



IN THE EAST AFRICAN COURT OF JUSTICE AT  
ARUSHA



FIRST INSTANCE DIVISION

*(Coram: Monica K. Mugenyi, PJ; Audace Ngiye & Charles O.  
Nyawello, JJ)*

CLAIM NO. 2 OF 2018

POVENTRA ANJIMBI SHITSIMI .....  
CLAIMANT

VERSUS

THE SECRETARY GENERAL OF  
THE EAST AFRICAN COMMUNITY .....  
RESPONDENT

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27<sup>TH</sup> JANUARY 2021

**JUDGMENT OF THE COURT**

**A. Introduction**

1. Mr. Poventra Anjimbi Shitsimi ('the Claimant'), the Senior Procurement Officer of the East African Community (EAC), lodged this Claim under Article 31 of the Treaty for the Establishment of the East African Community ('the Treaty'). It arose from the Claimant's suspension from duty by the Secretary General of the EAC ('the Secretary General'), an action that is perceived to have been unlawful, *ultra vires* the Secretary General's powers under Community laws and tantamount to the defamation of the Claimant.
2. The Secretary General is faulted for his misapprehension of the EAC Staff Rules and Regulations; EAC Financial Rules and Regulations; Procurement Standard Operating Procedures (SOPs), as well as the Claimant's role in the Community's procurement processes. The Secretary General is alleged to have taken punitive action against the Claimant on the basis of broad and vague allegations; incomplete East African Legislative Assembly (EALA) processes; interim reports and recommendations that were

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meant for institution building and not fault finding or punishment; and collective decisions of numerous committees that cannot be imputed to the Claimant as an individual member of staff.

3. The impugned action was allegedly premised on a non-existent investigation process; was taken without due process (including the Claimant's right to be heard), and thus contravenes universally accepted principles of natural justice and human resource management; as well as the Treaty and EAC Staff Rules and Regulations.
4. The Claim is opposed by the office of the EAC Secretary General ('the Respondent'), a self-defining office that was sued in its representative capacity pursuant to Article 4(3) of the Treaty. In its Statement of Defence, any breach of the Treaty in the terms proposed by the Claimant is denied. The Respondent asserts that the Secretary General acted within the powers conferred upon his office by the Treaty and EAC Staff Rules and Regulations, therefore the investigation of the Claimant should be allowed to run its course. The Respondent contends that the matter is prematurely before the Court as the applicable administrative process has not yet been concluded. It thus disputes the proposition that the Claimant's suspension pending investigation amounts to disciplinary action.

  
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5. At trial, the Claimant was represented by Mr. Donald Deya and Ms. Esther Muigai Mnaro, while the Respondent was represented by Ms. Florence Ochago and Mr. Dennis Kibirige Kawooya.

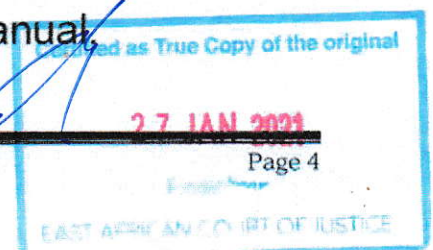
**B. Factual Background**

6. The Claimant was, effective 1<sup>st</sup> January 2014, appointed to the position of Senior Procurement Officer of the EAC under a five-year contractual term that was subject to the EAC Staff Rules and Regulations. On 8<sup>th</sup> October 2018, the Claimant was suspended by the Secretary General to pave way for investigations into his role in a purportedly fraudulent procurement process over the years.

7. The Claimant's suspension, contained in a letter from the Secretary General Ref. PF/0406, was particularly pegged on a Report of the (EALA) Committee on Accounts in respect of the EAC Audited Accounts for the Financial Year ended 30<sup>th</sup> June 2017, specifically the award of contract for EAC Staff Medical Insurance to M/s AAR Insurance at USD \$ 545,628.5.

8. The letter highlighted the following findings of the Committee:

- (a) The tender was advertised for 30 days contrary to the minimum period of 45 days provided by the EAC Procurement Procedures Manual.





- (b) Since M/s AAR Insurance had not submitted the audited financial statements for three previous years as required by bid documents, the firm would not have proceeded to the Technical Evaluation Stage.
- (c) There was unfair evaluation at the technical stage which disadvantaged M/s Jubilee Insurance in favour of M/s AAR in contravention of section 2.4.3.1 of the EAC Procurement Procedures Manual.
- (d) Despite deviation from the TORs and Procurement procedures, M/s AAR was recommended to be awarded the contract.

9. The Secretary General's letter did also contain the following observations by the Committee:

- (a) Non-compliance with procurement procedures may have denied EAC the benefit of purchasing high quality at prices that are competitive.
- (b) By handling the procurement in such a haphazard and unprofessional manner, the Community risks paying for substandard and poor quality services with no value for money attained.

- (c) Despite deviation from the TORs and Procurement procedures, M/s AAR was recommended to be awarded the contract.
- (d) There was violation of Regulation 43 of the EAC Financial Rules and Regulations which prohibits fraudulent practices, corruption and other unprofessional tendencies.
- (e) The evaluation team did not consider the technical criteria given in the bidding document.
- (f) There was lack of quorum in the procurement committee that awarded the tender to M/s AAR on 9<sup>th</sup> June 2016 where only 3 members were present out of 7 instead of 5 as required, and
- (g) Non-compliance with procurement procedures undermined the fundamental principles of transparency, value for money and fairness in management of the Community funds and this further undermined the quality of service.

10. The Committee reportedly recommended that the Claimant be investigated and held accountable for presiding over an apparently fraudulent procurement process. It was on that premise that the Secretary General suspended him to pave way for an investigation *'into the entire procurement*



*processes in the recent past and specifically in the procurement leading to the award of contract to M/s AAR for EAC Staff Medical Insurance at USD 545,628.5.'*

### **C. Applicant's Case**

11. The Claimant faults his suspension on the erroneous premise that he presides over the Community's procurement processes yet his role in the impugned processes is limited to serving as secretary to the various procurement committees. He further contends that the allegations levied against him are so broad and vague as to defeat any attempt to make specific responses to them. In any event, it is the contention that the EALA processes from which those allegations arise had not yet been completed as at the date of the contested suspension, therefore the recommendations accruing therefrom were susceptible to variation in due course.

12. Although the Respondent did vide a letter dated 29<sup>th</sup> October 2018 purport to appoint an Investigative Committee to investigate the Community's procurement processes; it is the Claimant's contention that the appointment letter did not specify any misconduct on his part, neither had the Committee or any individual sought him out with regard to the alleged investigation.

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13. The Respondent's handling of the matter is considered to specifically contravene Regulations 89 and 90 of the EAC Staff Rules and Regulations. Whereas the 38<sup>th</sup> Extraordinary Meeting of the EAC Council of Ministers held in January 2019 directed the Respondent to expedite his appraisal of the Claimant for purposes of contract renewal; the 38<sup>th</sup> Ordinary Council Meeting of May 2019 renewed the Claimant's contract with a directive to the Respondent to expedite the investigation process in accordance with the EAC Staff Regulations.

**D. Respondent's Case**

14. Conversely the Respondent contends that, as Head of the Community's Procurement Unit, the Claimant took functional responsibility for its performance and was rightly suspended under Regulations 8(2), 9 and 45 of the EAC Financial Rules and Regulations, and Regulations 3(1) and 91(1) of the EAC Staff Rules and Regulations.

15. The suspension was intended to pave way for investigations into the Claimant's culpability for the irregularities cited in respect of procurement processes for Financial Years 2014/ 2015 to 2017/ 2018. The result of the investigation would inform the action to be taken against the Claimant therefore, in the absence of any disciplinary action

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or exhaustion of the said administrative process, it is opined that the Claim is prematurely before the Court.

16. In his affidavit in support of the Respondent, the Chairperson of the Investigative Committee – Mr. Stephen Mlote – averred that the Respondent initiated a three-tier investigation process, which had since submitted its report to the Secretary General. Nonetheless, it urged, the Respondent would not conclude the investigation or take action against the Claimant without giving him an opportunity to be heard.

17. The three-tier process in reference entailed:

(a) An internal investigation committee to investigate all procurement and disposal process of Organs and Institutions of the Community from July 2013 up to September 2018, to establish compliance with the established rules and regulations.

(b) Employing the services of an Independent Procurement Expert to review the EAC procurement processes and identify the specific officers, committees and other structures that are acting in contravention of the established rules and regulations.



- (c) Using forensic and special audits to establish the nature and involvement of each of the officers in the service of the Community, including the Claimant, in any report relating to procurement processes of the Community as recommended by the Assembly.

### **E. Issues for Determination**

18. At a Scheduling Conference held on 16<sup>th</sup> March 2020, the Parties framed the following issues for determination:

- I. *Whether the suspension of the Claimant was lawful.*
- II. *Whether there has been an Investigation Committee duly constituted to investigate the Claimant.*
- III. *Whether the Claimant is entitled to the remedies sought.*

### **F. Court's Determination**

19. It will suffice to clarify that although the Reference was instituted under the East African Court of Justice Rules of Procedure of 2013, those Rules were effective 1<sup>st</sup> February 2020 replaced by the East African Court of Justice Rules of 2019 ('the Court Rules'). The latter Rules shall therefore be applied without prejudice to the validity of anything previously done under the 2013 Rules and provided, as enjoined by



Rule 136, that if and so far as it is impracticable to apply the 2019 Rules 'the practice and procedure heretofore followed shall be allowed.'

**Issue No. 1: Whether the suspension of the Claimant was lawful.**

20. The Claimant proposed that Regulation 18(3) of the EAC Staff Rules and Regulations having designated him in the category of professional staff; by virtue of Regulations 23(8) and 86(2), disciplinary action against him could only be undertaken by the EAC Council of Ministers ('the Council') under Regulation 90(10)(b). Under that provision, the Council would take a disciplinary decision upon securing the advice of a panel set up under Regulation 86(3) and the recommendation of the Secretary General in that respect. For ease of reference, Regulations 86 and 90(10)(b) are reproduced below.

**Regulation 86 of the Staff Rules and Regulations**

**(1) The respective appointing authorities as set up under Regulation 23 of these Rules and Regulations shall be the authorities responsible for disciplinary decisions.**

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(2) The Council shall set up a Disciplinary Panel in the case of Executive Staff.

(3) The Secretary General shall set up a Panel to advise on matters related to discipline of the professional and general staff. The members of the Panel shall vary according to the nature of the case and the level of a member of staff to be reviewed.

Regulation 90(10) of the Staff Rules and Regulations

(a) .....

(b) In case of the professional staff, the advice of the Disciplinary Panel together with the Secretary General's recommendation shall be submitted to the Council for appropriate decision.

21. The Claimant contends that whereas the Respondent purported to suspend him under Regulation 91(1) of the EAC Staff Rules and Regulations, no investigation had been conducted as at the date of filing his written submissions in this matter, neither had any report been furnished by the Respondent office. This is argued to be a clear violation of Regulation 91(4), which enjoins the Secretary General to



**'ensure that the case is resolved as expeditiously as possible, preferably within three (3) months.'**

22. It is thus the Claimant's contention that the Respondent had no mandate to discipline him. In his view, any disciplinary action should have been taken pursuant to a positive finding of his guilt as provided by Regulation 89(2) but, having neither been heard nor found guilty of misconduct, his suspension was premature and unlawful.
23. On its part, the Respondent draws a distinction between the suspension envisaged as a disciplinary measure under Regulation 89(2)(e), and that which was invoked by the Secretary General in this case under Regulation 91(1). The Respondent contends that not only is staff suspension to pave way for investigation duly provided for in the EAC Staff Rules and Regulations, it is recognized in international employment practice as highlighted by the numerous cases cited in that regard.
24. The same international jurisprudence on suspension pending investigation into financial impropriety was cited to support the legality of the Secretary General's action. It is the contention that as the Chief Executive and Accounting Officer of the Community, to whom all members of staff are accountable under Regulation 8(2) of the EAC Financial Rules and Regulations, non-implementation of the Staff



Rules and Regulations in the instant case would have been tantamount to a dereliction of duty on the part of the Secretary General.

25. Further, the Council having endorsed the investigation instituted by the Secretary General, his actions are in accordance with the executive functions entrusted to him under Article 67 of the Treaty, read together with the EAC Staff Rules and Regulations and Financial Rules and Regulations.

26. We carefully considered the rival arguments of both Parties. It is common ground herein that the Claimant was suspended under Regulation 91(1) of the EAC Staff Rules and Regulations, the only point of departure being the legality of the said action. The legality of that action is discernible from an appreciation of Regulation 91 within the context of the EAC disciplinary regime as encapsulated in the Staff Rules and Regulations. Regulation 91(1) provides as follows:

**A member of staff whose actions are being investigated by the Community or Police or against whom action is being taken for having committed a serious offence shall be suspended from duty with full pay.**

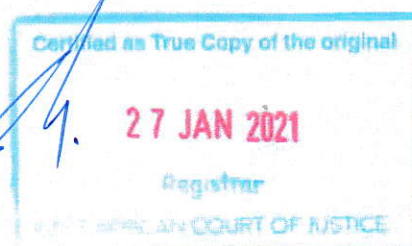
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27. As quite rightly argued by learned Respondent Counsel, the EAC Staff Rules and Regulations do indeed envisage two different forms of suspension: on the one hand, suspension as a punitive measure under Regulation 89(2)(e) and, on the other hand, suspension as an interim measure to pave way for investigations. The latter measure is the suspension prescribed under Regulation 91(1) and is the one that in contention presently. Therefore, although suspension to pave way for investigations is indeed available in the Staff Regulations, the more fundamental question for present purposes would be the function of that interim measure in the broader disciplinary procedures outlined in Regulation 90, so as to determine if it was aptly applied in the present case.

28. Whereas the Claimant sought to discredit his suspension on the pretext that disciplinary action against him could only be undertaken by the Council under Regulation 90(10)(b), that Regulation bespeaks to the contrary. The procedure detailed in Regulation 90(10) derives from the provisions of Regulation 90(7) and pertains to a member of staff that is alleged to have committed a *grave offence*. There is nothing on record to suggest that the Claimant stands accused of conduct that constitutes a *grave offence* as defined in Regulation 88(3).



29. On the contrary, the contents of the Secretary General's letter of suspension point to suspicion of his having played a pivotal role in a procurement that is considered to have flouted the Community's procurement regime. If established, this would amount to **'breach of Community Rules and Regulations'** and constitute a *serious offence* under Regulation 88(2)(e). We therefore cannot fault the Respondent for not pursuing the disciplinary action prescribed in Regulation 90(10) of the Staff Rules and Regulations.
30. Be that as it may, serious offences are addressed as follows in Regulation 90(5):

**A member of staff who commits serious offences shall receive a written warning for the first offence, and thereafter the subsequent offence may be considered as ground for termination or dismissal.**

31. On the other hand, Regulation 89(2) delineates the following disciplinary measures for a member of staff found guilty of misconduct:

- (a) verbal warning;
- (b) written warning;
- (c) reprimand;





- (d) deferment of annual salary increment;**
- (e) suspension from duty;**
- (f) termination, and**
- (g) dismissal.**

32. On its part, as observed earlier herein, Regulation 91(1) does provide for suspension where an employee's actions are being investigated by the Community.

33. Our construction of the foregoing Regulations is that the investigations envisaged under Regulation 91(1) would form the basis for the disciplinary measures prescribed in Regulations 90(5) and 89(2). However, the applicability of the disciplinary measures stipulated in Regulation 89(2) must of necessity be tampered with natural justice and logic. Thus, in so far as Regulation 90(5) elevates the penalties for serious offences to a written warning for a first offender, and termination or dismissal for a repeat offender; it automatically renders superfluous the penalty of a verbal warning with regard to serious offences.

34. In the same vein, it would defy logic for so elaborate an investigation to be instituted as would warrant an employee's suspension, only for the disciplinary action to terminate in a written warning on account of the employee being a first offender. Similarly absurd and incongruous in that regard would be recourse to suspension as a disciplinary measure



for a member of staff that had already been suspended as an interim measure. The Staff Rules and Regulations are couched in such terms as would suggest that a written warning, reprimand or suspension would accrue to offences that are lesser in nature to the sort of offences that would necessitate investigation that calls for the interim suspension of a member of staff.

35. We are fortified in this approach by the reference in Regulation 91(6) to separation of service (either by termination or dismissal) upon an investigation under that Regulation establishing the culpability of a member of staff under suspension. Such investigation clearly pertains to offences that could culminate in termination or dismissal. We take the view, therefore, that the investigation envisaged in Regulation 91 should pertain to grave offences as enshrined in Regulation 88(3) or, in the alternative, incidences of repeated serious offences - the first incidence(s) of offence having been duly established, which would elevate a member of staff found culpable to the category of offenders that are susceptible to termination or dismissal.

36. Turning to the circumstances of the matter before us, we find nothing on record to suggest that the Claimant was a repeat offender of any serious offence so as to warrant either termination or dismissal as prescribed in Regulation 90(5), or



as would propel him to the category of grave offences under Regulation 88(3)(a). Paragraph 4 of the Statement of Defence, supported by paragraphs 5 and 6 of Mr. Mlote's affidavit, do make reference to several reports of alleged lack of due diligence in execution of the Claimant's duties. However, no explanation was forthcoming as to why he had received no warning whatsoever with regard to those allegations. On the contrary, the Respondent does concede that there has not been a single warning extended to the Claimant, verbal or otherwise.<sup>1</sup> The Court thus defers to the Claimant's contention that the said matters had been investigated and closed. The fact that they were closed with no warning to him would lend credence to the conclusion that the matters were resolved in his favour.

37. According to the Secretary General's letter, his suspension was premised on an EALA Committee recommendation in respect of a specific procurement. However, the Secretary General decided to escalate the investigation to *'the entire procurement processes in the recent past.'* Indeed, it was the testimony of no less than the Deputy Secretary General in charge of Finance and Administration that the investigation took the form of an elaborate 3-tier process.





38. The circumstances of this case present a glaring contradiction between the disciplinary measures applicable to first offenders under the Staff Rules and Regulations and the action initiated by the Respondent. Applying the 'proportionality' test,<sup>2</sup> it behoves the Court to consider whether the adopted administrative measure was:

- a. suitable to achieve a desired objective;
- b. necessary for achieving the desired objective, and
- c. imposed excessive burdens on the individual it affected.

39. In the present case, we are hard pressed to appreciate the objective the Respondent's escalation of the investigation sought to achieve. As we have elaborated earlier in this ruling, the previous allegations against the Claimant had been seemingly resolved in his favour and thus attracted no punitive measure. What then would be the purpose of having them resurrected and included in a call for investigation that had specifically accrued to the more recent AAR procurement only? In any case, in the EALA Accounts Committee Report the Director of Human Resources reportedly took responsibility for late commencement of the procurement process. We thus find no plausible reason for



the Respondent's restriction of the suspension pending investigations to the Claimant and not that officer.

40. It thus becomes abundantly clear that for a senior member of staff with no previous history of having committed a serious offence to have been suspended in the foregoing circumstances alludes to an unjust, partial (discriminatory) and unwarranted administrative measure. It would impute the disproportionate exercise of the authority granted to the Respondent under Regulation 3(1). The EALA Committee's call for the Claimant's investigation with regard to the AAR procurement did not necessarily translate into a directive to reignite closed allegations, let alone his suspension pending the same. As a first offender, a simple in-house investigation would have sufficed to establish his culpability (if any) with specific regard to the impugned procurement for purposes of a written warning.
41. Consequently, we are of the decided view that in so far as the Claimant would be a first offender should his culpability for the offence he is under investigation for be established, his suspension was unwarranted and unjustifiable under the Staff Rules and Regulations and was, to that extent, unlawful. We would therefore resolve *Issue No. 1* in the negative.





**Issue No. 2: Whether there has been an Investigative Committee duly constituted to investigate the Complainant**

42. It is the Claimant's contention in submissions that as at the date of closure of pleadings in this matter the Respondent had not set up any investigation into the matters for which he was suspended. In his view, beyond the averments in Mr. Mlote's affidavit, there is no proof of the establishment of an investigation committee such as terms of reference (TORs), notice(s) of appointment or reports.

43. Nonetheless, in an affidavit deposed on 12th March 2020, the Claimant did acknowledge the appointment of the Committee referred to by Mr. Mlote, albeit with the assertion that it was set up to investigate all the Community's procurement and disposal processes. It is opined that the investigation committee was not established to investigate the Claimant as the issues it seeks to investigate go beyond the allegations raised against him; almost two years since he was suspended, the committee has never interfaced with or invited him for any hearing, and it was neither cited in the Respondent's pleadings of April 2019 nor mentioned in his engagements with the Council in May 2019.

44. We understand it to be the Claimant's proposition that in so far as the investigation committee in place was not



(demonstrably) set up to investigate any allegations against him, no committee was set up to conduct the investigation alluded to in his suspension letter. To compound matters, although the committee was required to investigate all officers involved in the procurement process, he was the only one that was suspended. In his view, not only was his suspension unjust and discriminatory, the submission of the investigation committee's report without according him a hearing; the re-opening of matters that had since been closed and the illegal utilization of a European Union consultant to investigate the Procurement Unit contrary to his TORs were but a pretext by the Respondent to unjustly keep him out of office.

45. Conversely, it is the Respondent's contention that it was not obliged to set up a committee as an investigation need not necessarily be undertaken by a committee. In a seeming contradiction, however, it was then argued that investigations by an investigation team set up by the Secretary General had commenced; the contention being that the first two processes in the 3-tier investigation having since been concluded, the investigations were complete; the findings thereof had been relayed to the Claimant and, in accordance with natural justice, his response thereto had been sought.





46. The Respondent attributed the delay in concluding the investigation to *'institutional and operational challenges'* including the nature of the EAC, which purportedly *'involves political and national interests and involves extensive consultations in order to balance the political, national and social interests, including specifically balancing the interests of the Community with the interests of the Partner State from which the officer originates as any investigation of the officer reflects on the Partner State.'*

47. Other factors that were opined to have caused the delay in conclusion of the investigation include meetings of the Summit of Heads of State and the Council respectively, as well as discussions with the European Union to provide a procurement expert to the investigation. It was argued that given that the internal investigation committee was presided over by the Deputy Secretary General responsible for Finance and Administration, who also doubles as the head of Summit and Council preparatory committees, meetings of the said committees affected and superseded the work of the investigation committee.

48. In a nutshell, the Claimant questions the applicability of the broad 3-tier investigation to his suspension; the workings of the said investigation, as well as the discriminatory nature of the suspension accruing therefrom, proposing that the

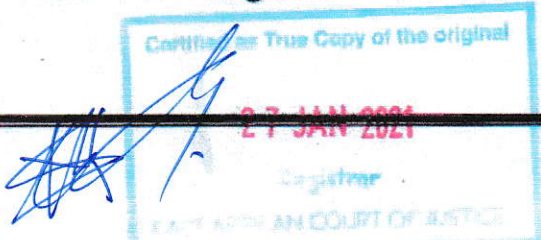




purported investigation and suspension were unjust and unwarranted. After careful consideration of the material on record we find that a committee was indeed instituted by the Respondent on 29th October 2018 to *'investigate and inquire into all procurement and disposal processes of the Organs and Institutions of the Community from Financial Year 2013/14 to September 2018.'*<sup>3</sup>

49. The appointment of that committee ensued against the backdrop of the Claimant's suspension, which was triggered by the EALA Accounts Committee's recommendation that he be investigated and held accountable for presiding over an allegedly fraudulent procurement process in respect of an award of contract to M/s AAR for EAC Staff Medical Insurance. The Secretary General opted to suspend him to pave way for a full investigation *'into the entire procurement processes in the recent past and specifically in the procurement leading to the award of contract to M/s AAR for EAC Staff Medical Insurance at USD 545,628.5.'*<sup>4</sup>

50. It would appear from Mr. Mlote's affidavit on behalf of the Respondent that the committee's investigation was part of a wider review of the EAC's procurement policies and procedures, and the responsible officers' compliance therewith. Our reading of paragraph 9 of that affidavit is that the Claimant is under investigation in all three tiers of the





broader investigation. In fact, the import of the averments in paragraphs 10 - 12 of the affidavit is that the findings of the investigation would be put to the Claimant (and any other officer found culpable) upon the completion of all three tiers of the investigation.

51. Consequently, we are satisfied that the Respondent did in fact set up an investigation committee to investigate the procurement that led to the recommendation for the award of a contract to M/s AAR, as well as the EAC procurement function over and above that specific process.

52. In terms of the committee's functionality, ideally the investigation committee should have been in place and ready to start its fact-finding assignment at the time of the Claimant's suspension, so as to conclude the assignment within the three months time frame preferred by Regulation 91(4) of the Staff Rules and Regulations. However, in this case, the internal committee that was constituted to undertake the first tier of the assignment was only set up three weeks after the Claimant's suspension and the investigation was still incomplete as at the date of filing of submissions, only the first and second tiers thereof having been completed.

53. It is mind-boggling to note the casual manner with which a matter so serious was approached by the Respondent.



Regulation 91(4) succinctly delineates three months as the indicative time frame within which any case that is the subject of investigations under the Staff Rules and Regulations should be concluded. The sheer gravity of matters that may be subjected to investigation under Regulation 91 (as was held in the Court's determination of the preceding *Issue*) would beg commensurate urgency in any investigation pertaining thereto.

54. It is appreciated that the interpretation and implementation of the EAC Staff Rules and Regulations is vested in the office of the Secretary General. *See Regulation 3(1) of the Regulations.* It is also appreciated that any appeal to this Court, pursuant to the exercise of the foregoing mandate by the Secretary General, is subject to the exhaustion of all **'appeal procedures as provided for under Rules and Regulations 87, 88, 89 and 90.'** *See Regulation 3(2).*
55. As highlighted earlier in this judgment, whereas Regulation 88 outlines the grounds for disciplinary action in the Community, Regulations 89 and 90 demarcate the disciplinary measures and procedures applicable thereto. Regulation 87, on the other hand, addresses the manner in which any complaints or grievances may be handled by the Secretary General. It enjoins the Secretary General to set up a Complaints Panel that will consider a staff member's

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complaint and submit a report to the Secretary General. The Secretary General would then make and communicate his decision on the matter within fifteen days whereupon, under Regulation 87(4), **'if a staff member is not satisfied with the Secretary General's decision, he or she may refer the matter to court.'**

56. In the instant case, the Claim was lodged in this Court on 1<sup>st</sup> November 2018, barely a month after the impugned suspension and supposed commencement of the investigation it was hinged onto. Given the unambiguous provisions of Regulations 3(2) and 87(4), the Claim should have been preceded by the exhaustion of the complaints process detailed in Regulation 87. However, it does present peculiar circumstances that cannot be ignored by the Court.

57. The Respondent's handling of the purported investigation unjustly curtails the equitability of the Staff Rules and Regulations, the central plank of its duty to EAC staff under Regulation 14. It will suffice to note that the timelines under the Court's Rules of Procedure with regard to the lodging of Statements of Claims and Statements of Defence in response thereto are such that a respondent would file its Statement of Defence within thirty days of receipt of notification of the Statement of Claim. See *Rule 33(1) of the Court's Rules*. In the instant case, the Claim having been

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lodged on 1<sup>st</sup> November 2018, the Defence should have been filed by 1<sup>st</sup> December 2018. It would therefore have been the expectation that by the closure of pleadings the Claimant's investigation would have been well underway, the pleadings having closed almost two months from the date of suspension; so that by the holding of the parties' Scheduling Conference shortly thereafter, the redundancy and prematurity of the case would form a valid subject for consideration.

58. Instead, the Response to the Claim was filed in April 2019, six months after the suspension and supposed commencement of the investigation, with the following averment in paragraph 9(k):

*The Respondent has since constituted an Investigation Committee to investigate all procurement processes from Financial Year 2014/ 15 to 2017/ 18. The suspension of the Claimant was to pave way for the investigation which is currently underway.*

59. Therefore, six months after the Claimant's suspension, when the Respondent's Defence was lodged in Court, an investigation that should have been concluded within three months under Regulation 91(4) was still ongoing. To compound matters, at the Scheduling Conference held on



27<sup>th</sup> January 2020, Ms. Ochago did unabashedly confirm that fifteen months since the Claimant was suspended the investigation was still underway. Furthermore, the Statement of Defence did not raise the issue of the prematurity of the Claim, the same only arising later in written submissions.

60. Against that background, we pause to ponder - what is the justice of this case? Regulation 14 of the Staff Rules and Regulations places a general duty upon the Community, through the Secretary General (its chief executive officer), to provide a conducive work environment for staff including ensuring *equity* to staff. One of the renown maxims of equity dictates that '**equity will not suffer a wrong without a remedy**', literally meaning that equity will not let a person with a good claim be denied the right to sue. The circumstances of this case are that a senior member of the EAC staff was suspended to pave way for a fact-finding investigation, the findings of which would determine whether or not to escalate the matter to full disciplinary proceedings.

61. However, the inordinate delay in the conclusion of the investigations defeats the provisions of Regulation 3(2) in so far as it indefinitely holds the Claimant's rights to legal recourse in abeyance at the behest of the Respondent's own conduct. That could not have been the intention of the Council that sanctioned the Staff Rules and Regulations or

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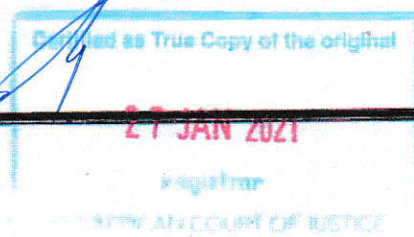
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the framers thereof. Indeed, it is a renown maxim that **'equity looks at the intent not the form'**, that is, it looks to the reality of what was intended rather than the way in which it is expressed.

62. It would be preposterous for this Court to contemplate the proposition advanced by the learned Respondent Counsel that the Respondent Office should be allowed yet more time to conclude its already illegally drawn out internal disciplinary measures to finality. This would be to render nugatory the magnanimity inherent in the Staff Rules and Regulations, and impede the spirit and letter of Regulation 91(4), an invitation we decline to consider. We would therefore interrogate the Claim to avert a miscarriage of justice, as is the duty of this or any other court.

63. It seems to us that the 3-month rule for investigations under Regulation 91 was intended to precisely avert the situation that the Claimant finds himself in, where a supposed investigation drags on indefinitely in utter disregard for the duty upon the Community under Regulation 14(2) to **'consciously and continuously aim to improve the quality of working life of staff.'** We draw apposite direction from the United Nation's handling of similar timelines set in its *Staff Rules on the Prohibition of discrimination, harassment, including sexual harassment and*





*abuse of authority (ST/SGB/2008/5)*. Section 5.17 thereof provides as follows:

The officials appointed to conduct the fact-finding investigation shall prepare a detailed report, giving a full account of the facts that they have ascertained in the process and attaching documentary evidence, such as written statements by witnesses or any other documents or records relevant to the alleged prohibited conduct. This report shall be submitted to the responsible official normally no later than three months from the date of submission of the formal complaint or report. (*Our emphasis*)

64. In Reilly vs. Secretary General of the United Nations, UNDT/2019/094, citing the decision in Oummih vs. Secretary General of the United Nations, UNAT/2015/518, the UN Dispute Tribunal observed that the failure to conclude an investigation has not systematically been considered a violation' to staff members' terms and conditions of employment on account of 'the complexity of some complaints, the fact that additional elements were put forward by the complainant and the exercise of the parties' rights through litigation (which) were considered

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**to be valid justifications when examining delays in the conclusion of investigations.'**

65. In the instant case, such formidable justifications for a delayed investigation did not arise. Rather, the Respondent sought to visit its own ineptness in the execution of its routine functions upon the Claimant; irresponsibly giving pre-eminence to routine operational meetings over the welfare of a senior member of staff on suspension. This is a far cry from the duty upon the Community under Regulation 14(c) of the Staff Regulations to provide **'healthy, safe and conducive working conditions'** for its staff, let alone its counter-productivity to the over-riding purpose of the Staff Rules and Regulations to **'attract and retain in the service of the Community staff who meet the highest standards of efficiency, competency and integrity.'** See Regulation 1(2).

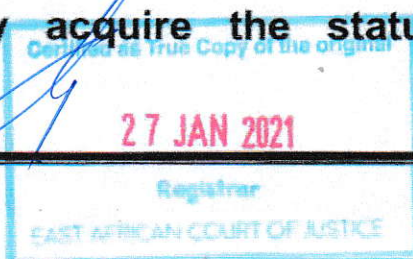
66. Further, in a completely self-defeating approach, learned Respondent Counsel attributed the delay to *'balancing the interests of the Community with the interests of the Partner State from which the officer originates as any investigation of the officer reflects on the Partner State.'* If true, this should have been carefully considered **prior** to the said officer's suspension and not after the event. In the same vein the alleged discussions with the European Union to provide a



procurement expert to the investigation should similarly have been explored prior to the impugned suspension.

67. Perhaps more importantly, this line of argument is an affront to the international character of EAC members of staff as spelt out in Article 72 of the Treaty. In essence, they shed their national identity and assume the status of international civil servants, the neutrality of whom their home countries are enjoined to respect under Article 72(3) of the Treaty. For learned Respondent Counsel to purport to invoke considerations of the Claimant's nationality as a basis for the delayed investigation, worse still seek to relate any alleged personal misconduct on his part to his country of origin is absurd, to say the very least. Connotations of such nationality considerations were laid to rest by the Court in Advisory Opinion No. 1 of 2015: A Request by the Council of Ministers of the East African Community in the following terms:

**Upon appointment by the Summit of both the Secretary General and the Deputy Secretary General, those appointees (just like all other officers and employees in the service of the Community) cease to be nominees of the particular Partner State of their nationality or nomination. ... they acquire the status and**





**character of international civil servants, beholden to no single Partner State, nor to any Head of State or member of the Council of Ministers. They owe all their loyalty and fidelity only to their Employer: the Community.**

68. Consequently, we find no justification in the present case for the delay in concluding the investigation. In the case of **Benfield-Larporte, UNAT/2015/505**, a 6-month period of inaction was held by the United Nations Appeals Tribunal to constitute a violation of the 3-month rule prescribed under Section 5.17 of the UN's ST/SGB/2008/5. Clearly, therefore, a fifteen-month delay is totally untenable. As was observed of the UN Tribunal in **Reilly vs. UN Secretary General** (supra), similarly in the present case, without justification for the delay in concluding the investigation the present Respondent essentially made '**a unilateral decision to deviate from the applicable rules, which is not permitted.**'

69. We are satisfied therefore that the inordinate delay of the investigation committee in concluding its fact-finding assignment would negate the *bona fides* of its constitution, rendering the Claimant's protracted suspension on account thereof a blatant violation of his terms and conditions of

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employment by the Respondent. *Issue No. 2* is answered in the negative.

**Issue No. 3: Whether the Claimant is entitled to the remedies sought.**

70. The Claimant sought the following reliefs as reproduced verbatim below:

- a. A DECLARATION that the Respondent has acted unlawfully and *ultra vires* his powers under the laws of the EAC to the detriment of the Claimant.
- b. A DECLARATION that the Respondent has violated the rights of the Claimant under the EAC Treaty, the EAC Staff Rules and Regulations, and *inter alia* universally accepted principles of natural justice.
- c. AN ORDER to the Respondent to rescind and/ or withdraw the purported suspension of the Claimant and to immediately reinstate the Claimant in his ordinary working position and conditions.
- d. AN ORDER to the Respondent to ensure scrupulous adherence to due process and to the relevant provisions of the EAC Treaty and

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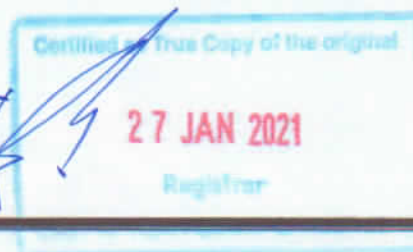


EAC law, including relevant provisions of EAC Rules and Regulations.

- e. AN ORDER for reparations to the Claimant, including by way of general, exemplary and/or punitive damages.
- f. AN ORDER to the Respondent to pay the costs of the Applicant.
- g. Any such other or further orders, remedies or directions as this Honourable Court may deem fit to grant.

71. Having held as we have on *Issue No. 1*, we would grant the declaration sought under paragraph 70(a) above, albeit only in terms of the illegality of the Respondent's actions. We would similarly grant the declaration sought in paragraph 70(b) with specific regard to the Respondent's violation of the Claimant's rights under the EAC Staff Rules and Regulations. Violation of the EAC Treaty was not canvassed before the Court.

72. Consequently, having established the illegality of the Respondent's action viz the Staff Rules and Regulations, we do grant the prayer sought under paragraph 70(c). The Respondent is nonetheless at liberty to conclude the investigations that are underway, should the said office be so inclined.



73. With regard to the prayer for general damages, the Court is undoubtedly clothed with jurisdiction to grant such relief to parties. Thus in the case of Hon. Dr. Margaret Zziwa vs. The Secretary General of the East African Community,<sup>5</sup> the duty upon the Court to grant remedies to parties was spelt out as follows:

**The full effectiveness of East African Community Laws including the Treaty and the protection of the rights granted by such laws requires the Court to grant effective relief by way of appropriate remedies in the event of breach of such laws. Otherwise such laws would be no more than pious platitudes. ... Articles 23(1) and 27(1) of the Treaty do not confine the Court's mandate to mere Treaty interpretation and the making of declaratory orders but confer on the Court, being an international judicial body, as an aspect of its jurisdiction, the authority to grant appropriate remedies to ensure adherence to law and compliance with the Treaty.**<sup>6</sup>

74. The foregoing precedent is applicable to the present scenario in so far as the EAC Staff Rules and Regulations that have been breached do constitute EAC Community law. Accordingly, taking into account the circumstances of this

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case - particularly the inordinate delay in the conclusion of the investigations initiated by the Respondent leading to an unwarranted and unduly protracted suspension, the Court is of the decided view that the Claimant be awarded reparations in terms of general damages.

75. In the case of Grand Lacs Supplier S.A.R.L vs. The Attorney General of the Republic of Burundi,<sup>7</sup> considering that the compensation awardable as general damages would be 'for what is termed moral, non-material or non-pecuniary loss or damage,' the Court awarded USD \$20,000 *inter alia* for Treaty and Protocols violations, including disruption to the successful party's economic activity. In the instant case, the Court is alive to the fact that the Claimant has continued to draw a salary while on suspension and has, to that extent suffered no direct economic hardship. We would nonetheless award him general damages for the moral, non-material or non-pecuniary injury arising from his protracted suspension, and would consider an award of USD \$10,000 appropriate in the circumstances. Given the totality of the circumstances of this case, we do deem it necessary to grant simple interest on the compensation awarded at 6% per annum from the date of this judgment until payment in full.

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76. Meanwhile, Rule 127(1) of the Court's Rules of Procedure provides that costs shall follow the event unless the Court for good reason decides otherwise. This rule was emphatically reinforced in the case of The Attorney General of the Republic of Burundi vs. The Secretary General of the East African Community & Another.<sup>8</sup> Finding no reason to decide otherwise, we would award the costs hereof to the Claimant.

### **G. Conclusion**

77. In the result, the Claim is allowed in the following terms:

- (a) A DECLARATION is hereby issued that the Respondent's suspension of the Claimant was unlawful.
- (b) A DECLARATION is hereby issued that the Respondent violated the Claimant's employment rights under the EAC Staff Rules and Regulations.
- (c) The Claimant's suspension pending investigations by the Respondent is hereby rescinded forthwith, the Respondent being at liberty to conclude the investigations that notwithstanding.
- (d) Compensation in general damages in the sum of USD \$10,000 (ten thousand) is hereby awarded to the Claimant.

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(e) Simple interest at 6% per annum is awarded against the compensation designated in paragraph 78(d) hereof from the date of this judgment until payment in full.

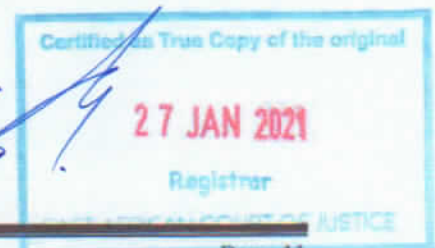
(f) Costs are awarded to the Claimant.

It is so ordered.

**Dated and delivered by Video Conference this 27<sup>th</sup> Day of January, 2021.**

*Monica K. Mugenyi*

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**\*Hon. Lady Justice Monica K. Mugenyi**  
**PRINCIPAL JUDGE**



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**Hon. Justice Audace Ngiye**  
**JUDGE**

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**Hon. Justice Dr. Charles O. Nyawello**  
**JUDGE**

***\*[Hon. Lady Justice Monica K. Mugenyi completed her tour of duty with the Court in November 2020 but signed this Judgment in terms of Article 25(3) of the Treaty.]***

<sup>1</sup> See paragraph 4 of the Statement of Defence.

<sup>2</sup> See reference to the same test in Gallo vs. Secretary General of the United Nations, UNDT/2015/073.

<sup>3</sup> See Annex 5 to the Claimant's Affidavit of 12th March 2020.

<sup>4</sup> See letter of suspension dated 8th October 2018.

<sup>5</sup> EACJ Appeal No. 2 of 2017.

<sup>6</sup> Ibid. at p. 19, para. 35

<sup>7</sup> EACJ Reference No. 6 of 2016, p. 26, para. 60.

<sup>8</sup> EACJ Appeal No. 2 of 2019

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