



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2021/002
Order No.: 090 (NBI/2021)
Date: 30 April 2021
Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ARMAND

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON A MOTION FOR
INTERIM MEASURES PENDING
PROCEEDINGS**

Counsel for the Applicant:
Julia Kyung Min Lee, OSLA

Counsel for the Respondent:
Nicole Wynn, AAS/ALD/OHR
Rosangela Adamo, AAS/ALD/OHR

Introduction

1. The Applicant is a Movement Control Assistant at the FS-5 level working with the United Nations Support Office in Somalia (“UNSOS”).¹

2. On 6 January 2021, the Applicant filed before the United Nations Dispute Tribunal in Nairobi an application on the merits challenging the United Nations Administrative decision to deduct from his salary a sum of USD5,032.33 monthly, which was, as he termed it, “based on a misrepresentation of his salary and without a proper exercise of discretion, pursuant to staff rule 3.18(c)(iii)”.²

3. On 23 April 2021, he filed a motion for interim measures pending proceedings claiming that the court judgment on which the decision was based, has been reversed. He is accordingly seeking:

a. suspension of the Administration’s decision of 10 November 2020 to deduct USD5,032.33 from his salary in child support, including retroactive child support and arrears on a monthly basis; and

b. Repayment of the deductions of USD5,032.33 since 10 February 2021 from his salary.

4. On 26 April 2021, the motion was served on the Respondent, who filed his reply on 28 April 2021. On the same day, 28 April 2021, the Applicant filed the Appeals Court decision denying the motion filed by the Applicant’s former spouse seeking a rehearing of the Court’s Opinion dated 10 February 2021.

Facts

5. Since 2018, the Applicant has had proceedings in court in Florida, the United States of America, relating to divorce and child maintenance.³

¹ Application, section I.

² Application, section V.

³ Application, section VII.

6. On 3 March 2020, the Court in Miami-Dade County, Florida, issued a judgment in Case No. 2017-021520-FC-04, titled “Final Judgment of Dissolution of Marriage”, pronouncing the Applicant’s divorce and, among other, requiring him to pay in child support a total of USD5,032.33 monthly, plus retroactive child support and arrears.⁴

7. In regard to the above-mentioned judgment by the Miami-Dade County Court, UNSOS Chief Legal Officer sought information directly with the Judge who issued it, as to whether it was final. A court clerk responded that the query remained unanswered.⁵ Prior to seeking authorization for deductions, Ms. Martha Helena Lopez, the Assistant Secretary General for Human Resources consulted the Office of Legal Affairs (“OLA”) seeking their advice on whether the judgment can be considered as final pursuant to sec. 2.3 of ST/SGB/1999/4 (Family and child support obligations of staff members). In reply, OLA advised that the Judgment is final, binding and fully enforceable.⁶

8. On 10 November 2020, UNSOS informed the Applicant that the Under-Secretary-General for Management, Strategy, Policy and Compliance had granted authorization for recoveries to be made from his salary pursuant to sec. 2.2(b) of ST/SGB/1999/4 based on the judgment in Case No. 2017-021520-FC-04. The Applicant was also informed that with effect from the November 2020 payroll and subsequent months thereafter, the Organization would deduct a sum of USD5,032.33 from his salary and that in compliance with the Court judgment, the amount will be forwarded to the Florida State Disbursement Unit.⁷ The deductions have been implemented.⁸

⁴ Reply, R/3.

⁵ Correspondence of Manuel Calzada of UNSOS with Legal Assistant of the County Court, Florida dated 14 October 2020, Applicant’s Annex 1 to the motion; Application Exhibit 7p. 60.

⁶ Application on the merits, Reply R/8, para. 7; Applicant’s Exhibit 2E, Management evaluation p. 4.

⁷ Applicant’s motion for interim measures pending proceedings, filed on 23 April 201, Exhibit 1.

⁸ Application on the merits, Case No. UNDT/NBI/2021/002, Exhibit 1.

9. In filing an application of the merits, the Applicant signaled that he was appealing the Final Judgment of Dissolution of Marriage and attached a copy of the appeal.⁹

10. On 10 February 2021, the Third District Court of Appeal of the State of Florida reversed the Judgment in Case No. 2017-021520-FC-04 and remanded the case, having found that the subject matter jurisdiction had not been properly ascertained.¹⁰

11. On 10 February 2021, the Applicant sent a copy of the Florida Appeals Court Judgment to UNSOS and informed them of the reversal of the Miami-Dade County Court Judgment on which the Administration had based the deductions.¹¹ He reiterated the same on 23 February 2021.¹² On 24 February 2021, UNSOS replied to the Applicant, stating that the matter was being dealt with in the proceedings currently underway before the Dispute Tribunal; that the proceedings were handled by the Administrative Law Unit of the Department for Management, Strategy, Policy and Compliance; and that UNSOS would wait for the outcome of those proceedings and act in accordance with the relevant instructions.¹³

Applicant's submissions

12. The Applicant contends that all the premises required by art. 10.2 of the UNDT Statute are met: The impugned decision is *prima facie* unlawful, because the judgment which formed the basis of the salary deductions was entirely reversed on 10 February 2021. The Applicant's matrimonial case was remanded for an entirely new hearing on subject matter jurisdiction to determine whether the court that issued the judgment even has the jurisdiction to pronounce on the Applicant's child support obligations, including the qualification of the amount of child support that he needs to pay his former spouse.

⁹ Ibid, exhibit 11.

¹⁰ Applicant's motion for interim measures pending proceedings, filed on 23 April 201, exhibit 2.

¹¹ Ibid, p.3.

¹² Ibid.

¹³ Ibid.

13. The test of urgency has been satisfied, because the impugned decision is being implemented indefinitely-if the SOA is not granted, the Administration will continue to deduct USD5,032.33 from his salary on a monthly basis.

14. The irreparable harm test is met because the loss of over half of his salary affects his ability to provide basic food and housing for his family; which harms their physical and mental health and well-being. The deductions are sent to a third party, as to whom there is no certainty that the UNSOS Administration or the Applicant will be able to recover from them any undue payments.

Respondent's submissions

15. The Respondent submits that the Applicant has not satisfied the three prerequisites for granting interim relief under art. 10.2 of the Statute of Dispute Tribunal.

Unlawfulness

16. The Respondent contends that the contested decision is *prima facie* lawful. The Respondent cites sec. 2.3 of the ST/SGB/1999/4 (Family and child support obligations of staff members) which provides that “if a staff member concerned contests the order, he or she must submit a new order of a competent court, setting aside or vacating the original order or staying the original order pending appeal, or proof that he or she has otherwise amicably resolved the matter with his or her spouse or former spouse. Until such evidence is submitted, the Organization will honour the original court order”.

17. The Respondent underscores that the first page of the Appellate Opinion states that it is “not final until disposition of timely filed motion for rehearing”. The Appellate Opinion did not stay or vacate the Trial Judgment. To the contrary, the Appellate Opinion held the matter in abeyance pending the disposition of any motion for rehearing of the appeal. The Applicant has not submitted any subsequent order or judgment setting aside or vacating the Trial Judgment as required under sec. 2.3 of

the ST/SGB/1999/4. The Applicant has presented no basis for the Organization to discontinue the current salary deductions prior to final adjudication of the case on the merits.¹⁴

18. The Respondent, further submits that the only matter at issue in the appellate proceedings is subject matter jurisdiction over the divorce, not child support. The Applicant appealed the Trial Judgment only with respect to the divorce. Accordingly, the Appellate Opinion proposed to remand the matter to the Trial Court solely for a review of subject matter jurisdiction over the divorce. The Appellate Opinion did not disturb the ruling or the order on child support. Under Florida law, the jurisdiction over the dissolution of a marriage is not tied to jurisdiction over child support.¹⁵

19. Moreover, the Respondent submits that, in any event, the interlocutory child support order of 2 April 2018 would remain in effect and the Applicant would still owe arrears should the Trial Judgment ultimately be vacated with respect to both child support and the divorce. The Respondent cites to *Kuate* Judgment UNDT/2021/018 to support that the Applicant's reading of the Appellate Opinion would place the matter of child support in limbo, which would systematically contradict the principle of protecting the interest of the child.

Urgency

20. The Respondent opines that any urgency is self-created. The Applicant's claim of urgency is meritless where salary deductions of which he complains are lawful, foreseeable, and a result of his own actions. Urgency is also self-created because the Applicant waited until 23 April 2021, more than two months after the 10 February 2021 Appellate Opinion was issued to request for interim measures. He provides no explanation for this delay.

Irreparable harm

¹⁴ Reply to the motion for interim measure, para 9.

¹⁵ Ibid, para. 10.

21. The Applicant has not demonstrated that the decision will cause him irreparable harm. It is generally accepted that mere economic loss does not satisfy the requirement of irreparable damage. Further, there is no merit in the Applicant's allegation that the decision would cause irreparable harm as the Organization could not recover the third-party deductions. The Respondent argues that should the Applicant prevail on the merits of this case, the Dispute Tribunal may award compensation that the Organization would be obligated to pay to the Applicant, regardless of its ability to recover the third party's deductions.

22. With regard to the Applicant's request for repayment of the deducted amount from his salary since 10 February 2021, the Respondent maintains that such a request is premature given that the Applicant has not shown that the Appellate Opinion has changed the *status quo ante* with respect to his child support obligations.

23. In view of the above, the Respondent requests the Tribunal to deny the Applicant's motion on interim measures.

Considerations

24. Under art. 10.2 of the Statute and art. 14 of the Rules of Procedure of the Tribunal an applicant for suspension of action must establish that the impugned decision is *prima facie* unlawful, calls for urgent adjudication and that implementation of the decision would cause him/her irreparable harm. The Tribunal is not required at this stage to resolve any complex issues of disputed fact or law. All that is required is for a *prima facie* case to be made out by an applicant to show that there is a judicable issue before the Court.¹⁶

Unlawfulness

25. On the prong of unlawfulness, it is recalled that the controlling instrument, ST/SGB/1999/4, section 2.3, allows deduction for family support on the basis of a final

¹⁶ *Hepworth* UNDT/2009/003 at para. 10.

court order, and defines it to mean one that has “become executable”. In the present case, the title relied upon by the Respondent in the issuance of the impugned decision is the Judgment of Miami-Dade County Court. The primary question for the matter at hand is whether this Judgment constituted a final, alternatively-non-final but executable, order in the sense of ST/SGB/1999/4, section 2.3.

26. The Tribunal finds no indication that the Judgment of Miami-Dade County Court was executable upon issuance, neither does the issue seem to have been investigated by the administration in the proceedings leading to the impugned decision. Rather, all pertinent documents focus on the finality, apparently presumed from the title ‘Final judgment of dissolution of marriage’. The Tribunal considers that the title should not have been relied upon. It posits that, at minimum, an issue whether a divorce and derivative orders on division of property, alimony, child custody and child support may be at all pronounced without a right of appeal warranted a reflection – indeed displayed by the UNSOS Chief Legal Officer. Moreover, a basic internet search provides information that in the Florida legal system the expression ‘final order’ denotes appealable decisions.¹⁷ Furthermore, in the application on the merits, at the latest, the Applicant informed of the fact that he had filed an appeal.

27. Turning to the new fact of the matter, that is the issuance of the appellate judgment by the Third District Court of Appeal of the State of Florida, the Tribunal does not find any indication of it being limited to a divorce decision only. The orders of the Judgment of Miami-Dade County Court on child support were issued in the regime of a divorce case, where the County Court assumed to have jurisdiction. It is noted that the appellate court reversed and remanded the “final judgment of dissolution of marriage” for the question of jurisdiction, citing, among other, that “A judgment entered by a court which lacks subject matter jurisdiction is void...” It also noted that it did not address Armand’s remaining arguments on appeal as they are were not

¹⁷ E.g., <https://rules.floridaappellate.com/rule-9-030/>

necessary to the resolution of this case.¹⁸ Finally, it was alive of child support issues, citing that “If a question of existence or exercise of jurisdiction [...] is raised in a child custody proceeding, the question, upon request of a party, must be given priority on the calendar and handled expeditiously.” The Respondent’s narrowing “interpretation” of the Judgment of the Third District Court of Appeal is lacking basis.

28. Regarding the Respondent contention that the Third District Court of Appeal only “proposed” to reverse and remand, while in itself was not final, the Tribunal finds that the discussion about the finality of the appellate judgment does not remove a doubt about initial executability of the ‘Final judgment of dissolution of marriage’. Be it as it may, of note is the most recent filing by the Applicant, which documents that a motion by the Applicant’s (former) wife (“the appellee”) was refused. The aspect of the finality of the appellate judgment is now clarified. Whatever had been taken as premise for accepting that the Judgment of the Miami-Dade County Court was executable, it is not anymore.

29. The Respondent’s argument that the remand of the Miami-Dade County Court Judgment must have caused an earlier temporary child support award order¹⁹ to revive is speculative and the Respondent produces no support for this contention. The Tribunal observes that the temporary order was also issued in the context of a dispute about subject matter jurisdiction of the child support. No information has been put before the Tribunal as to the result of that dispute.

30. To the extent the Respondent invokes an earlier, non-final Judgment of this Tribunal in *Kuate*²⁰, in that provisional measures stay in force until otherwise decided by the court before which the case is pending, that this effect is *ex lege* and that a different interpretation would place the matter of child support in limbo, which would systematically contradict the principle of protecting the interest of the child – this holding was made upon

¹⁸ Applicant’s motion for interim measures pending proceedings, filed on 23 April 201, exhibit 2. Judgment of the Third District Court of Appeal, fn. 2.

¹⁹ Application on the merits, exhibit 2F.

²⁰ *Kuate*, UNDT/2021/018, para. 50.

examination of the text of the law of Cameroon which had been put before the Tribunal, and where there was no dispute about existence of subject matter jurisdiction. It cannot be *verbatim* transferred to the present context. Whereas the general rule of interpretation consistent with the interest of the child is teleologically valid here as well, the goal might be possibly achieved within the proceedings after remand, as noted in the appellate judgment (“If a question of existence or exercise of jurisdiction [...] is raised in a child custody proceeding, the question, upon request of a party, must be given priority on the calendar and handled expeditiously”). There is no basis to presume a revival of a temporary order from three years ago.

31. However, the impugned decision has as the executive title the Judgment of the Miami-Dade County Court. Should the Secretary-General grant authorization to proceed with child deductions upon a different title, this would require an amendment to the decision in both the formal and substantive aspect, the latter necessarily examining the enforceability and the extent of obligation stated in the order (significantly lower than presently executed by the Respondent). Presently, the Respondent does not make any such showing.

32. In conclusion, the impugned decision is *prima facie* unlawful.

33. Once on *Kuate*, however, the Tribunal wishes to recall its general observations stated therein, which show to be fully relevant to this case as well. The Tribunal, first, observes that the Respondent’s first duty as employer is to pay the staff members their salary and entitlements in return for the work rendered. It is not a primary role of the Respondent to execute family support orders, as is expressed by the controlling legal act, ST/SGB/1999/4 (Maintenance, education and other support obligations of officials), whose section 2 establishes authorizing deductions as discretionary. This reflects the fact that making relevant determinations on the interface of municipal private law, in which the Organization has no expertise, may prove overly cumbersome and time-consuming, and still be erroneous in the end. It follows that a decision to

authorize deductions must be based on a court order that is unequivocal. This, in the present case, is not present.

34. Second observation is that it is the municipal law that controls the family status of a staff member and finality or executability of court orders in the context of ST/SGB/1999/4 and ST/AI/2009/1 (Recovery of overpayments made to staff members). In the event where the Organization chooses to define the meaning of any such elements specifically for the purpose of its own operations, such definition must be express, as in section 2.3 of ST/SGB/1999/4. Still, the ultimate plane of reference in establishing *in casu* whether a definition from section 2.3 of ST/SGB/1999/4 or section 1.7 of ST/AI/2009/1 is met, remains the municipal law. Therefore, deference is owed to it where the Organization purports to deplete a staff member's salary in execution of municipal court orders. At the outset, the persons concerned, and especially the one requesting deductions, should be obligated to furnish all the pertinent information and documents. Moreover, specifically for the purpose of sorting out competing legal titles, ST/SGB/1999/4, section 2.4 foresees means of cooperation within the Organization as well as inter-entity. Ultimately, a failure to effectively obtain the relevant information should not be held against the staff member. Rather, it is this Tribunal's considered opinion that lacking clarity as to the disputed court order, and absent cooperation from the state agency as to clarifying the needful, the Organization should err on the side of refraining from deductions. The Organization should not be expected to ensure for claimants of child support more protection than it is granted to them by the original jurisdiction.

35. Third observation is that no administrative issuance can explicitly foresee all relevant situations arising on the ground of municipal laws or, for that matter, in any area of their operation. That the SGB does not literally refer to a certain scenario does not automatically authorize *a contrario* inferences unfavourable for the employee, where the overall purpose of the administrative issuance is not undermined by applying analogy. This purpose necessarily encompasses due protection of the staff member's salary. Staff members are not always in a position to obtain from their courts an order

phrased identically as section 2.3. The example of mechanistic, unfavorable interpretation in this case is the Respondent's insistence that the Judgement of District Court of Appeal did not "vacate" the first instance judgment.

Urgency and irreparable harm

36. Regarding the prongs of urgency and irreparable harm, the Tribunal shares the views of the Applicant. While indeed the Applicant does not explain why he did not come before the Tribunal earlier, it is documented that in February 2021 he had made effort to have the decision suspended or reversed directly with UNSOS. Moreover, it transpires from the case that the Applicant had acted without counsel and that he retained counsel from OSLA only on 23 April 2021. The undoubtful complexity of the case must have required examination. On the irreparable harm, the Tribunal concurs that deducting half of a salary is a serious burden, which may not be reversible for reasons on the part of the third party. The Tribunal is perplexed by the Respondent's declared readiness to burden the Member States with the costs incurred by his unlawful actions.

37. The application is granted with regard to suspension of monthly deductions for child support. In the remaining part, the application seeks a reversal of a decision that has already been implemented and a *de facto* satisfaction of the whole claim. As such it goes beyond the scope of an interim measure and falls to be dismissed.

Conclusion

38. The monthly deductions from the Applicant salary on account of child support are henceforth suspended.

39. The remaining pleas are dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 30th day of April 2021

Entered in the Register on this 30th day of April 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi