

**ADMINISTRATIVE TRIBUNAL  
OF THE AFRICAN DEVELOPMENT BANK**

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

**APPLICATION No. 2011/01**

A. R. R., Applicant  
African Development Bank, Respondent

Decision No. 77 of the Tribunal delivered on July 15, 2011

**I. THE FACTS**

1. The Bank seeks the summary dismissal of an application brought by Mr. A. R. R. The Applicant seeks the review of a decision of the Appeals Committee, which declared his appeal to be irreceivable as it had been brought outside the time permitted by the Staff Appeal Committee's Rules of Procedure.
2. The Bank argues that the Applicant's Tribunal application should be dismissed as Mr. R. failed to exhaust all of his internal remedies. The Bank further argues that the Appeals Committee's finding that the Applicant's appeal was commenced outside of the period provided for in the Staff Appeal Committee's Rules prevents the Tribunal from examining the Applicant's application on its merits.
3. The dispute between the Applicant and the Bank has its origin in a housing loan granted to the Applicant by the Bank in 1993. The calculation of the amounts owing on the loan were affected by a number of events, including two decisions taken by the Board of Directors of the Bank in 1994 and 1996 as a result of the devaluation of the CFA Franc
4. The Applicant sold the property in question in May of 2006 and paid off the balance allegedly owing on the loan at that time. However, the Applicant did not agree with the Bank's calculation of the amounts owing on the loan. The Applicant reserved his right to make the necessary verifications and adjustments when he received a detailed accounting for the loan from the Bank. The Applicant claims that he asked the CHRM for an amortization table for his loan, which was never provided.
5. The Applicant tried to resolve this issue internally over the next several years, using data given to him by the Bank to make his own calculations as to the amount owing on the loan. The Bank confirmed that the Applicant's baseline data was correct in emails dated January 20 and March 24, 2009. Based upon his own calculations, the Applicant concluded that there was a difference of 2 588 611 CFA Francs between the amount that he had paid to discharge the loan and the balance he should have paid. The Bank had paid 139 240 CFA Francs to the Applicant on account of the loan on June 15, 2006. As a result, the Applicant believed that the total sum owing to him was 2 449 371 CFA Francs as of May 24, 2006. The Applicant retired from the Bank on May 31, 2009.

6. On June 12, 2009, the Applicant wrote to the Director of the Bank's Human Resources Management Department (CHRM) restating his concern about his over-payment on the loan. On June 24, 2009, the Applicant received a statement of termination benefits dated June 22, 2009. This document makes no reference to any monies being owed to the Applicant on account of an overpayment on his loan. The Applicant believes that the failure to mention these excess payments in his statement of termination benefits is a deliberate silence that represents an implicit refusal to repay the overpaid sum, or a refusal to acknowledge the overpayment.
7. On August 7, 2009, the Bank responded to the Applicant's June 12, 2009 letter, advising the Applicant that the matter was still under review. On October 12, 2009, the CHRM's office wrote to the Applicant advising him that it had been determined that his claim to have overpaid his loan was without foundation. The Applicant says that he never saw this memorandum until it was produced in response to his application to the Tribunal.
8. On December 8, 2009, the Applicant wrote to the Vice-President of Institutional Services (CVSP), asking for a review of the rejection of his request for reimbursement. This request was brought within the time limit required by Rule 103.04 (a) of the Staff Rules. Pursuant to this Rule, the CVSP had 30 days to respond to the Applicant's request. There was no response within this time.
9. Rule 103.04 (a) of the Staff Rules provides that an Applicant has an additional 30 days, or 60 days from the date of the original request for review, to submit an appeal to the Staff Appeals Committee. Thus an appeal to the Staff Appeals Committee should have been filed before February 6, 2010 (and not February 8, 2010, as claimed by the Bank).
10. The Applicant submitted his appeal on February 2, 2010. He did so by putting his appeal documents in the inter-office mail at the Bank's offices in Madagascar. In his written submissions to the Tribunal, the Applicant says that he used the inter-office mail as the cost of sending the documents by other means would have been prohibitive. In contrast, he stated at the hearing that he used the Bank's inter-office mail system as it would ordinarily be the most reliable means of transmitting the appeal documents to the Secretariat of the Staff Appeals Committee.
11. The appeal was registered at the Staff Appeals Committee on March 3, 2010, with an acknowledgement of receipt dated March 4, 2010.
12. In light of these dates, the Bank took the position before the Staff Appeals Committee the appeal was filed 24 days late.
13. The Applicant did not dispute the accuracy of these dates before the Staff Appeals Committee, but took the position that his appeal should be deemed to have been filed when the appeal documents were placed in the Bank's inter-office mail system.
14. In a decision dated November 29, 2010, the Staff Appeals Committee held that the filing date for an appeal to the Staff Appeals Committee is the day upon which the appeal is received at the Office of the Secretary of the Staff Appeals Committee, and not the date the appeal is sent by an Applicant. As a result, the Staff Appeals Committee concluded that the Applicant's appeal was filed out of time. In coming to this conclusion, the Committee noted that the Applicant did not argue that there were

exceptional circumstances that caused his delay and merited relief pursuant to Rule 103.05 (d) of the Staff Rules, which permits the Staff Appeals Committee to waive the time limits “in exceptional circumstances”.

15. The Staff Appeals Committee held that submitting the appeal to another office of the Bank does constitute a filing before the Staff Appeals Committee itself. The Staff Appeals Committee is autonomous and independent from the Bank, and its Rules of Procedure, in particular, Rule 10 (a), require that submissions be made to the Office of the Secretary of the Committee.
16. The Staff Appeals Committee further found that the Applicant should have been aware of this Rule, given that he was a member of the Staff Appeals Committee and acted as its Vice-President from December 2002 to March 2003.
17. As such, the Staff Appeals Committee concluded that the claim was irreceivable because the Applicant was out of time pursuant to Article 8 (b) of the Rules of Procedure of the Appeals Committee and 103.04 (b) of the Staff Rules of the African Development Bank. As a result, there were no grounds to examine the claim on the merits.
18. The Applicant filed his appeal to this Tribunal on February 24, 2011, within the time period described in Article III (2) of the Tribunal’s Statute.
19. The CVSP eventually responded to the Applicant’s December 8, 2009 request for review. In a letter dated March 19, 2010, the CVSP stated that he had studied the situation and was satisfied that the amount repaid on the housing loan accurately reflected the final terms of the loan and that the Applicant had not been overcharged, although the CVSP did not address the Applicant’s calculations with respect to the monies purportedly owing to him. Nor did the CVSP provide the Applicant with any information as to how the Bank had arrived at the balance allegedly outstanding at the time that the mortgage was discharged in 2006. The CVSP did state that because there had been no new administrative decisions regarding the loan taken since the 1996 Board of Director’s decision, the time limits for administrative review had long been exceeded. This decision does not affect the case before the Tribunal as it was taken outside the 30-day response timeline required in the Staff Rules.

## **II. THE BANK’S MOTION FOR DISMISSAL**

20. By motion under Rule XIV of the Rules of Procedure of the Tribunal, the Respondent seeks the dismissal of this application, asserting that it is inadmissible. The Bank argues that the Applicant failed to exhaust his available administrative remedies within the Bank. The Bank further submits that the finding of irreceivability by the Staff Appeals Committee deprives this Tribunal of jurisdiction to consider the Applicant’s application. The Bank also argues that the Applicant has failed to demonstrate the existence of exceptional circumstances which might lead the Tribunal to admit the application.
21. The Applicant argues that he fulfilled the requirement that he exhaust his internal remedies. The only remedies available to him were to submit the issue to the Vice-President for review and to then appeal this decision, or lack of a decision, to the Staff Appeals Committee. Having done both of these things, the Applicant submits that he has fulfilled the requirement to exhaust all his internal remedies.

22. The Applicant further submits that the irreceivability finding by the Staff Appeals Committee is unfounded. He asserts that his appeal was not brought out of time, and that the Committee erred in finding his appeal to be irreceivable. According to the Applicant, he should not be penalized for the delays in the Bank's inter-office mail system.
23. Finally, the Bank contends that the late decision by the Vice-President does not result in a new decision or restart the clock in this case: *ILOAT, decision No. 2866, 108<sup>th</sup> session, considerations 4 and 5*. Indeed, both parties agree with this proposition.

### **III. THE LAW**

24. At this stage in the proceeding, the Tribunal is required by Article XIV of the Tribunal's Rules of Procedure to limit its consideration to the question of the admissibility of the Applicant's application: see the *Judgment of the AfDB Administrative Tribunal delivered on November 24, 2000, Application No 2000/01, at para. 11*.
25. Rule XIV of the Tribunal's Rules of Procedure makes it clear that an application to the Tribunal will not be admissible unless the Applicant has exhausted all other available internal administrative review remedies prior to bringing the case before the Tribunal: see the *Judgment of the AfDB Administrative Tribunal delivered on May 11, 2006, Application No. 2005/02, at para. 14*.
26. The Bank relies on decisions of the International Labour Organization Administrative Tribunal to say that where a complaint is not brought before the Staff Appeals Committee in a timely manner, the Applicant will be deemed to have failed to exhaust his internal administrative remedies: see, for example, the *Judgment of the ILO Administrative Tribunal delivered on February 2, 2011, Judgment No. 2962*.
27. The Bank further cites decisions in support of its contention that the failure of an applicant to commence an appeal before the Staff Appeals Committee in a timely manner is a fatal defect, which deprives the Tribunal of the jurisdiction to deal with a subsequent appeal from the Staff Appeals Committee: see *Judgment No. 2722 of 9 July 2008, the Administrative Tribunal of the International Labour Organization*.
28. The difficulty with the Bank's argument is that in all of the cases relied upon by the Bank, there was no question that the Applicant had either failed to exhaust his or her internal remedies, or was late in bringing the application before the Staff Appeals Committee or the Administrative Tribunal. The issue for determination in those cases was the consequences that should flow as a result.
29. For example, in the decision of the ILO Administrative Tribunal delivered on July 8, 2010, Judgment No. 2912, the Applicant admitted that he did not follow the internal appeal procedure. As a consequence, the Tribunal concluded that he had failed to exhaust the internal means of redress: see para. 4.
30. Similarly, in the Judgment of the ILO Administrative Tribunal delivered on February 2, 2011, Judgment No. 2962, there was no dispute about the fact that the Applicant had failed to seek redress before the Staff Appeals Committee: see para. 12.
31. Moreover, it is apparent from reading the Judgment of the AfDB Administrative Tribunal delivered on May 11, 2006, Application No. 2005/02, that the Applicant in that

case did not deny that his appeal to the Staff Appeals Committee had been brought outside of the prescribed time period: see para. 12.

32. The situation confronting the Tribunal in this case is quite different. Here, the Applicant disagrees with the finding of the Staff Appeals Committee that he had failed to comply with the time limits for bringing his appeal. Indeed, the question before the Tribunal is whether the Staff Appeals Committee was right in rejecting the Applicant's appeal on the ground that it was not commenced in a timely manner.
33. As a consequence, the issue in this case is closer to that confronting the ILO Administrative Tribunal in *In re Fournier D'Albe*, Judgment No. 364 delivered on November 13, 1978. There, the Tribunal identified the question before it as "whether the Appeals Board was right in rejecting the complaint on the ground that it was not brought before it in due time": see para. 8. The Tribunal then proceeded to examine all of the surrounding circumstances before deciding the issue.
34. In examining all of the surrounding circumstances in this case, it is first necessary to have regard to the Staff Appeals Committee's Rules of Procedure, and specifically Rule 4 (a). The English version of Rule 4 (a) is quite clear that there are only two acceptable ways to file documents relating to an appeal: by filing the documents with the Secretariat of the Staff Appeals Committee in person, or by sending the documents to the Secretariat by registered mail. In contrast, while the French version of the Rules also allows for in-person filing, it is much less specific in relation to alternative means of filing appeal documents. The operative portion of the French Rule provides that "L'original ainsi qu'une (1) copie sont déposés au bureau du Secrétaire, *ou expédiés à l'adresse du bureau sous pli recommandé*".
35. Given that the Staff Appeals Committee's Rules of Procedure are established by the Bank, it follows that it is incumbent on the Bank to ensure that the Rules are clear, and that the French and English version of the Rules are consistent. Any ambiguity in this regard should be resolved in favour of the employee. Consequently, the Tribunal is satisfied that, in accordance with the French version of Rule 4 (a), it was open to the Applicant to use the Bank's inter-office mail system to send his appeal documents to the Committee's Secretariat.
36. The Staff Appeals Committee's Rules of Procedure also do not specify whether the date of filing is to be the date upon which documents are sent to the Appeals Committee Secretariat, or the date upon which the documents are actually received by the Secretariat. While it would be open to the Bank to enact a Rule specifying that it is the date of receipt that will be considered to be the effective date of filing, in the absence of a clear Rule on this point, the Rule should once again be construed in favour of the employee.
37. Moreover, while the Staff Appeals Committee is unquestionably both autonomous and independent from the Bank, it must nevertheless be recognized that, like the Madagascar office, the Committee forms part of the institutional structure of the Bank. In the unique circumstances of this case, the Tribunal is satisfied that, having entrusted his appeal documents to the inter-office mail system at the Bank's Madagascar office, he took all reasonable steps to ensure that his appeal documents were filed with the Staff Appeals Committee in a timely manner. The Applicant should not be penalized for the apparent inefficiencies of the Bank's inter-office mail system.

38. The Tribunal is thus satisfied that the Staff Appeals Committee erred and that the Applicant did not fail to exhaust all of his internal remedies prior to commencing his Tribunal application. The Applicant's appeal to the Staff Appeal Committee should be deemed to have been commenced within of the period provided for in the Staff Appeal Committee's Rules of Procedure. Accordingly, the Bank's motion is dismissed.
39. It remains to be determined whether any money is in fact owing to the Applicant. Without pre-judging that question in any way, the Tribunal is nevertheless concerned with respect to the way in which this matter has unfolded. The Applicant has made repeated efforts to obtain basic information from the Bank as to how the balance owing on his staff mortgage was calculated and has yet to receive a satisfactory answer to his inquiries. Indeed, when a response was finally provided to the Applicant by the CVSP on March 19, 2010, the CVSP simply stated that the amount repaid on the housing loan accurately reflected the outstanding balance, without providing any explanation to the Applicant as to how the Bank had arrived at the balance allegedly outstanding on the mortgage at the time that the mortgage was discharged in 2006.
40. It is clear that what remains in issue between the parties is purely a matter of accounting. There is no reason why the parties should not be able to meet to resolve this matter between themselves immediately upon receipt of this decision. Indeed, this should have happened long ago.
41. While the Tribunal is quite prepared to hear the parties with respect to the merits of the Applicant's appeal at the next sitting of the Tribunal if necessary, the failure of the parties to resolve what appears to be a simple arithmetical question is a factor that the Tribunal may decide to take into account in exercising its discretion in relation to the issue of costs.

#### **IV. THE DECISION**

42. For the above reasons, the motion to dismiss the Application is dismissed

Professor Yadh BEN ACHOUR

President

Mrs. Albertine LIPOU MASSALA

Executive Secretary

#### **THE APPLICANT**

A. R. R.

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