



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2018/041
Order No.: 031 (NBI/2020)
Date: 6 February 2020
Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

RUBVUTA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON THE APPLICANT'S
MOTION TO RECONSIDER ORDER
NO. 213 (NBI/2019)**

Counsel for the Applicant:
Sètondji Roland Adjovi

Counsel for the Respondent:
Elizabeth Gall, AAS/ALD/OHR

Background

1. On 10 December 2019, the Tribunal issued Order No. 213 (NBI/2019).
2. On 10 January 2020, the Applicant filed a Motion for reconsideration of Order No. 213 (NBI/2019). In said Motion, the Applicant advances two arguments for the reconsideration. The first is related to the factual circumstances leading to the hearing while the second one derives from the publication of Order No. 213 (NBI/2019).
3. On 14 January 2020 the Tribunal issued Order No. 005 (NBI/2020) which required:
 - a. Counsel for the Respondent to submit a response to the Motion by 20 January 2020;
 - b. the Registry to consider the Motion with respect to the issues raised concerning the Tribunal's practice on communication, consultation, dissemination and publication of its Orders by 27 January 2020; and
 - c. The Applicant to submit a reply to the submissions raised in paragraphs 3(a) and (b) above by 3 February 2020.
4. Counsel for the Respondent filed a response to Order No. 005 on 17 January 2020 stating that she does not have a position on the Applicant's Motion.
5. The Registry's response to the Order was transmitted to the parties on 24 January 2020.
6. The Applicant filed his response to Order No. 005 on 3 February 2020.

The relevant facts

7. On 20 November 2019, the Tribunal issued Order No. 196 (NBI/2019) scheduling a CMD in this case for 9 December 2019.

8. At the CMD, Counsel for the Respondent appeared in person and the Registry contacted Counsel for the Applicant on the mobile number provided. Counsel for the Applicant was, however, in a moving vehicle at the time of the CMD. The Tribunal suggested to Counsel to stop the vehicle, hold the CMD, conclude and resume his trip but he refused to consider the suggestion. The combination of loud interference and poor connection from being in a moving vehicle, compelled the Tribunal to adjourn the proceedings.

9. The Applicant's Counsel explained his circumstances at the time of the CMD by suggesting that it was because the Registry had failed to consult him when setting the date for the CMD.

10. After the Judge had adjourned the CMD on 9 December 2019, the Registry's Legal Officer and Counsel representing the parties had a brief discussion about possible dates for the rescheduled CMD. A tentative date of 7 January 2020 was proposed. The Registry's Legal Officer informed Counsel that the tentative date would be subject to agreement from the Presiding Judge. After consulting the Judge, the Registry's Legal Officer was informed that a more suitable date would be 13 January 2020.

11. On 10 December 2019, the Registry's Legal Officer sent an email to the Counsel informing them that the new date for the CMD would be 13 January 2020 and asked them to confirm their availability. An automated response was received from Counsel for the Respondent indicating her absence from the office. Another response, however, was received from the generic email address for the Appeals and Accountability Section on 10 December 2019 stating that Counsel for the Respondent would be available on 13 January 2020.

12. On 10 December 2019, the Tribunal issued Order No. 213 (NBI/2019) rescheduling the CMD for 13 January 2020.

13. In a follow-up email dated 11 December 2019, Counsel for the Respondent herself confirmed her availability for the CMD on 13 January 2020.

14. On 4 December 2019, Mr. René Vargas, Registrar, UNDT Registry in Geneva, informed all UNDT Registry Staff of an instruction from the Principal Registrar that all orders issued by the UNDT are to be published on the UNDT website unless a UNDT Judge expressly advises the Registry not to publish.

15. Order No. 181 (NBI/2019) was issued on 7 November 2019. Order No. 196 (NBI/2019) was issued on 20 November 2019. These two Orders were not published on the UNDT website.

16. Order No. 213 (NBI/2019) was issued on 10 December 2019. It was published as per the Principal Registrar's directive.

Registry's submissions

17. The dates of CMDs are determined by the Judge presiding over a case based on her/his judicial diary. The Registry notifies the parties at least seven days before the scheduled date. The dates will tend to be more inflexible when half-time Judges are involved. It has always been the practice in the UNDT that parties to a proceeding are at liberty to file a motion or simply send an email to the Registry seeking a rescheduling of the matter due to circumstances which they would explain in the request.

18. In the present case, Counsel for the Applicant had more than 14 days to seek a rescheduling of the CMD.

Applicant's submissions

19. The submissions from the Registry raise a question of method: schedules are issued without consideration and could be amended if they do not suit the availability of the parties. For judicial economy, consultation should be conducted with due time for a response before the schedule is issued.

20. The schedule for 9 December 2019 was issued without any prior consultation. The Registry does not challenge that but argues that Counsel should have sought a postponement.

21. The request for reconsideration has already explained the reasons why no change to the schedule for 9 December 2019 was sought.

22. The negative view expressed by the Registry in paragraph 14 of its response does not fall within the scope of the submissions required from the Registry. Counsel for the Applicant was muting his connection anytime he was not speaking while at the time of the communication there was no traffic around. Once Counsel for the Applicant was reached for the hearing there was no issue about the connection until the Judge was also remotely connected. Indeed, after the hearing, the parties were able to exchange further on their availability for the rescheduling. One needs to balance the interest of the Applicant for a timely outcome vis-à-vis these plausible technical inconveniences and the Applicant made his choice.

23. On 9 December 2019, the consultation took place at the end of the CMD, and it seems that the parties and the Registry were able to hear each other without any difficulty. Then the Registry sent an email on 10 December 2019 suggesting a different date and asking the parties for their availability. On the same date, before any party had responded, Order No. 213 (NBI/2019) was issued. Counsel for the Applicant later made the necessary arrangements to be available and comply with the Order. The Order having been issued, it is difficult to see the value of any response on the request for availability, especially when Counsel has taken steps to be available.

24. As to the publication of the Order on the website, the submissions of the Registry brought in a self-serving justification for the publication. This internal instruction, unknown to the Applicant, does not provide full transparency in the operations. As of today, some Orders in Nairobi after 4 December 2019 have not been published and there is no explanation on the situation. If indeed the process has been reversed such that orders are now published except where the judge specifically instructs the Registry not to publish them, the basis for any non-publishing of the order should be communicated to both Counsel in the interests of transparency while the non-published orders should still be listed with the

notice that the Tribunal has decided not to publish them. These submissions failed to address the core issue of the application for reconsideration.

25. The explanation provided was factually accurate: the schedule was made without prior consultation; the Applicant chose to conduct the hearing to advance the case; and his Counsel took reasonable measures to mitigate the fact that he would be in a moving vehicle while notifying the Registry and the Tribunal that he would not be in optimal conditions.

26. The suggestion that the Applicant and his Counsel did not afford the seriousness deserved to these proceedings could not be factually sustained. The Applicant and his Counsel fully considered the importance of the hearing for the case and decided not to delay its consideration for both schedules, first on 9 December 2019 and then on 13 January 2020, ensuring the availability of Counsel despite the lack of prior consultation and other professional commitments. The technical constraint could not be foreseen and should not have been used against the interest of the Applicant.

27. At Annex 1 of the submissions of the Registry, the instructions from the Judge referring to the seriousness of the proceedings seem different and to be addressed to both parties and not only to the Applicant and his Counsel. Yet, the Order issued thereafter made a suggestion which does not match the instructions while the suggestion was only made towards the Applicant without any motivation for such a shift.

28. The publication is harmful to both the Applicant and his Counsel. The new internal policy of the Registry does conceive that some orders would not be published and it is reasonable to consider that the potential harm contained in an order could be a justification not to publish such an order. The new policy does not fully justify the publication of Order No. 213 (NBI/2019) and the argument on the harm to the case of the Applicant and to his Counsel remains.

29. The Applicant renews his prayers for the Tribunal to grant the reconsideration of Order No. 213 (NBI/2019) and to publish its related order as a

remedy to the harm. The Applicant further requires the Tribunal to direct the Registry to link the new order with Order No. 213 (NBI/2019) on the same portal.

Considerations

30. 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.¹

31. The power to regulate and manage conduct of a proceeding in the United Nations Dispute Tribunal is vested in the presiding Judge. This is an inherent power which cannot be delegated. This position is affirmed by UNAT in *Igbinedion* 2014-UNAT-410, where, in considering the Secretary-General's arguments that the UNDT had acted unlawfully and that he was therefore entitled to disobey the UNDT's order, held that:

The ability to promote and protect the court, and to regulate proceedings before it, is an inherent judicial power. In the opinion of this Tribunal, it is essential to, *inter alia*, a tribunal's case management and ability to conduct hearings.²

32. Counsel for the Applicant has not cited any rule of procedure, statutory provision or jurisprudence to justify his assertion that he ought to have been consulted before setting down the matter for CMD or before publishing the impugned order.

33. The narration by Counsel for the Applicant of events leading to the 9 December 2019 CMD is irrelevant to his application to reconsider the order. The order was issued based on the facts and circumstances before the Tribunal at the time of issuing it. The Tribunal cannot be compelled to reconsider the order based on facts that were not before it at the material time.

34. Similarly, the Registry did not deviate from the normal and designated practice of communication, notification, transmission and publication of its orders

¹ Article 19 of the UNDT Rules of Procedure.

² Paragraph 31.

even in light of the General Assembly resolution on the issue of case backlog in the UNDT.

35. The Motion to reconsider Order No. 213 (NBI/2019) is without legal basis and it is accordingly denied and dismissed.

ORDER

36. The Registrar is directed to reassign the application to a different Judge to ensure that the matter proceeds with no perception of ill will on account of these proceedings.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 6th day of February 2020

Entered in the Register on this 6th day of February 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi