion of certain functions in the transition was at all times subject to the considered judgment of the RC, according to her view of the operational requirements of the RCO, and the MEU found no clear error in this regard. In addition, there was no promise of her retention expressed in any of the documentation surrounding the transition, and thus the MEU concluded that no legitimate expectation had been created. Moreover, she was not guaranteed an extension of her appointment under either version of the Transition Plan. Finally, her terms of appointment themselves created no legal expectancy of renewal.

8. Following Ms. Mkhabela’s application filed with the UNDT on 27 July 2021, on 18 August 2021, the Secretary-General filed a motion requesting that the UNDT determine the receivability of the application as a preliminary matter. In the motion, the Secretary-General argued that the application was not receivable *ratione temporis* and *ratione materiae*.

9. In the impugned Judgment, the Dispute Tribunal dismissed Ms. Mkhabela’s application both *ratione materiae* and *ratione temporis*. The UNDT agreed with the Secretary-General that the application was not receivable *ratione materiae*. In the view of the UNDT, it is firmly established in jurisprudence that applications against decisions having no direct impact on the applicant’s terms of employment were not receivable; among them, various decisions on restructuring and reorganization leading to abolishment of post were considered prefatory acts, the validity of which could only be challenged before the tribunals in the context of an application against a non-renewal of appointment. The UNDT found, in the present case, that the impugned decision to depart from the terms of the Transition Plan constituted such a prefatory act, and as such, the application was not receivable.<sup>1</sup>

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<sup>1</sup> Impugned Judgment, para. 20.

10. The Dispute Tribunal also agreed with the Secretary-General that the application was not receivable *ratione temporis*.<sup>2</sup> Taking the last day of May as the date when Ms. Mkhabela was made aware of the change in the Transition Plan, she was required, in accordance with Staff Rule 11.2(c), to submit her request for management evaluation of the contested decision 60 days later, on 30 July 2019. However, she submitted it on 30 December 2019, five months after this deadline. The Tribunal is not competent to extend or waive deadlines pertinent to the administrative stage of the proceedings.

*Procedure before the Appeals Tribunal*

11. On 1 November 2021, Ms. Mkhabela filed the instant appeal.

12. On 21 December 2021, the Secretary-General filed his answer.

**Submissions**

**Ms. Mkhabela's Appeal**

13. In her appeal, Ms. Mkhabela requests that her application be received and allowed to proceed for determination on its merits.

14. Ms. Mkhabela denies having held any consultation/meeting with the RC in April 2022 and states the first time she received communication of an alleged decision made to deviate from the Transition Plan, was by e-mail dated 21 October 2019, wherein the RC alluded to a decision which to date Ms. Mkhabela does not have. Moreover, the RC had given her until 31 December 2019 to seek review of the contested decision.

15. Ms. Mkhabela maintains that the notice of non-renewal of her contract of employment, issued on 29 November 2019, was erroneous and unlawful as it was contrary to the Transition Plan “in as much as the Transition Plan was taking [the Appellant] onboard in that she was to apply for the position as agreed in the discussions and in terms of the approval of the Eswatini Transition Plan by the RCO”.

16. First, on the issue of the time limit and the application not being receivable since it was filed after the expiry of 90 days, Ms. Mkhabela submits that according to Article 7 of the Statute of the Dispute Tribunal “...the application shall be receivable unless the joint body unanimously

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<sup>2</sup> *Ibid.*, para. 21.

conceded that it is frivolous”.<sup>3</sup> In order to determine this, the Dispute Tribunal must enquire into the merits of the dispute.

17. Ms. Mkhabela contends that in accordance with the Transition Plan, the RC had issued an instruction to the Human Resources Associate to proceed with the advertisement of several National Officer posts in that plan, including the position of Strategic Planning/RCO Team Leader-NOD then encumbered by Ms. Mkhabela. However, that position was never advertised. Instead, as a deviation from the recruitment instruction in the Transition Plan, an advertisement for the recruitment of an Economist position, listed for international recruitment, appeared in the UNDP intranet in the first week of May 2019.

18. On realizing this, Ms. Mkhabela requested the Operations Manager to convene an urgent meeting with the RC to enquire about this deviation. The RC’s response in this meeting was simply that the plan had changed. Ms. Mkhabela maintains that “this was not only wrong and unlawful action on the part of the RC and the HR, it was procedurally and substantively unlawful in as much as the change from the approved Transition Plan was not authorized and approved by the RCO nor had the staff been consulted and/or made representation on it.” She maintains that unfortunately, neither during the meeting, nor in response to a subsequent written enquiry by Ms. Mkhabela, did the RC address the issue of deviation from the Transition Plan, and related accountability and/or transparency.

19. Second, Ms. Mkhabela challenges the unauthorised deviation from the approved Transition Plan. There is no documented paper trail of the decision itself, and neither was she furnished with any decision to deviate. In the absence of such a decision, it was impossible for Ms. Mkhabela to adhere to the timelines. She is challenging “the validity of the actions of the respondent arising from deviation from respondent’s own recruitment instruction to the HR which was predicated on the approved Transition Plan way before the purported expiry of her contract of employment.”

20. In addition, Ms. Mkhabela states that the effect of the deviation was denial to her of an opportunity to apply for the post (Strategic Planner/Team Leader), which was not abolished, but was instead enhanced in the Transition Plan. Such deviation was a deliberate precursor to the non-renewal of the contract, in order to get rid of her, and that is unacceptable.

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<sup>3</sup> Quoted language is not found in the UNDT Statute.

21. Moreover, she argues that in accordance with Chapter IX of the United Nations Staff Regulations, and with human resources practices, a contract will be renewed unless there are issues of non-performance and/or disciplinary issues. Ms. Mkhabela's performance results and record had been exceptionally good over a period of 14 years, having served under three RCs. The effect resulting from the deviation caused a serious prejudice on the pension and future earnings of Ms. Mkhabela, as her pension would have increased by 100 per cent in her fifteenth year of service.

22. Lastly, Ms. Mkhabela submits that the Tribunal has discretion in determining issues of time limits and/or receivability of the application. According to her, Article 7 of the Statute of the Tribunal states that "in any particular case the Tribunal may decide to suspend the provisions regarding time limits".<sup>4</sup> She also maintains that it is a known principle of law that for a party to successfully raise the issue of time limit, it has to demonstrate prejudice and an alternative available to the party that has allegedly offended that principle. In this case, neither the UNAT Statute nor the United Nations Staff Regulations provide what will become of the issue or dispute when the applicant has failed to meet the time limits. Instead, she argues that the use of the word "may" in the above quotation suggests that the Dispute Tribunal had the powers to determine the receivability of her application. Therefore, UNAT is asked to exercise its discretion in favor of Ms. Mkhabela, in as much as she has demonstrated exceptional circumstances that occasioned the delay, and that the application has prospects of success.

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

23. The Secretary-General submits that first, the UNDT correctly found that the application was not receivable pursuant to United Nations Staff Rule 11.2(c) and that it was not competent to extend or waive deadlines pertinent to the administrative stage of the proceedings.

24. He argues that the UNDT finding that the application was not receivable pursuant to Staff Rule 11.2(c), is correct. Article 8(1)(c) of the UNDT Statute provides that an application shall be receivable if an applicant has previously submitted the contested administrative decision for management evaluation, where required. Staff Rule 11.2(c) further requires the staff member to file a request for management evaluation within "60 calendar days from the

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<sup>4</sup> This quotation is not found in the UNDT or UNAT Statute. Instead, Article 8(3) of the UNDT Statute, and Article 7(3) of the UNAT Statute both state that the Tribunal "may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases."

date on which the staff member received notification of the administrative decision to be contested.” The UNAT has held that should the staff member fail to submit a request for management evaluation within the required timeframe, the request will not be receivable by the MEU, and the UNDT will lack jurisdiction to hear and determine the application. Also, in accordance with the jurisprudence of the UNAT, notification of an administrative decision occurs when all relevant facts for a particular decision are known or should have reasonably been known.

25. The Secretary-General submits that in her application, Ms. Mkhabela claimed that, although she was not formally notified of the contested decision, she became aware of the change to the Transition Plan sometime in May 2019. Taking the last day of May as the date of the meeting with the RC in which Ms. Mkhabela was made aware of the contested decision, she was required, in accordance with Staff Rule 11.2(c), to submit her request for management evaluation of that decision 60 days from the date of its notification, that is on 30 July 2019. However, she submitted her request for management evaluation on 30 December 2019, five months after that deadline. Even if 21 October 2019, the date when the RC responded to her about the change to the Transition Plan, was to be considered as the date of notification of the contested decision, Ms. Mkhabela would have had to submit her management evaluation request on 21 December 2019, instead she submitted it on 30 December 2019. Even in that case, she missed the 60-day deadline by 9 days.

26. Furthermore, the Secretary-General submits that the UNDT finding that it was not competent to extend or waive deadlines pertinent to the administrative stage of the proceedings is also correct. In her application, Ms. Mkhabela argued that she could not proceed with the appeal earlier because it “was the height of the global pandemic and with lockdowns it became near impossible to proceed with the appeal.” Article 8(3) of the UNDT Statute stipulates that “the [UNDT] may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases. The [UNDT] shall not suspend or waive the deadlines for management evaluation.” The UNAT had also confirmed that the UNDT has no jurisdiction to suspend or waive the deadlines for management evaluation.

27. The Secretary-General argues that in light of the above, the UNDT correctly found that the application was not receivable because the application had been filed after the expiration of the statutory filing deadline. Additionally, based on the legal framework, the UNDT cannot

suspend or waive the deadlines for management evaluation. Consequently, the UNDT correctly dismissed the Application as not receivable.

28. Second, the Secretary-General submits that UNDT correctly found that the application was not receivable *ratione materiae*. The UNDT held that the application was also not receivable because the contested decision did not amount to an administrative decision impacting the staff member's terms of employment. The UNDT found that decisions on restructuring and reorganization leading to the abolition of post are considered prefatory acts, the validity of which could only be challenged in the context of a non-renewal of appointment.

29. The Secretary-General states that in the present case, Ms. Mkhabela submitted that she did not contest the decision not to renew her fixed-term appointment, which was communicated to her by letter on 29 November 2019, but rather that she was challenging the changes made to the Transition Plan. Unlike the decision not to renew her fixed-term appointment, which Ms. Mkhabela failed to challenge, the contested decision is a managerial decision about the posts to be established in the new structure of the RCO Eswatini. On its own, the contested decision challenged by Ms. Mkhabela is not reviewable as it has no direct impact on her terms of appointment or contract of employment. It does not constitute a reviewable administrative decision under Article 2(1) of the Dispute Tribunal Statute. If anything, the contested decision merely constituted an act leading up to the decision not to renew Ms. Mkhabela's fixed-term appointment which was taken on 29 November 2019, and which she made clear she was not challenging.

30. Third, according to the Secretary-General, in the appeal, Ms. Mkhabela fails to show any reversible error by the UNDT, as provided for by Article 2(1) of the UNAT Statute, and as clearly set out in the jurisprudence of the UNAT. The appeal merely contains repetitions of earlier submissions advanced by Ms. Mkhabela, while she as the appellant has the burden of satisfying the Appeals Tribunal that the Judgment rendered by the Dispute Tribunal is defective.

31. The Secretary-General contends that Ms. Mkhabela has failed to identify any error by the UNDT and has not demonstrated any of the grounds for appeal listed in Article 2(1) of the UNAT Statute. Therefore, the present appeal should be rejected, and the impugned Judgment should be affirmed by the UNAT.



### Considerations

#### *Receivability ratione temporis*

32. The UNDT found that Ms. Mkhabela's application was not receivable *ratione temporis*, since her request for management evaluation was filed five months after the deadline of sixty days from the notification of the contested decision.

33. On the matter of management evaluation, Staff Rule 11.2 provides that a staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, shall ordinarily, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision. This same provision stipulates that a request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested. It further specifies that this deadline may be extended *by the Secretary-General* pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

34. Time limits in the context of the administration of justice in the United Nations' internal justice system must be observed and strictly enforced.<sup>5</sup> It is incumbent on the UNDT to individualise and define the administrative decision challenged by a party and to identify the subject of judicial review.<sup>6</sup>

35. The Appeals Tribunal notes that in its Judgment, the UNDT found that the date on which Ms. Mkhabela was informed of the contested decision was 31 May 2019, and not 21 October 2019, as claimed by her. The UNDT then concluded that her 30 December 2019 request for management evaluation was beyond the 60-day limit prescribed by the law. However, the UNDT also determined that, even considering the communication

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<sup>5</sup> *Diab v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-495; *Kissila v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-470; *Christensen v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-218; *Abu-Hawaila v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-118.

<sup>6</sup> *Fasanella v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-765, para. 20. See also *Dufresne v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1041, para. 25; *Monarawila v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-694, para. 32; and *Massabni v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-238, paras. 25-26.

on 21 October 2019 as contended by Ms. Mkhabela, her request for management evaluation on 30 December 2019 was time barred.<sup>7</sup>

36. Therefore, it is the Appeals Tribunal's finding that Ms. Mkhabela's argument on appeal merely reiterates her previous contentions already dismissed by the first instance tribunal, without her demonstrating any error in the UNDT Judgment which would warrant a reversal of its determination. As previously established by the Appeals Tribunal jurisprudence, "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 Appeals Tribunal that the contested decision fulfils the objective criteria of its competence", as prescribed by Article 2(1) of the Appeals Tribunal Statute.

37. In this regard, Ms. Mkhabela's argument that the RC had afforded her the possibility of requesting management evaluation until 31 December 2019 cannot be seen as a lawful extension of the time limits to file a management evaluation request. Apart from the fact that there is no evidence of such a promise, the truth is that the RC did not have such authority, which is only bestowed upon the Secretary-General, as prescribed by Staff Rule 11.2(c). Likewise, Ms. Mkhabela's claim that she was not apprised of the reasons or decision to deviate from the Transition Plan is without merit, as she is not entitled to be made aware of reasons behind managerial actions not directly impacting on the terms or conditions of her appointment.

38. Therefore, Ms. Mkhabela's references to any discretionary power of the tribunals to waive or extend time limits are misplaced, in light of the authority given by the respective statutes. The decision of the UNDT was thus correct when it held that the Tribunal is not competent to extend or waive deadlines pertinent to the administrative stage of the proceedings, as set out by the Dispute Tribunal Statute and the Appeals Tribunal's jurisprudence.<sup>8</sup>

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<sup>7</sup> Impugned Judgment, paras. 14 and 21.

<sup>8</sup> Article 8(3) of the UNDT Statute. See *Mazen Qassem v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1132, para. 22; and *Rosana v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-273.

39. In light of these facts, the UNDT correctly declined to exercise its jurisdiction. Ms. Mkhabela should have requested management evaluation within 60 days from the notification of the contested decision, even if this was on 21 October 2019 which is the date when she acknowledged having received such communication. Instead, she requested management evaluation on 30 December 2019, beyond the expiry of the 60-day statutory deadline. The UNDT was accordingly correct when it concluded that the application was not receivable *ratione temporis*.

*Receivability ratione materiae*

40. The UNDT also found that Ms. Mkhabela's application was not receivable *ratione materiae* as it was directed against the decision to depart from the terms of the Transition Plan, which was an administrative decision not subject to judicial review, but a mere prefatory act.

41. It is well settled jurisprudence that the Organization has the power to restructure some or all its departments or units, including the abolition of posts, the creation of new posts and the redeployment of staff.<sup>9</sup> The Appeals Tribunal will not interfere with a genuine organisational restructuring even though it may have resulted in the loss of employment of staff.

42. However, even in a restructuring exercise, like any other administrative decision, the Administration has the duty to act fairly, justly and transparently in dealing with staff members.<sup>10</sup> In this regard, the Appeals Tribunal has also consistently held that the key characteristic of an administrative decision subject to judicial review is that the decision must produce direct legal consequences affecting a staff member's terms and conditions of appointment. The administrative decision must hence, in order for it to be reviewable, have a direct adverse impact on the terms of appointment or contract of employment of the individual staff member.<sup>11</sup>

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<sup>9</sup> *Loeber v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-844, para. 18.

<sup>10</sup> *Loeber* Judgment, op.cit., para.18; *De Aguirre v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-705; *Matadi et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-592.

<sup>11</sup> *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481; *Andati-Amwayi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-058.

43. It follows that, although Ms. Mkhabela cannot challenge the discretionary authority of the Secretary-General to restructure the Organization or to abolish a post or to change a Transition Plan and the status of a certain position, or even to manage the posts to be established in the new structure, she could have challenged an administrative decision resulting from the change in the transition plan affecting her contract once that decision had been made. However, she did not do so and instead, in her appeal, Ms. Mkhabela reiterates in bold that she is challenging the *validity of the actions of the Secretary-General arising from an alleged deviation from the original transition plan*, rather than the *expiry of her appointment*, the former having been communicated to her on 21 October 2019 and the latter on 29 November 2019. Her application to the UNDT was restricted to the specific scope of a broader and general nature over which the tribunals do not have jurisdiction.

44. Therefore, her general allusions to her individual contract not having been renewed or her not being able to apply for a certain post as a result of the changes to the Transition Plan cannot be considered at this stage, even if they were grounded, since they had not been previously subjected to management evaluation.

45. Incidentally and for the purposes of clarification, we recall the well-established principle that fixed-term appointments or appointments of limited duration carry no expectation of renewal or conversion to another type of appointment.<sup>12</sup> Even the renewal of the appointment of a staff member on successive contracts does not, in and of itself, give grounds for an expectation of renewal, unless the Administration has made an express promise that gives the staff member an expectation that his or her appointment will be extended.<sup>13</sup> Separation as a result of the expiration of a fixed-term appointment takes place automatically, without prior notice, on the expiry date specified in the letter of appointment.<sup>14</sup>

46. The UNDT made no error in finding that the application was not receivable *ratione materiae*, since the contested decision was not an administrative decision warranting judicial review. Being a managerial decision about a change in the Transition Plan of the RCO

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<sup>12</sup> *Kule Kongba v. Secretary-General of the United Nations*, Judgment, No. 2018-UNAT-949, paras. 25-27; *Muwambi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-780, para. 25; *Ncube v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-721, para. 15; *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311, para. 32; *Badawi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2012-UNAT-261, para. 33.

<sup>13</sup> *Kule Kongba* Judgment, *op. cit.*, para. 25.

<sup>14</sup> *Koumoin v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-119.

Eswatini, it had no direct impact on Ms. Mkhabela's terms of appointment or contract of employment. It merely constituted an act leading up to the final decision not to renew her fixed-term appointment, which was not the subject of her application.

47. Under these circumstances the UNDT did not err in finding that the application was not receivable.

**Judgment**

48. The Appellant's appeal is dismissed, and Judgment No. UNDT/2021/103 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 28<sup>th</sup> day of October 2022 in New York, United States.

*(Signed)*

Judge Halfeld, Presiding

*(Signed)*

Judge Murphy

*(Signed)*

Judge Raikos

Judgment published and entered into the Register on this 15<sup>th</sup> day of December 2022 in New York, United States.

*(Signed)*

Juliet Johnson, Registrar