



Before: Judge Goolam Meeran

Registry: Geneva

Registrar: René M. Vargas M.

EL-AWAR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT
ON AN APPLICATION
FOR EXECUTION OF AN ORDER
ON SUSPENSION OF ACTION**

Counsel for Applicant:

Marisa MacLennan, OSLA

Counsel for Respondent:

Saidou N'Dow, UN-Habitat

Introduction

1. By application filed on 20 March 2017, the Applicant, a Senior Coordination Officer (P-5) of the United Nations Human Settlements Programme (“UN-Habitat”), requests execution of Order No. 59 (GVA/2017) of 28 February 2017 which suspended, pending management evaluation, the decisions to withdraw the Applicant’s delegation of authority and a number of his functions.
2. The Respondent replied to the application on 27 March 2017.

Facts

3. The Applicant joined the Global Water Operators Partnerships Alliance (“GWOPA”), an alliance of partners promoting the Water Operators Partnership established by UN-Habitat, in 2008, as a Programme Manager. It would appear that since then, he has been the head of the GWOPA Secretariat in Barcelona.
4. By a memorandum dated 16 February 2017, Dr. Joan Clos, Under-Secretary-General and Executive Director, UN-Habitat, informed the Applicant as follows:

[T]he Delegation of Authority to sign UN-Habit Agreements and Legal Instruments, the Delegation of Procurement Authority and the Delegation of Authority to Recruit Consultants and Individual Contractors granted to you through my memoranda dated 16 December 2014 are hereby temporarily withdrawn with immediate effect, pending further notice.

5. By a second memorandum that day, Mr. Rafael Tuts, the Director, Programme Division, UN-Habitat, informed the Applicant that UN-Habitat had decided to “conduct a management review of GWOPA”. Consequently, he instructed the Applicant as follows:

You are instructed to desist from entering into any financial commitments for GWOPA without my explicit approval. Disbursements against current commitments and obligations must be cleared through the Director, Management and Operations. You may not initiate any new procurements, hire of consultants, or travel without my authorization, until further notice.

Until explicitly authorized by me, you are instructed not to engage with member states, UN agencies, the Steering Committee and the wider membership of GWOPA, media, other governments, or other partners on any topic, and if asked, simply inform inquiring parties that a management review has started with a view to strengthening GWOPA, and that you are awaiting further instructions from me or the Executive Director.

6. On 24 February 2017, the Applicant requested management evaluation of the decisions contained in the two memoranda referred to in paras. 4 and 5 above.

7. On the same day the Applicant requested suspension, pending management evaluation, of UN-Habitat's decisions to withdraw his delegation of authority and to remove the majority of his functions.

8. By memorandum of 28 February 2017, the Executive Director, UN-Habitat, reminded the Coordinator, Urban Basic Services Branch, UN-Habitat, of his supervisory role over the Applicant. This memorandum was copied to the Applicant.

9. On 28 February 2017, the Tribunal issued Order No. 59 (GVA/2017), which suspended, pending management evaluation, the execution of the decision to withdraw the Applicant's delegation of authority as well as the decision to withdraw the Applicant's functions stipulated in the memorandum of 16 February 2017 from the Director, Programme Division, UN-Habitat.

10. By email of 4 March 2017, the Coordinator, Urban Basic Services Branch, UN-Habitat, asked the Applicant to postpone a mission to Canada.

11. By memorandum of 9 March 2017, which the Applicant apparently received on 16 March 2017, the Coordinator, Urban Basic Services Branch, UN-Habitat, sought to "establish a working arrangement" with the Applicant. He gave the Applicant specific instructions on the need to consult him and to keep him informed of activities and actions concerning the development of GWOPA strategy. For some actions, the Coordinator required the Applicant to obtain clearance from him or to route the action through his office.

12. By memorandum of 10 March 2017, which the Applicant states that he received on 16 March 2017, the Executive Director, UN-Habitat, informed him that the decision to withdraw his delegation of authority had been suspended pending the outcome of his request for management evaluation.

13. By a similar memorandum of the same day, which the Applicant also apparently received on 16 March 2017, the Director, Programme Division, UN-Habitat, informed the Applicant that the instructions given to him in the memorandum of 16 February 2017 were withdrawn pending the outcome of his request for management evaluation.

Parties' submissions

14. The Applicant's principal contentions are:

a. The Respondent failed to comply with Order No. 59 (GVA/2017), which suspended the decisions to deprive the Applicant of his essential functions;

b. Through the memoranda of 28 February 2017 and 9 March 2017, UN-Habitat acknowledged the Applicant's functions but handcuffed him by requiring consultation, briefing clearance and approval for almost all actions he undertakes. This constitutes an attempt to circumvent Order No. 59 (GVA/2017);

c. The memorandum of 9 March 2017 contradicts the two memoranda of 10 March 2017 where the Respondent agreed to suspend the contested decisions pending the outcome of management evaluation; and

d. The Applicant requests the Tribunal to direct the Respondent to rescind the memorandum of 9 March 2017, to restore his functions and authority, and to not further interfere with his contract or functions during the pendency of the process of management evaluation review.

15. The Respondent's principal contentions are:

- a. The impugned decisions were taken in accordance with the applicable rules, without ulterior motives and in compliance with Order No. 59 (GVA/2017);
- b. It was within the purview of the discretion of the Executive Director, UN-Habitat, to draw attention to the supervisory role of the Applicant's supervisor, and to advise the latter to send more detailed instructions to the Applicant relating to his current functions as Head of GWOPA;
- c. The memorandum of 9 March 2017 is simply a request for the Applicant to cooperate and to establish a working arrangement with his supervisor for the smooth exercise of his functions, in compliance with staff rule 1.2;
- d. By its memoranda of 10 March 2017, the Respondent manifested a genuine intention to comply with Order No. 59 (GVA/2017); and
- e. The Respondent asks the Tribunal to reject the application in its entirety.

Consideration

16. Although the Respondent did not challenge the receivability of the application, the Tribunal must examine the issue *proprio motu* since it is directly relevant to its competence to rule upon the application (see, e.g., *Christensen* 2013-UNAT-335; *Chahrour* 2014-UNAT-204; *O'Neill* UNDT/2010/203; *De Porres* UNDT/2010/55; *Babiker* UNDT/2015/108).

17. The application is filed pursuant to arts. 32.2 and 36.1 of the Tribunal's Rules of Procedure. Art. 32.2 of the Tribunal's Rules of Procedure, which replicates art. 12.4 of the Tribunal's Statute, provides that:

Once a judgement is executable under article 11.3 of the statute of the Dispute Tribunal, either party may apply to the Dispute Tribunal for an order for execution of the judgement if the judgement requires execution within a certain period of time and such execution has not been carried out.

18. Art. 36.1 of the Tribunal's Rules of Procedure provides that:

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.

Art. 7 of its Statute gives the Tribunal power to establish its own rules of procedure to address a number of matters. These do not make any explicit provision in respect of execution of judgments.

19. The Tribunal's power to order the execution of judgments is clearly set out in art. 12.4 of its Statute and art. 32.2 of its Rules of Procedure. Art. 36.1 of the Tribunal's Rules of Procedure does not authorise the Tribunal to circumvent these explicit provisions and to extend its competence beyond the limits defined by the General Assembly in the Tribunal's Statute.

20. The Tribunal finds that the above-mentioned rules do not grant it jurisdiction to enforce the execution of an order for suspension of action. Art. 12 of the Tribunal's Statute and art. 32.2 of its Rules of Procedure make explicit reference to a "judgment", and the possibility of enforcing its execution when the judgment "requires execution within a certain period of time and such execution has not been carried out". The exclusion of orders for suspension of action from these provisions cannot be seen as a mere lacuna in the rules. It stems from the fact that such orders do not make any award that may be the subject of execution, but only to maintain the status quo pending the outcome of a management evaluation. An order for suspension of action does not require any specific action to be carried out within a certain time limit.

21. An examination of the specific remedies sought by the Applicant further confirm that the Tribunal has no jurisdiction to grant the application. The Applicant requests the Tribunal to direct the Respondent to “rescind the 9 March memo and to restore his functions and authority ... and not to further interfere with his contract and functions”.

22. In issuing Order No. 59 (GVA/2017), the Tribunal acted pursuant to its powers under art. 2.2 of its Statute, which were limited to suspending the implementation of the contested decisions, as temporary relief, pending the outcome of management evaluation. The Applicant is now asking the Tribunal to go beyond its powers and to award remedies similar to those available when disposing of the merits of a case under art. 10.5 of its Statute. The Tribunal does not have such power in the context of an order for suspension of action.

23. It would appear that the Respondent has taken steps to comply with the binding nature of the Tribunal’s Order No. 59 (GVA/2017). However, such order, which is of a temporary nature, does not vest the Tribunal with powers to monitor the workplace and constantly intervene in the Applicant’s relationship with his supervisors. If the Applicant considers that decisions were taken in violation of Order No. 59 (GVA/2017) after its issuance, he may challenge them as new administrative decisions in accordance with the procedure set out in the rules or, if appropriate, initiate proceedings for contempt neither of which options were utilised in this case.

24. In this respect, the Tribunal notes that the Applicant’s statement that he “defers to the Tribunal as to whether any action should be taken with respect to the Respondent for failure to comply with Order No. 59” is insufficient to trigger contempt proceedings on the facts of this case.

25. Finally, the Tribunal stresses that the simple measure granting temporary relief pending a review of the contested decisions by the Administration based on a *prima facie* examination of the case should not become overcomplicated.

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Judgment

26. The Application for execution of Order No. 59 (GVA/2017) is rejected.

(Signed)

Judge Goolam Meeran

Dated this 4th day of April 2017

Entered in the Register on this 4th day of April 2017

(Signed)

René M. Vargas M., Registrar, Geneva