

COURT OF APPEAL

Judges Maria Natércia Gusmão Pereira, Antonino Gonçalves, and Jacinta Correira da Costa, who compose the Court of Appeal, decide on the following:

I – REPORT

In the present records of temporary injunction (unspecified), in which Ivo Nelson de Caires Batista Rosa is the applicant, and the Superior Council for the Judiciary is the respondent, the former **requested that a declaration be made to suspend the efficacy of the decision made by the Superior Council for the Judiciary on 13 November 2008 “not to renew the contract with UNDP insofar as the applicant is concerned”**.

To that end, the applicant alleges the following:

On 11 September 2006, the applicant signed a letter of appointment with UNDP for a period of six months. Such letter of appointment was renewed for equal periods of six months on 10 March 2007 and on 10 September 2007;

By decision of the Superior Council for the Judiciary made on 20 September 2006, the applicant was appointed as District Court judge and was sworn-in in that capacity on 28 September of that same year;

The applicant exercised his functions as a judge in the Dili District Court up to 24 May 2008;

By decision of the Superior Council for the Judiciary of 7 March 2008, the applicant, following a process of selection and interview, was appointed Court of Appeal judge and was sworn-in in that capacity on 23 May 2008;

Between 28 September 2006 and 21 June 2008, the applicant also worked as trainer for the seven national judges currently working at the Dili District Court;

From 15 March 2008, the applicant has been working as trainer for the two national judges whose training programme will be completing on 15 March 2009;

A letter of agreement was entered into by the Superior Council for the Judiciary and UNDP on 10 March 2008, with identification number 00114955, as a way of implementing the Programme for Strengthening the Justice System;

Pursuant to that letter of agreement, UNDP undertook before the Superior Council for the Judiciary to pay the applicant’s monthly salary;

Also pursuant to that same letter of agreement, the Superior Council for the Judiciary undertook itself to do its best to ensure that the International Judge to be recruited meets the highest standards of efficiency, competence and personal integrity;

The applicant did not take part in the above-mentioned letter of agreement;

Ever since his appointment as District Court judge up to this date, the applicant has always enjoyed good technical and moral reputation and has been the object of positive evaluations on the part of the President of the Superior Council for the Judiciary;

On 21 November 2008, at the request of UNDP, the President of the Superior Council for the Judiciary provided UNDP with the result of the evaluation of the applicant's work in his capacity as judge of the Court of Appeal and as a trainer;

In that evaluation, the President of the Superior Council for the Judiciary underscored the technical as well as the human qualities of the applicant, stated the relevance of such qualities for the strengthening and consolidation of the Timorese justice system, and requested the renewal of the contract between the Superior Council for the Judiciary and UNDP for a further period of 12 months;

Between 9 June 2008 and the date on which the present temporary injunction was lodged, the applicant, in his capacity as judge of the Court of Appeal, made 63 decisions. All such decisions were made in due time and no pending cases can be attributed to him;

UNDP has always recognized the quality of the services rendered by the applicant, including his contribution to the strengthening of the justice system and the consolidation of the Rule of Law;

The applicant was the rapporteur of the decision (with general binding force) made in the framework of proceeding number 4/2008 and which declared the unconstitutionality and unlawfulness of several rules contained in Law No. 12/2008 of 5 August (Law Rectifying the State Budget);

The National Parliament was notified of the above-mentioned decision on 13 November 2008;

According to news disseminated on the media, the Superior Council for the Judiciary would have allegedly decided to remove the applicant from the functions of judge of the Court of Appeals;

According to statements made to Jornal Expresso, the Vice-President of the Superior Council for the Judiciary conceded that the decision to remove the applicant was made on the day of the notification of the decision referred to above on the Rectifying Budget Law, i.e. on 13 November 2008, without such item being included in the working agenda for the meeting and without the knowledge of Cláudio Ximenes;

In those same statements, the Vice-President of the Superior Council for the Judiciary stated the following: "I am not putting at stake the competence of the judge, but it was a proposal made by two judges of the Court of Appeal and, despite being a polemic one, the proposal ended up being voted on by unanimity;

In the meeting of 13 November 2008, the Superior Council for the Judiciary decided to renew the contracts of the other two international judges working in the Court of Appeal;

The Superior Council for the Judiciary also decided to request the recruitment of a new judge to replace the applicant;

No fixed-term contract exists between the applicant and the Superior Council for the Judiciary.

The decision of the Superior Council for the Judiciary to remove the applicant from the exercise of his functions was premised on questions of a political nature and represents a clear interference in the independence of the Courts;

The Vice-President of the Superior Council for the Judiciary is the Secretary-General of CNRT, a political party integrating the Government;

Another member of the Superior Council for the Judiciary, Cirilo Cristóvão, is an adviser in the Office of the Prime Minister;

The decision under review represented a reprisal against the rapporteur of the decision which considered the afore-mentioned rules to be unconstitutional;

The salary that the applicant receives from UNDP is his only source of revenues;

Complying with the decision under review will imply the immediate cessation of the payment of the salaries of the applicant, thereby depriving him of the sole means of subsistence that he possesses;

Complying with that same decision will also imply the Court of Appeal to be deprived of the minimum number of judges necessary to its normal functioning;

The removal or replacement of the applicant from his functions as a trainer during the final stage of the training programme will equally entail damages to the process of evaluation of the judges currently on probation;

Maintaining the effects of such a decision constitutes a factor of instability for the normal functioning of the judicial power and the Democratic State based on the Rule of Law.

Opposing to the request of temporary injunction, the Superior Council for the Judiciary alleged the following and requested it to be impeached:

According to the Superior Council for the Judiciary, the temporary injunction under review is subject to payment of judicial costs. The applicant does not enjoy any objective or subjective exemption and, as such, he has to pay the respective justice tax;

The Superior Council for the Judiciary has no legal personality and, as such, it lacks the capacity to be a party in a case. It is not a legal personality body, but a simple administrative organ of the Courts;

The temporary injunction should have been lodged against the State, represented by the Public Prosecution.

The letter of agreement referred to by the applicant has a limited duration, after which it forfeits, unless the parties thereto agree to renew it;

Even where the decision made by the Superior Council for the Judiciary was to be suspended, the end of the functions of the applicant in Timor-Leste would always occur following the completion of the normal duration of the agreement;

Letters of agreement are not renewed automatically;

The decision made by the Superior Council for the Judiciary is only an informative act stating that the Council has no intention to renew the agreement;

Thus, the suspension or non suspension of the decision made by the Superior Council for the Judiciary is irrelevant since the afore-mentioned agreement has forfeited. Any subsequent decision to the contrary is therefore useless;

The relationship existing between the judge and the Superior Council for the judiciary has a contractual nature (provision of services);

None of the contracting parties is obliged to hire or to renew the duration of any given contract;

The Statute of Judicial Magistrates is applicable to international judges, with the necessary adaptations;

Thus, no interest to take action should exist because the action would be useless;

The newspaper articles referred to in the initial application do not correspond to the decision made by the Superior Council for the Judiciary;

The cause-effect relation between the fact according to which the applicant has acted as the rapporteur of the decision which declared the unconstitutionality and unlawfulness of certain rules of the Rectifying Budget Law and the decision made by the Superior Council for the Judiciary constitutes a pure journalistic speculation;

Proceeding no. 4/2008, under which the decision under review was made, is still open since the Public Prosecution invoked the nullity of all the process that took place after the initial petition for lack of citation;

The decision under review will not yield any practical results because the budgetary law rectified by the law whose rules were declared to be unconstitutional or unlawful will cease its validity on 31 December 2008;

The applicant is not the first international judge whose contract is not renewed;

The decision of the Superior Council for the Judiciary was made by unanimity;

The composition of the Superior Council for the Judiciary is heterogeneous and no one except that whenever a judge feels himself or herself prejudiced by a decision of the Council he or she should allege a political motivation to be under such decision;

There is no legal incompatibility whatsoever as regards the members of the Superior Council for the Judiciary;

The international judges are part of the Timorese judicial organization only on a temporary basis;

Even before the letter of agreement was entered into in 2007, the decisions made by the applicant were the object of controversy and such a situation has not prevented him from remaining in Timor-Leste;

The Court of Appeal is not prevented from operating in the absence of the applicant and the recruitment of four Portuguese judges is underway. These judges are expected to start working next month;

The training and evaluation of the judges on probation will not suffer from the removal of the applicant since such tasks will be secured by the international judges who continue to work in Timor-Leste;

The entry and exit of international judges to and from Timor-Leste is public and notorious and such movements have not jeopardized the normal functioning of the judicial power and the Democratic State based on the Rule of Law;

The conduct of the applicant is the object of comments and controversy;

Despite the fact that the applicant did not participate in the negotiation and signing of the letter of agreement, he adhered to its contents by accepting it;

The applicant is arguing in bad faith since it is not true that the salary paid by UNDP is his only source of income;

From September 2008, the applicant has been receiving his salary in Portugal;

Since he is a judge in Portugal, once his functions in Timor-Leste are over, he will return to his workplace in that country.

CURATIVE ACTS

The Court has jurisdiction on account of the nationality, the matter under review and the hierarchy, as per article 104.1 of Law No. 8/2002 of 20 September as amended by Law No. 11/2004 of 29 December (hereinafter referred to as Statutes of Judicial Magistrates or EMJ).

A – Legal personality of the Superior Council for the Judiciary

Pursuant to article 8 of the Statute of Judicial Magistrates, the Superior Council for the Judiciary is the managerial and disciplinary body of judicial magistrates charged with appointing, assigning, re-assigning and promoting judges (this is a reproduction of the provisions contained in article 128.1 of the Constitution of the Democratic Republic of Timor-Leste). The list of the other competences of the Superior Council for the Judiciary is contained, *inter-alia*, in article 15 of the Statute of Judicial Magistrates.

The composition of the Superior Council for the Judiciary is contained in article 17.

The form of decisions it makes is contained in article 17.

The means and process through which its decisions can be impeached are regulated by articles 104 and subsequent articles of that same Law. Pursuant to article 107.3 of the Statute of Judicial Magistrates, “Should the appeal case proceed, the judge rapporteur shall cause copies thereof to be referred to the Superior Council for the Judiciary so that a reply is given within 10 days and, during the same timeframe, the case is referred to the Supreme Court of Justice”.

By analyzing the above-mentioned legal regime, one concludes that no need exists to examine the legal nature of the Superior Council for the Judiciary. Whether the Superior Council for the Judiciary is an autonomous collective body with legal personality or whether it is a mere organ of the State to be represented by the Public Prosecution pursuant to article 23 of the Civil Procedure Code, what remains true is that, as regards appeal proceedings to impeach decisions made by such organ, the law clearly establishes that the party defendant is the Superior Council for the Judiciary and, as such, it has the right to respond.

In any case, and without engaging in such a discussion, since it would be useless, it is always wise to state that, in a democratic State based on the Rule of Law and subject to the principle of the separation of powers, with the Courts being independent organs of sovereignty as is the case in Timor-Leste (articles 1.1, 69, 118.1 and 119 of the Constitution), one cannot easily argue, as the Superior Council for the Judiciary is attempting to do, that this organ, given its competences, is an organ of State administration to be represented in court by the Public Prosecution.

Nevertheless, whether the Superior Council for the Judiciary has legal personality or not, for the purposes of the judicial appeal to impeach its decisions, the Superior Council for the Judiciary actually has legal personality.

Moreover, as provided for in article 10 and subsequent articles of the Civil Procedure Code, the procedural prerequisite for a lawsuit is the judiciary personality and not the legal personality, it being certain that those who have legal personality also have judiciary personality, whereas not all those that have judiciary personality also have legal personality.

Since the present temporary injunction is a preliminary procedure to that appeal, one has necessarily to consider that such judiciary personality for the main lawsuit is extensive to the temporary or executive injunctions inherent to it.

This being the case, the Superior Council for the Judiciary is incorrect when it states that the lawsuit should be lodged against the State as represented by the Public Prosecution.

The allegation according to which the Superior Council for the Judiciary lacks judiciary personality is therefore dismissed.

The parties do have judicial personality and the capacity to sue and to be sued.

B – Lack of interest to take action

The Superior Council for the Judiciary also alleges that no interest to take action exists that would justify this temporary injunction.

Here again the Superior Council for the Judiciary is not right.

The applicant has a direct interest in suing because, should the petition for temporary injunction be granted, the decision made by the Superior Council for the Judiciary not to renew his contract, including all the consequences resulting thereof, would be neutralized. The Superior Council for the Judiciary has a direct interest in contradicting this request of temporary injunction because, should this temporary injunction be granted, the execution of its decision not to renew the contract of the applicant would be neutralized. For this reason, pursuant to article 29 of the Civil Procedure Code, the applicant has a direct interest in suing and the Superior Council for the Judiciary has a direct interest in contradicting such action.

No one can state that both the applicant and the Superior Council for the Judiciary have no interest in taking action.

There is, therefore, an interest in taking action because the decision of the Court may yield useful legal effects for the party that lodged the lawsuit.

Now therefore, the alleged dilatory exception according to which there is not interest in taking action is dismissed.

The parties are legitimate.

No nullities, or other exceptions, exist that should be examined by the court or that prevent the court from examining the merits of the case.

C – Lack of payment of Justice Tax

The Superior Council for the Judiciary alleges that the present temporary injunction is subject to payment of court costs and, as such, it is subject to the rules for payment of justice tax as provided for in Decree-Law No. 15/2003 of 1 October (Code of Court Costs, or CCJ).

There are no doubts that this is true, so much so that article 108 of the Statute of Judicial Magistrates clearly provides for the amount of the costs subject to collection. It should be recalled that although this article results from the initial version of the Statute (Law No. 8/2002 of 20 September), it has not been revoked by the Code of Court Costs, nor has it been revoked by the first amendment to the Statute (Law No. 11/2004 of 29 December). One should therefore conclude that court costs resulting from appeals to impeach decisions made by the Superior Council for the Judiciary continue to be governed by that Statute. The need arises nevertheless to find out whether such costs are subject to the rules of payment provided for in the Code of Court Costs.

We do not think so. First of all, according to article 7 of the Code of Court Costs, only civil proceedings and criminal proceedings are subject to payment of legal fees. On its turn, article 10 provides that prepayment of costs to be paid by the parties shall correspond to one-quarter of the total amount of the justice tax for the lawsuit.

Appeals to impeach decisions made by the Superior Council for the Judiciary are surely not civil proceedings in nature. This is so because the legal relations susceptible of being affected by such decisions are always of a public nature and are governed by administrative law. Therefore, such appeals are not subject to justice tax (which, by the way, is confirmed by the already mentioned article 108 of the Statute of Judicial Magistrates, which only refers to final costs). So, if this is the case, they are not subject to payment of any prepayment costs, with the global amount of costs being determined and paid at the end of the proceeding if the losing party does not benefit from any subjective exemption.

Since the present temporary injunction is preliminary to that appeal, it quite obviously observes the same taxation rules (even if, for lack of a specific provision of administrative procedural law, the common rules of precautionary procedures provided for in the Civil Procedural Code are applied).

One therefore concludes that the present temporary injunction is not subject to prepayment costs.

This question is therefore dismissed.

No other issues are found that should be examined by the court.

II – FACTS TO BE CONSIDERED BY THE COURT

In the face of the stances taken by the parties, and considering the documents attached to the records, no need exists to produce any further evidence, whereupon the petition can now be examined – article 310.1 of the Civil Procedure Code.

To that end, **the following facts are considered to have been proved:**

1. On 11 September 2006, the applicant signed a letter of appointment with UNDP for the period of six months. The letter of appointment was renewed for equal periods on 10 March 2007 and on 10 September 2007;
2. By decision of the Superior Council for the Judiciary dated 20 September 2006, the applicant was appointed District Court judge and was sworn-in in that capacity on 28 September of that same year;
3. The applicant worked as Dili District Court judge up to 24 May 2008;
4. By decision of the Superior Council for the Judiciary dated 7 March 2008, the applicant was appointed Court of Appeal judge following competition and interview and was sworn-in in that capacity on 23 May 2008;
5. Between 28 September 2006 and 21 June 2007, the applicant also worked as judge trainer for the seven national judges who are currently working at the Dili District Court;
6. From 15 March 2008, the applicant has been training the two national judges on probation and the training is planned to complete on 15 March 2009;
7. The Superior Council for the Judiciary and UNDP entered into a letter of agreement (number 0014955) on 10 March 2008 as a way of implementing the Programme for Strengthening the Justice System;
8. Pursuant to that letter of agreement, UNDP undertook before the Superior Council for the Judiciary the obligation to pay the monthly salary of the applicant;
9. Also pursuant to that letter of agreement, the Superior Council for the Judiciary undertook to do its best to ensure that the international judge to be recruited should meet the highest standards of efficiency, competence and personal integrity;

10. The applicant did not take part in the mentioned agreement;
11. Ever since he was appointed as District Court judge, the applicant has always been the object of positive evaluations on the part of the President of the Superior Council for the Judiciary;
12. UNDP has recognized the quality of the services provided by the applicant as well as his contribution towards the strengthening of the justice system and the consolidation of the Rule of Law;
13. On 21 November 2008, at its request, the President of the Superior Council for the Judiciary provided UNDP with the result of the evaluation of the applicant in his capacity as Court of Appeal judge and as trainer;
14. In that evaluation, the President of the Superior Council for the Judiciary underscored the technical as well as the humane qualities of the applicant and stated the relevance of those qualities for the strengthening and consolidation of the justice system in Timor-Leste;
15. In his capacity as Court of Appeal judge, the applicant made 63 decisions between 9 June 2008 and the date on which he submitted the present temporary injunction;
16. The applicant was the rapporteur of the decision (with general binding force) made under proceeding number 4/2008 which declared the unconstitutionality and unlawfulness of several rules contained in Law No. 12/2008 of 5 August (Law Rectifying the State Budget);
17. The National Parliament was notified of the above-mentioned decision on 13 November 2008;
18. According to news disseminated on the media, the Superior Council for the Judiciary would have allegedly decided to remove the applicant from the functions of judge of the Court of Appeals;
19. According to statements made to Jornal Expresso, the Vice-President of the Superior Council for the Judiciary conceded that the decision to remove the applicant was made on the day of the notification of the decision referred to above on the Rectifying Budget Law, i.e. on 13 November 2008, without such item being included in the working agenda for the meeting and without the knowledge of Cláudio Ximenes;
20. In those same statements, the Vice-President of the Superior Council for the Judiciary stated the following: "I am not putting at stake the competence of the judge, but it was a proposal made by two judges of the Court of Appeal and, despite being a polemic one, the proposal ended up being voted on by unanimity;"

21. The Superior Council for the Judiciary, which is composed of Dionísio Babo, Vice-President, Napoleão Soares, Guilhermino da Silva and Nelson de Carvalho as ordinary members, and Cirilo Cristóvão, Dionísio Babo's alternate member, decided on 13 November 2008, by unanimity, not to renew the contract of the applicant in his capacity as Court of Appeal judge;

22. In that same meeting of 13 November 2008, the Superior Council for the Judiciary decided to renew the contracts of the other two international judges working in the Court of Appeal who, together with the applicant, formed the three-judge court that issued the above-mentioned ruling on the Rectifying Budget. The Superior Council for the Judiciary further decided in that meeting to start the process of recruiting a new judge to replace the applicant;

23. In its decision, the Superior Council for the Judiciary did not indicate any reason to justify the non-renewal of the contract of the applicant;

24. The letter of agreement referred to by the applicant comes to an end on 31 December 2008 and can be extended as long as the parties to it so agree;

25. Complying with the decision of the Superior Council for the Judiciary will imply reducing the number of judges of the Court of Appeal to two and will also imply the need to start the process of selecting and recruiting another judge to replace the applicant;

26. Following the non-renewal of the contract of the applicant, the latter will cease to work as a trainer for the two national judges currently at the final stage of their training programme, a stage where the trainer should prepare a report informing on the performance of the trainees and advising on their readiness to be appointed as judges of law.

III – STATEMENT

1. Irregularity in the composition of the Superior Council for the Judiciary

When applying the law to the facts, we first of all come across an irregularity in the composition of the Superior Council for the Judiciary which made the decision not to renew the contract of the applicant. As a matter of fact, Cirilo Cristóvão is only an alternate member to ordinary member Dionísio Babo and, as such, pursuant to article 9.3 of the Statute of Judicial Magistrates, he can only participate if it is to replace Dionísio Babo and in cases where the latter is absent or impeded to participate, but never in simultaneous with him. What actually occurred is that Cirilo Cristóvão participated in the decision-making process as a member of the Superior Council for the Judiciary simultaneously with ordinary member Dionísio Babo without the latter being absent or impeded. Ordinary member Dionísio Babo could not be considered to be absent or impeded only because he is the Vice-President or because he replaces the President; it cannot be stated that he was absent because he actually took part in the meeting. Also, it cannot be stated that he was impeded because he actually took part in the decision made at the meeting. The undue participation of Cirilo Cristóvão in the decision made by the

Superior Council for the Judiciary not to renew the contract of the applicant renders such decision an annulable act, pursuant to article 52 of Decree-Law No. 32/2008 of 27 August which establishes the administrative procedure rules.

2. Legally protected interest

Let us now see whether the applicant is entitled to a right or to a legally protected interest deserving protection through the temporary injunction being requested.

Based on evidence, we notice that the applicant has first worked as Dili District Court judge and subsequently as Court of Appeal judge and as a trainer for the two national judges and that his work along this period of time has been positively evaluated by the President of the Superior Council for the Judiciary and by UNDP, with his contract being successively renewed. Despite this, by decision of 13 November 2008, the Superior Council for the Judiciary decided not to renew the contract of the applicant in his capacity as Court of Appeal judge and to start the process for recruiting a new judge to replace the applicant;

Since the contract can be renewed periodically for a fixed-term, we have to conclude that, in case of non-renewal, the contract comes to an end after the period of its validity has elapsed; on the other hand, since no evidence exists that a stipulation had been made to automatically renew his contract, no one can say that the applicant is entitled to see his contract being automatically renewed.

However, article 111.1 of the Statute of Judicial Magistrates states that “the provisions of this law shall apply, with the necessary adaptations, to international judges engaged to exercise functions in the judiciary organization of Timor-Leste”. This means that, apart from those rules which, by their nature, would only apply to national judges, the provisions of this law also apply to international judges exercising functions in the Timorese judiciary organisation.

The provisions intended to guarantee independence and impartiality of judges apply necessarily to international judges.

More precisely, the rule contained in article 6 of the Statute of Judicial Magistrates that states that: “*judicial magistrates shall not be reassigned, suspended, promoted, made to retire, removed from office or otherwise have their status changed, unless in cases provided for by these Statutes*” also apply to international judges with the necessary adaptations. This means that international judges may only be suspended, removed from office or otherwise have their status changed in cases provided for by Law. Namely, the exercise of their functions cannot be made to cease by virtue of the expiration of their contract so long as the need to have them work in the Timorese judiciary organisation continues to exist, on pain of violating the principle of security of tenure.

The fact that the contract establishes a temporal duration for the international judge to remain in the Timorese judicial system cannot, under any circumstance, grant the Superior Council for the Judiciary the faculty to put an end to the functions of the international judge without any reason, much less at a time when the presence of such judge is still required and when there is no other reason preventing the judge from remaining in the country (such as, for instance, where the judge himself is no longer interested in continuing to remain in the country, or where he fails to obtain authorization from his original workplace to remain in the country or where there are no funds to pay him). Interpreting article 111.1 in such a way that enables the Superior Council for the Judiciary to, without a valid reason, decide not to renew the contract in those cases where the permanence of the international judge is deemed to be convenient and required actually violates the principle of security of tenure of judges provided for in article 6 of the Statutes of Judicial Magistrates and in article 121.2 of the Constitution. Such an interpretation would allow the exercise of jurisdictional functions by international judges to be vulnerable to pressures and persecutions of a varied nature, namely of a political nature, and the international judges would find themselves at permanent risk of not seeing their contracts renewed in case they made decisions contrary to interests with influence within the Superior Council for the Judiciary (in cases where this organ can be influenced by such interests). This would be entirely contrary to the objective sought by article 111, which is to allow Timor-Leste to resort to non-national judges in order to maintain the smooth and regular functioning of its judicial system, a functioning that relies necessarily on the independence and impartiality of the judges working in the Timorese courts.

It follows then that it is only legitimate for an international judge whose contract comes to an end to have a legal expectation that his or her contract will be renewed as long as the need to have him or her in the Timorese judicial system persists.

Thus, one has to recognize that the applicant has a legal expectation to see his contract being renewed, considering that his permanence in the country is needed and deemed to be convenient. Where such expectation is violated, it deserves to be protected by law.

3. Lack of substantiation of the decision made by the Superior Council for the Judiciary

We also note that the decision not to renew the contract of the applicant lacks any substantiation.

As a matter of fact, pursuant to Decree-Law No. 32/2008, administrative acts shall indicate their foundations whenever necessary (article 42.1(e)). Also, legal foundations shall be provided for administrative acts that negate, terminate, restrict or affect in any way rights of legitimately protected interests or that impose or affect duties, charges or sanctions, or that decide differently from precedents set by the resolution of similar cases, or in the interpretation and applications of the same legal principles or precepts (article 43.1 (a) and (e)). The foundations must be expressly stated, by means of a summary exposition of the actual and legal foundations for the decision, and may

consist of a simple declaration of accordance with the foundations of prior opinions, reports or proposals that constitute, in this case, an integral part of the respective act (article 44.1).

As it now opposes the temporary injunction, it is irrelevant for the Superior Council for the Judiciary to indicate a list of reasons as constituting the foundations for its unsubstantiated decision. The foundations should be contained in the administrative act itself, as stated in the afore-mentioned article 44.1.

The Superior Council for the Judiciary defends itself by stating that all it did was to exercise a discretionary power and, for that reason, providing the foundations for its decision was not a must.

Such an understanding however is entirely against the law. The afore-mentioned rules do not exclude the duty to provide foundations for acts undertaken in the exercise of a discretionary power. On the contrary, as can be seen in article 43.2 of the afore-mentioned Law, only orders given by hierarchical superiors to subordinates in matters of service and in a legal manner do not require the provision of foundations. But even here, this can only occur in cases where the law does not state otherwise. As stated by Professor Rui Machete and cited by Professor Freitas do Amaral, the duty to provide foundations for administrative acts is intended, first and foremost, to protect individuals who can only accept peacefully a contentious or non-contentious impeachment proceeding if he or she is informed of the reasons that led the Administration to decide in a certain direction. Secondly, it is intended to assist in the Administration self-control, because the duty to provide foundations corresponds to an invitation for the Administration itself to ponder on all the facts that may be of interest to the decision to be made. On the other hand, explaining the reasons for undertaking an administrative act do facilitate the respective control by the organs endowed with supervisory powers. Thirdly, it enables to appease the relations between the Administration and the individuals, for the latter tend to better accept decisions that are unfavorable to them if the corresponding reasons are communicated to them in a complete, clear and coherent manner. Fourthly, it serves as clarification and evidence of the facts on which the decision is premised (compliance with requirements of transparency on the part of the Administration (see Diogo Freitas do Amaral, in *Curso de Direito Administrativo*, II vol, Almedina, 2002, pages 350 to 351).

The Superior Council for the Judiciary also alleges that, since it is the exercise of a discretionary power, it was free to decide between renewing or not renewing the contract of the applicant without attending to any reason whatsoever.

However, such a conception of discretionary power is incorrect. Exercise of discretionary power cannot be purely arbitrary. It cannot rest on the free will of the entity making the decision. As stated by Professor Freitas do Amaral, “under discretionarity, the law does not grant the competent administrative organ the freedom to choose any solution. Rather, it obliges the entity making the decision to search for the best solution that respects the objective of the juridical rule. It obliges the entity making the decision to

search for the best solution in order to satisfy the interest of the public in accordance with the legal principles. By granting discretionary power to a given organ, the law does not accept any choice whatsoever that does not respect the objective sought by it. On the contrary, it deliberately aims at, and expects that, the administrative organ will choose a decision that takes into consideration all the facts and circumstances, including imperatives that stem from principles of proportionality, equality, good faith and impartiality. (see Diogo Freitas do Amaral, in curso de Direito Administrativo, II vol, Almedina, 2002, pages 82 and 81, respectively).

In the case under review, the Superior Council for the Judiciary decided not to renew the contract of the applicant without pondering on the circumstances of the concrete case. On the other hand, considering the proven facts, namely the fact that ever since the applicant was appointed as District Court judge up to this date, the applicant has always been the object of positive evaluations by the President of the Superior Council for the Judiciary; that, in the evaluation made by UNDP, the quality of the services provided by applicant has always been recognized, including his contribution to strengthen the justice system and consolidate the Rule of Law; that, in his capacity as Court of Appeal judge and as a trainer, the applicant, between 9 June 2008 and the present date, issued 63 decisions within the legal timeframe, without any pending cases being attributable to him, the best solution for the satisfaction of the public interest would be to renew the contract of the applicant.

Considering the circumstances referred to above and the fact that the position continues to be needed, since the Superior Council for the Judiciary decided at the same time to take the necessary measures with a view to hiring another judge in order to replace the applicant, once again we conclude that the decision was not motivated by reasons of public interest. Moreover, considering that the Superior Council for the Judiciary decided to renew the contracts of the other two judges of the Court of Appeal without any reason to justify such difference in terms of treatment, the decision of the Superior Council for the Judiciary also violated the principle of equality of treatment as well as the principle of justice and impartiality provided for in articles 3 and 5, respectively, of Decree-Law No. 32/2008. The decision made is clearly an arbitrary one and is contrary to the law that grants the Superior Council for the Judiciary the managerial and disciplinary competence of judges with the objective of ensuring the smooth functioning of the judicial power, namely to ensure that the courts have judges with humane, professional and technical qualities to make decisions based on competence and impartiality. The circumstances and the manner in which the decision was made allowed it to appear in the eyes of the media, and to be conveyed by the latter, as a decision that was motivated by political reasons, linked to the decision made earlier on by the applicant, a situation that affects the good image of the Superior Council for the Judiciary itself in its capacity as an organ that has the obligation to ensure that the judges are not penalized by their decisions so that they can exercise their functions with independence and impartiality.

For these reasons, one is to expect that, in the appeal to be lodged by the applicant, the decision of the Superior Council for the Judiciary is to be declared null, pursuant to articles 52 and 53 of Decree-Law No. 21/2008.

4. The periculum in mora (The danger existing in the delay)

In the face of what has been proved, executing the decision of the Superior Council for the Judiciary of not to renew the contract, thereby originating the recruitment of another judge to replace the applicant, will definitively hinder the accomplishment of the legal expectation of the applicant to see his contract being renewed.

On the other hand, executing the decision of the Superior Council for the Judiciary would render useless any favorable decision that the applicant might obtain from this appeal. Executing such a decision will entail the recruitment of another judge for the Court of Appeal and will hinder the renewal of the contract of the applicant as is his expectation. Moreover, executing the decision of the Superior Council for the Judiciary will imply reducing the number of judges of the Court of Appeal to only two and will cause the applicant to cease working as a trainer for the two national judges currently attending the final stage of their training programme, a stage in which the trainer should prepare a report informing on the performance of the trainees and providing an advice as to whether they are ready to be appointed as judges, a task that can only be undertaken in a conscientious and fair manner by somebody who has actually monitored them during their training programme.

This being the case, all the requirements provided for in articles 305.1 and 305.2 of the Civil Procedure Code for granting the present temporary injunction have been met.

No grounds exist to condemn the applicant for bad-faith litigation as alleged by the Superior Council for the Judiciary.

IV – RULING

Against the above-mentioned background, the judges of the Court of Appeal decide to suspend the implementation of the decision made by the Superior Council for the Judiciary on 13 November 2008 “not to renew the contract of the appellant, judge Ivo Nelson de Caires Batista Rosa, and start the process of selection and recruitment of another judge to replace him as judge of the Court of Appeal”.

No court costs are to be paid, for the Superior Council for the Judiciary, which lost this case, is exempt from such costs pursuant to article 2.1(a) of the Code of Judicial Costs.

Please notify the applicant, the Superior Council for the Judiciary and UNDP.

Dili, 31 December 2008.

The judges of the Court of Appeal

[signed]

Maria Natércia Gusmão Pereira, President and Rapporteur

[signed]

Antonino Gonçalves

[signed]

Jacinta Correia da Costa