



UNITED NATIONS DISPUTE TRIBUNAL

Original: English

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**Before:** Judge Vinod Boolell

**Registry:** Nairobi

**Registrar:** Jean-Pelé Fomété

MASSAH

v.

SECRETARY-GENERAL

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



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

