

**ADMINISTRATIVE TRIBUNAL  
OF THE AFRICAN DEVELOPMENT BANK**

QUORUM:	Professor Yadh BEN ACHOUR	Vice President
	Judge Salihu Modibbo Alfa BELGORE	Member
	Judge Anne L. MACTAVISH	Member
	Judge Benjamin J. ODOKI	Member

**APPLICATION No. 2008/02**

Mr. C. A. B. O., Applicant  
African Development Bank, Respondent

Judgment No. 69 of the Tribunal rendered on 13 November, 2009

**I. THE FACTS**

1. On August 8, 2008 the Administrative Tribunal of the African Development Bank rendered a judgment on Application No. 2007/01 filed by Mr. C. A. B. O. against the African Development Bank, dismissing the Application for lacking in merit.
2. The dismissal of his case is the subject of the Request for Revision of Judgment filed by the Applicant on 31 October 2008, pursuant to Article XII of the Tribunal's Statutes and Rule XXII of the Tribunal's Rules of Procedure.

**II. ARGUMENTS OF THE PARTIES**

**THE APPLICANT**

**Internal Memorandum dated 09/08/2006 from the Director, CHRM<sup>1</sup> to the VP, CMVP<sup>2</sup>**

3. The Applicant submits that subsequent to the Tribunal's decision of 08 August 2008, the Applicant discovered a memo from the Director, CHRM, addressed to the Vice President, CMVP and dated 09 August 2006, regarding the notification of charges of misconduct against the Applicant. That document was not within the knowledge or reach of the Applicant at all material times preceding the judgment of the Tribunal of 08 August 2008.
4. The VP, CMVP made handwritten notations on the memorandum, directing the Director, CHRM to request the Audit Department (OAGL) "to address the inconsistencies [...] referred to in th[e] memo." The content of the VP's directive was a "material fact" in the administrative process leading to the dismissal of the Applicant and thus warrants a revision of the Tribunal's judgment of 08 August 2008. In addition the referral of charges against the Applicant to the Disciplinary Panel was subject to the resolution of "inconsistencies" in the OAGL report as directed by the VP, CMVP.

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<sup>1</sup> Human Resources Management Department

<sup>2</sup> Corporate Management Vice Presidency (*currently Corporate Services Vice Presidency – CSVP*).

## **Procedural irregularities resulting in errors of fact and violation of due process**

5. First, the Applicant contends that the Tribunal was misled into making its judgment that the referral of charges against the Applicant was at the request of the Director ORPC to the Director CHRM. In support of this contention, the Applicant points to paragraph 48 of the Tribunal's judgment in Application No. 2007/01, wherein is stated that the ORPC Director requested that his colleague, the Director CHRM, refer the matter to the Disciplinary Committee. Next, the Applicant notes that the Director, CHRM did not follow the directive from the Vice President and therefore no request was made to address the inconsistencies in the OAGL report. This failure to comply with the VP's directive amounted to procedural irregularity that flawed the entire administrative review process in his case and all administrative processes flowing from the OAGL report. The directive would have had a decisive influence on the Administrative Tribunal had the memorandum been known to the Applicant prior to the 08 August 2008 judgment.
6. The Applicant submits that the non-compliance with the VP's directive constituted a violation of the requirements of due process and procedural fairness, which warrants that the decision be nullified. In support of this contention, the Applicant cites *Ms. J. v. the International Monetary Fund*<sup>3</sup>, and *Iddi v. The Secretary General of the United Nations*<sup>4</sup>, referring particularly to the criteria for a tribunal's review of decisions involving disciplinary cases. According to the Applicant, these cases stand for the proposition that where one of the criteria is not met, all subsequent decisions should be set aside. In addition, the Applicant points to *F.V. vs. The Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization*<sup>5</sup>, arguing that this case held that advancing serious allegations that have not been properly investigated against an individual amounted to "serious failure of due process and want of fairness and good faith." The Applicant asserts that had the CHRM Director followed the VP's directive and requested OAGL to review its report for inconsistencies, the allegations of misconduct would have been thoroughly investigated and found baseless.

## **Effect of non-compliance**

7. The Applicant contends that the VP's directive was a condition precedent to the referral of allegations of misconduct to the Disciplinary Committee. The non-compliance by the Director, CHRM therefore constituted an omission that vitiated all subsequent administrative processes leading to the Applicant's dismissal. In effect, the Applicant maintains that the alleged findings on which his dismissal was based were inconsistent, not conclusive nor established; there was no basis for the allegation of serious misconduct given the circumstances of irregularity leading to the referral of charges of misconduct; the referral of charges of misconduct to the Disciplinary Committee contrary to the VP's directive was procedurally irregular, arbitrary and amounted to a breach of due process and denial of fair hearing; and the inconsistencies that were never resolved before the referral of charges of misconduct

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<sup>3</sup> IMFAT Judgment No. 2003-1, paras 122-123.

<sup>4</sup> UNAT Judgment No. 1011 (2001), para. VI (V).

<sup>5</sup> ILOAT Judgment No. 2524 (2006), paras. 30-31

to the Disciplinary Committee weighed heavily on the minds of members of the Disciplinary Committee, the ADB President and the Administrative Tribunal, and thus vitiated all proceedings arising from the irregularity.

8. In its judgment the Tribunal reached erroneous conclusions based on the OAGL's Audit Report which the Respondent knew was factually inconsistent and unreliable. For example, the meeting that the Applicant went to attend was not cancelled, but rescheduled; the OAGL report deliberately confused the tripartite meeting with the meeting involving several partners; the Back to Office Report (BTOR) was not false with regard to the particulars of the meetings the Applicant held while on mission; and the Applicant provided a full explanation regarding the problematic receipt during the investigation. The Applicant further submits that the conclusions reached by the Disciplinary Committee and the Administrative Tribunal were based on the OAGL Audit report that was inconsistent, and that an examination of the conduct of the investigation would have uncovered why and how the contradictory explanations mentioned in the Audit Report occurred.

### **THE RESPONDENT**

9. To the Respondent, Application No. 2007/01 was conclusively decided by the Administrative Tribunal in its 08 August 2008 decision and the matter has thus become *res judicata*. In order for the Applicant to be successful in his request for revision, his Application must satisfy the requirements of Article XII (4) of the Tribunal's Statute and Rule XXII of the Tribunal's Rules of Procedure. The Respondent submits that this Application for revision does not satisfy the requirements set out in the Tribunal's Statute and Rules as interpreted by this Tribunal in *C. A. W. vs. ADB*<sup>6</sup> and *K. K. vs. ADB*<sup>7</sup>.
10. The Respondent further maintains that no new fact exists that will trigger the revision of the Tribunal's 08 August 2008 decision in Application No. 2007/01. The Respondent notes that the report of the Disciplinary Committee meeting held on 22 and 29 September 2006 indicates that the Disciplinary Committee questioned the Director, CHRM (Mr. Guy Terracol) on the "inconsistencies mentioned in CHRM's memorandum of 09 August 2006 to CMVP." The report further indicates that Mr. Terracol clarified that the Audit Report may have extended into matters unrelated to the charges against the Applicant, such as the conclusion that the Applicant had traveled to Amsterdam to visit his family. The Disciplinary Report, which discusses the 09 August 2006 CHRM memo and the inconsistencies in the Audit report, was attached to the Applicant's original Application No. 2007/01 as Annex 5. Therefore, it is clear that the matter of inconsistencies is not new to the Applicant or this Tribunal.
11. The Respondent notes that the matter of inconsistencies in the Audit Report was referred to and addressed by the Applicant's counsel during the hearing of Application No. 2007/01 on 31 July 2008<sup>8</sup>. In addition, the Applicant himself, during the 31 July 2008 hearing, referred not only to the inconsistencies in the CHRM memorandum, but also to the alleged directive by the VP, CMVP to address said inconsistencies.<sup>9</sup> Thus

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<sup>6</sup> Application No. 2006/04, ADB-AT (2006), paragraph 14.

<sup>7</sup> Application No. 2006/05, ADB-AT (2006), paragraph 25.

<sup>8</sup> See verbatim report of the XV<sup>th</sup> Judicial Session of the ADB Administrative Tribunal, paragraph 219.

<sup>9</sup> See verbatim report of the XV<sup>th</sup> Judicial Session of the ADB Administrative Tribunal, paragraph 271.

the Applicant and his counsel clearly knew and relied on the content of the 09 August 2006 CHRM memorandum during the hearing on Application No. 2007/01. Therefore, contrary to the Applicant's claims, he did not discover any new document or fact after the Tribunal's 08 August 2008 judgment. There is no basis therefore for the Tribunal to revise its judgment in Application 2007/01.

12. The Respondent maintains that the handwritten notes by the VP, CMVP neither constitutes a directive nor a condition precedent to the referral of charges of misconduct against the Applicant to the Disciplinary Committee. The essence of the VP's note was that it approved the referral of the Applicant's case to the Disciplinary Committee for consideration. The exact mention by the VP in her handwritten note was "*Also request OAGL to address the inconsistencies that you referred to in this memo.*" The Respondent posits that this addition to the VP's note was aimed at ensuring that all relevant issues were considered by the Respondent in this matter.
13. Even if the handwritten note were considered a new document discovered by the Applicant subsequent to the 08 August 2008 judgment, knowledge of such a document by the Tribunal or the Applicant prior to the delivery of that judgment would not have had a decisive influence on the judgment, as the inconsistencies were addressed by the Director, CHRM to the satisfaction of the Disciplinary Committee during its hearing. In this regard, the Respondent makes reference to this Tribunal's decision in *C. A. W.*<sup>10</sup>, which, in discussing the requirements for revision of judgment, states: "*where the application for revision does not meet any of the conditions, the application must be declared inadmissible.*"<sup>11</sup> The Applicant did not discover any new fact or document and has not established that the new document he purports to have discovered would have had a decisive influence on the Tribunal's judgment rendered on 08 August 2008 in Application No. 2007/01.
14. The Respondent concludes that the Applicant and his counsel were aware of the issue of inconsistencies mentioned in the CHRM memorandum, which the Applicant now claims to have discovered after the Tribunal's judgment in his original Application No. 2007/10. These inconsistencies were the subject of an attachment to the Applicant's Application No. 2007/01 and were referred to and canvassed by both the Applicant and his counsel during the hearing of Application No. 2007/01. The Respondent adds that the findings of the Disciplinary Committee were based on specific charges of misconduct against the Applicant and nothing else. The inability of the Applicant and his counsel to convince the Tribunal in their arguments regarding these inconsistencies cannot, therefore, be a basis for revision of the Tribunal's judgment in Application No. 2007/01. Consequently, the Applicant has failed to satisfy the conditions established by this Tribunal regarding the admission of requests for revision of judgment.
15. Finally, the Respondent notes that in his request for revision of judgment in Application No 2007/10, the Applicant advances several arguments that were already considered and disposed of conclusively by the Tribunal. These arguments are totally irrelevant to an Application for revision and should not be considered by the Tribunal.

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*, at paragraph 14.

## **THE APPLICANT'S REPLY TO THE RESPONDENT'S ANSWER**

16. In his Reply to the Respondent's Answer, the Applicant contends that the Respondent's reliance on the principle of *res judicata* is erroneous because the issue of OAGL's failure to address the inconsistencies in the Audit Report was neither addressed nor resolved by the Administrative Tribunal in its judgment in Application No. 2007/01. Though the Respondent claims, incorrectly, that the "inconsistencies" were part of the proceedings in Application No. 2007/01 and gives the misleading impression that the Applicant knew of the existence of the 09 August 2006 internal memorandum, the Applicant notes that Application No. 2007/01 only contained the report of the Disciplinary Committee in which these inconsistencies were mentioned, and not the memorandum itself. Moreover, the Respondent knows that the Applicant could never be privy to such a memorandum in the ordinary course of the Respondent's business.
17. Furthermore, all references to "inconsistencies" as shown in the verbatim report of the XV<sup>th</sup> Judicial Session of the Administrative Tribunal came about in the Applicant's responses to questions by members of the Disciplinary Committee. While the VP's note directed that OAGL address these "inconsistencies," they were dismissed by CHRM as minor facts that did not affect the report or charges brought against the Applicant. However this erroneous conclusion by CHRM misled all other authorities in recommending and the Administrative Tribunal in upholding the Applicant's dismissal.
18. In addition to the arguments put forward above, the Applicant states that the Respondent and its counsel made further misleading claims relating to the questions that set off the events leading to the Applicant's dismissal, as exhibited in paragraph 239 of the verbatim report of the XV<sup>th</sup> Judicial Session of the Administrative Tribunal.
19. The Applicant maintains that, contrary to the Respondent's assertion that he has not met the requirements for revision, he has demonstrated that by the very nature of the 09 August 2006 memorandum, he was neither privy to its contents nor aware of its existence until after the delivery of the judgment in Application No. 2007/01. This memorandum was never in issue during the hearing on Application No. 2007/01.

### **III. REQUESTS BY THE PARTIES**

#### **The Applicant**

20. The Applicant requests the Tribunal to:
  - a. Revise its decision rendered on 08 August 2008 upholding the dismissal of the Applicant for serious misconduct, in light of the procedural irregularities in the administrative processes leading to the dismissal;
  - b. Reinstate the Applicant or in lieu thereof, pay him three years of salary for compensation for wrongful dismissal;
  - c. Order payment of the Applicant's salary and benefits retroactively, from the date of dismissal up to the date of the Tribunal's judgment in this Application;

- d. Order payment of the Applicant USD 25 000 for moral injury, emotional distress and injury to his personal and professional reputation;
- e. Order the expunging from his records all references to his dismissal and the issuance to the Applicant of an attestation to the effect that his separation from the Bank was voluntary;
- f. Charge to the Respondent all the legal costs, attorney's fees, costs and expenses, and other financial costs arising from his summary dismissal.

### **The Respondent**

21. The Respondent prays the Tribunal to dismiss the Application for a revision of the Tribunal's judgment in Application No. 2007/01.

### **IV. THE LAW**

22. The Applicant was dismissed by the Respondent and the decision was affirmed by this Administrative Tribunal in case No. 2007/01 on 8<sup>th</sup> August 2008.
23. The Applicant has now come back asking this Tribunal to revise its decision of 8<sup>th</sup> August 2008 aforementioned. The Application is purportedly brought by virtue of Rule XXII of Rules of Procedure of Administrative Tribunal of African Development Bank which provides as follows:

*“Rule XXII  
Revision of Judgments:*

1. *A party may request revision of a judgment issued by the Tribunal, but only in the event that a fact or a document is discovered which by its nature might have had a decisive influence on the judgment of the Tribunal and which at the time of the judgment was unknown to the Tribunal and to the party to the case making application for the revision and such ignorance was not the responsibility of that party.*
2. *The revision must be requested within thirty (30) days from the date on which the fact or document is discovered. In any event, the revision must be requested within one year from the date on which the party requesting the revision was notified of the judgment unless, upon request, the [P]resident sets another time limit.*
3. *The procedure set forth in Rules X to XIII shall be applied, mutatis mutandis, to the request for revision.*
4. *The Tribunal shall decide whether to admit the application for revision. If the application is admitted, the Tribunal shall pass judgment on the matter at issue in accordance with these Rules.”*

24. The Applicant alleges that Mr. Guy Terracol, Director CHRM, addressed a document to the Vice President of the Bank, Ms. Arunma Oteh, alleging some inconsistencies in the Audit Report used against him and that the failure to resolve the inconsistencies must negate the judgment based on that decision to dismiss him from the service of the Bank.
25. It is pertinent at this stage not to lose sight of the accusations against the Applicant, to wit:
- a. he was to go to Brussels on a mission to meet representatives of German Development Bank and World Bank;
  - b. a week before his planned departure from Tunis on the mission he was well aware that the proposed meeting had been cancelled and he failed to inform his superior of the cancellation;
  - c. knowing the meeting in Brussels had been cancelled he deliberately disregarded the fact and embarked on the journey not to Brussels but to Amsterdam having changed his route at Tunis airport;
  - d. not having a meeting and conscious his trip was not the authorized one he submitted a Back to Office Report setting out facts of a meeting that was never held and which he acknowledged was misleading and also presented false hotel and taxi receipts.
26. The Audit Report at length addressed the hotel and taxi receipts on an unauthorized journey. The first taxi receipt presented was not a genuine one, the genuine one presented at best was on unauthorized journey or mission by the Applicant. Whichever way the Audit Report is looked at, it concerned a recurring light in this matter, that is to say, it concerned an unauthorized journey by the Applicant whereby he wanted the expenses to be borne by the Bank. This borders on fraud on the Bank.
27. By all parameters of interpretation of Rule XXII the big issue are the charges of misdeed against the Applicant and whatever inconsistencies there may be in the Audit Report have no mitigating effect on the gross misconduct by the Applicant.
28. The international practice of Administrative Tribunals is to give full recognisance and respect for the principle of *res judicata*. Unless there are compelling facts not available up to the time a decision is entered, the Tribunals' judgment will not be interfered with and it is final. It is therefore pertinent to set out the handwritten memo concerning parts of the Audit Report that is given such a large prominence in the Applicant's present application:

*"Mr. Terracol / Director CHRM : (1) I note that your recommendations have been made in consultation with the General Counsel and that it is in compliance with Rule 101.03. Therefore refer to the Discipline Committee (DC) for examination and advice. Their proceedings must start no later than 14 August, given the 30 day requirement of Rule 102.05 as well as the need to urgently bring this long outstanding issue to closure. Please indicate to the DC that they must endeavour to revert to us by 15<sup>th</sup> Sept-2006*

(2) Also request OAGL to address the inconsistencies that you referred to in this memo.

Thank you.

Signature 10/8

Copy: The President O/R  
The General Counsel”

29. It is therefore clear that a mountain is being made out of the anthill in the Applicant relying on the handwritten note from CMVP to CHRM, appended to the 9 August 2006 memorandum<sup>12</sup>.
30. The principle of *res judicata* is intended to maintain the finality of a judgment and avert possibility of a multiplicity of actions in the same subject-matter between the same parties so that there will be an end to litigation between the parties. The *raison d'être* is to obviate abuse of process in matters already decided to finality whereby no appeal lies to any other body or Tribunal.
31. This Application is based on a side-issue not relevant to the gravamen of the complaints of the Respondent against Applicant. The handwritten note, given such prominence in Applicant's application, is so trivial to the issues at stake that this application is completely unwarranted. The serious misdeed levied against the Applicant cannot in any way, by any means, be subsumed in the trivial excuse on the alleged non-disclosure of the handwritten note.

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<sup>12</sup> “Inter office memorandum

Confidential  
Date: 9<sup>th</sup> August 2006

To: Ms. Arunma OTEH  
Vice President, CMVP

From: Guy TERRACOL  
Director, CHRM

Subject: Mr. O. – Notification of charges of misconduct

On 21<sup>st</sup> July 2006, following an audit investigation, charges of serious misconduct were notified to Mr. C. O. (letter attached). Specifically, the charges relate to: (i) wrongly undertaking an official travel; (ii) submitting a false back-to-office report; and (iii) submitting a false travel expense claim. I have discussed the response (documents attached) of Mr. O. to the General Counsel and his advice is that in view of the gravity of the charges made against the staff member and the fact that the audit report on which the charges are based contain inconsistencies, the matter should be referred to the Disciplinary Committee for in-depth examination and advice.

It is my view that if even the audit report contains minor inconsistencies or inaccuracies, the answers given by Mr. O. are evasive and unsatisfactory. In his responses, he recognizes to a large extent the reality of the audit findings and therefore the validity of the charges. In addition, missions play a key role in the implementation of our operations and should not be fiddled with. Finally, apart from the fact that the actions of the staff member placed the Bank at risk of acting on false information, he is a Governance Expert, who should be in the vanguard to eradicate fraud and corruption.

My conclusion is therefore that the charge of serious misconduct should be maintained and GECL concurs with me in this analysis. Under the circumstances, there are two options to consider: (i) summary dismissal by the President or (ii) to arraign the staff member before the Disciplinary Committee.

In the interest of justice and considering that Management decisions are the subject of strict scrutiny by the Administrative Tribunal, I recommend that the matter be referred to the Disciplinary Committee for examination and advice. As provided in Staff Rule 102.08 (c) you shall upon receipt of the report of the Disciplinary Committee, whose recommendations are not binding, take the final decision on the appropriate disciplinary measure that should be imposed on the staff member.

Submitted for your consideration and approval.”

32. Whether the Counsel for the Applicant was notified of the hearing date for the Application or not is a side issue. At the hearing of the main case the Applicant was represented by Counsel and he also made extensive submissions. No adjournment was then sought to allow his present Counsel to attend the hearing. Certainly this is not an issue of any significance to warrant setting aside or revisiting the previous decision.
33. The raison d'être of the Applicant coming back to the Tribunal is the alleged discovery of a new document. This document has no impact whatsoever on the accusation levied against the Applicant for fraudulently embarking on an unauthorized mission, followed by a misleading Back to Office Report and false receipts.
34. It must be pointed out that this Application is an abuse of process in view of clear culpability of the Applicant in the serious misconduct that led to his dismissal.

## **V. THE DECISION**

Based on the foregoing, the Tribunal rejects the request for revision of judgment No. 60 rendered on 8 August 2008 in Case No. 2007/01.

Professor Yadh BEN ACHOUR

Vice President

Mrs. Albertine LIPOU MASSALA

Executive Secretary

### **COUNSEL FOR THE APPLICANT**

Dr. Oladejo Justus OLOWU, Esq.

### **COUNSEL FOR THE RESPONDENT**

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Mr. Steven ONEN