



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/008/  
UNAT1581  
Order No.: 147 (NBI/2011)  
Date: 17 November 2011  
Original: English

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**Before:** Judge Vinod Boolell

**Registry:** Nairobi

**Registrar:** Jean-Pelé Fomété

MASSAH

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER**

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**Counsel for Applicant:**

Clarence E. Clarke

**Counsel for Respondent:**

Steven Dietrich, Nairobi Appeals Unit, ALS/OHRM, UN Secretariat

1. The Applicant was employed as a Security Officer with the United Nations Mission for the Referendum in Western Sahara (MINURSO). On 14 March 2007 the Secretary-General decided to dismiss the Applicant from service following findings by the Joint Disciplinary Committee (JDC) that he had engaged in serious misconduct.
2. On 29 February 2008 the Applicant filed an Application with the former United Nations Administrative Tribunal contesting the Secretary-General's decision.
3. On 1 January 2010 the matter was transferred to the Nairobi Registry of the United Nations Dispute Tribunal, as part of the transitional measures related to the introduction of the new system of Administration of Justice (ST/SGB/2009/11).
4. On 27 July 2010, the Applicant died. The Applicant's Counsel, Mr. Clarence Clarke, indicated that he would continue to pursue the case on behalf of the Applicant.
5. By Order No. 236 (NBI/2010) dated 30 November 2010 the Tribunal required Mr. Clarke to produce "conclusive proof to the Tribunal that he is a beneficiary of the estate of the deceased Applicant or that he is an eligible person or an assignee duly authorized to continue the proceedings."
6. On 21 April 2011, the Tribunal received written confirmation from the beneficiaries of the Applicant's estate that they authorized Mr. Clarke to act as Counsel and to continue the proceedings on their behalf.
7. Hearings in this matter took place on 5, 6 and 26 July 2011. Due to technical difficulties, the Applicant's Counsel was not able to participate in the hearing on 26 July. A further hearing was set for 15 November to enable him to do so.

### **Respondent's Motion**

8. At the hearings on 26 July and 15 November, Counsel for the Respondent raised a concern regarding Mr. Clarke's continuing to appear on behalf of the beneficiaries of the Applicant. The Respondent argued that the position of Mr. Clarke is somehow compromised because it appears he was involved in one of the alleged acts of the Applicant. Counsel for

the Respondent did not elaborate to the Tribunal on how exactly this prevented Mr. Clarke from conducting the proceedings in the best interests of his deceased client's beneficiaries. However, Counsel for the Respondent did refer the Tribunal to an email sent by Mr. Clarke to the Applicant, which formed part of the initial investigation by the Office of Internal Oversight Services and appears in the documentation before the Tribunal.

9. Counsel for the Respondent further argued that because of Mr. Clarke's involvement in the facts of this case, the Respondent may wish to call him as a witness, to testify about this particular email.

10. The Respondent therefore urged the Tribunal to ask Mr. Clarke to step down from the bar in this case or, alternatively, to permit the beneficiaries of the estate of the Applicant the opportunity to consider whether or not in the circumstances they wished Mr. Clarke to continue to represent them.

### **Mr. Clarke's Response**

11. In Response to the Motion, Mr. Clarke stated that he had been the Applicant's Counsel from the start, even before there was any investigation into the Applicant's conduct. Mr. Clarke questioned why the Respondent was only raising this issue now, right at the end of proceedings, when it had been known to him for such a long time. He also informed the Tribunal that this issue had been discussed before the JDC at length but they "did not touch it".

12. Mr. Clarke did not deny having sent the email in question, or the contents thereof, and offered some observations which are irrelevant for the determination of the present Motion.

### **Considerations**

13. The Tribunal notes with some surprise that the Respondent has only raised this matter at the eleventh hour. It has been known to the Respondent from the start of proceedings that Mr. Clarke had sent this email. Therefore it seems odd and surprising, not to say careless, not to have raised it earlier if it was really of great concern.

14. The issue before the Tribunal is not whether or not Mr. Clarke is guilty of any misconduct or offence. The Tribunal does not have a mandate to decide that issue. The

Tribunal cannot and will not take the view that, because he sent this email, Mr. Clarke is not fit to appear before it.

15. The issue is rather whether, in view of the subject email, which forms part of the evidence in this case, Mr. Clarke is not in a position to provide true representation to the beneficiaries of the Applicant's estate.

16. It does not appear to the Tribunal that there can possibly be a conflict of interest between Mr. Clarke and the parties he represents. The email in question has absolutely no relevance to the way Mr. Clarke has so far conducted this case and it is firmly the view of this Tribunal that the email will not and cannot affect the way Mr. Clarke will continue to conduct the case.

17. In deciding this Motion, the Tribunal bears in mind that the interests of justice in this case involves not only considerations of the character of counsel and his ability to best represent his clients, but also the fair and expeditious conduct of proceedings. The Tribunal must also consider the best use of the resources of the United Nations and the Tribunal itself, as well as the time and effort of the witnesses—some of whom occupy high positions—who have already participated in the hearings held to date. If the Tribunal asks Mr. Clarke to stand down from the bar, it is possible that a retrial will be necessary. When such likelihood is weighed into the balance, it seems disproportionate, in the particular circumstances of this case, to take such drastic action.

18. Counsel for the Respondent raised the possibility that the Respondent may wish to call Mr. Clarke as a witness. As indicated above, the Respondent has been aware for a long time—indeed, since 2005—that Mr. Clarke was involved in some way in the allegations against the Applicant. At no stage has the Respondent indicated the necessity of calling Mr. Clarke as a witness. His name was not listed amongst those witnesses described in the Respondent's Response to Order No. 050 (NBI/2011) of 16 June 2011, and in any event, the Respondent could not compel Mr. Clarke to testify for him.

19. The Tribunal is confident that Mr. Clarke is providing representation for the Applicant's beneficiaries with integrity and with their best interests and the best interests of

the reputation of his deceased friend and former colleague, and sees no reason, at this late stage in proceedings, to ask him to stand down.

**IT IS HEREBY ORDERED THAT:**

20. The Respondent's Motion is dismissed.

21. The hearing of *Massah v. the Secretary-General of the United Nations* will resume on **29 November 2011, at 1600 hours** Nairobi Time, (**0800 Eastern Standard Time**) in Conference Room 12, UNON Complex. Parties should be available 15 minutes before the start of proceedings for the testing of the communication facilities.

22. Mr. Vladimir Dzuro, Investigations Division, Office of Internal Oversight Services, appear before the Tribunal for cross-examination on **29 November**, commencing at 1600 hours Nairobi time (**0800 Eastern Standard Time**).

23. Mr. Dzuro is to provide the Registry, by **28 November**, with a phone number upon which he can be reached for the hearing.

24. The Respondent is to make the witness Mr. Zayed available for cross-examination from 1600 hours on **29 November** and is to provide the Tribunal with a contact telephone number upon which he can be reached by **28 November**.

25. This Order serves as a hearing notice, pursuant to Article 16 of the Tribunal's Rules of Procedure.

(Signed)

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Judge Vinod Boolell  
Dated this 17<sup>th</sup> day of November 2011

Entered in the Register on this 17<sup>th</sup> day of November 2011

(Signed)

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Jean-Pelé Fomété, Registrar, UNDT, Nairobi