

ADMINISTRATIVE TRIBUNAL  
OF THE AFRICAN DEVELOPMENT BANK

**QUORUM :**     **Justice Mohammed Bello, President**  
                  **Professor Maurice Glélé Ahanhanzo, Vice-President**  
                  **Justice Lombe Chibesakunda, Member**

**APPLICATION No 1999/01**

Mr. O. B. S., Applicant  
African Development Bank, Respondent.

Judgment of the Tribunal – delivered on 9 July 1999

The Applicant Mr. O. B. filed on the 29<sup>th</sup> of April 1999 with the Executive Secretary an application challenging the decision of the former Appeals Committee dated 25<sup>th</sup> of January 1999 and signed on the 5<sup>th</sup> of March 1999 and received by the Applicant on the 30<sup>th</sup> March 1999. The President in accordance with Executive Instruction N° 005-92 concerning Appeals and Reviews on ‘Administrative decisions’ in the Bank had endorsed the recommendations by the former Appeals Committee. The Applicant before us therefore is claiming that the Committee failed to apply the internal procedure to determine his level of involvement in the alleged crime as stipulated in Chapter. 10 of the Discipline and Civil Liability of Bank Staff Regulation adopted by the Board of Directors on 19<sup>th</sup> of June 1980 and re-edited in 1985.

The Defendant pursuant to Rule XIV of Rules of Procedure of this Tribunal in limine litis on the 3<sup>rd</sup> of June 1999 filed this motion to dismiss this Application arguing lack of Jurisdiction and incompetence of the Tribunal.

According to this Rule, a motion to dismiss suspends the period of time for answering the Application until the motion is acted on by the Tribunal. Therefore, the present consideration of the Applicant’s claim is confined to jurisdictional issues before us. Its substantive aspects are referred to only to the extent necessary for the disposition of these jurisdictional issues.

## **THE FACTS**

The facts on which the claim is based and on which there is common ground are summarized as follows. The Applicant was recruited on 16<sup>th</sup> May 1979 as a typist at grade G3 -1. He was integrated into the Defendant's career service on the 1<sup>st</sup> May 1985. He served the Bank for 18 years. Now, in 1996 it came to the notice of the Bank that some Nigerians, who were not staff of the Bank, were using the Bank to perpetrate what is generally known as the "419 Fraud". It is the offence of obtaining by false pretences under section 419 of the Nigerian Criminal Code. In consequence thereof the Bank carried out a brief inquiry internally which made the Bank to suspect that six (6) members of its staff, including the Applicant, were parties in the conspiracy to commit the offence. The Bank made a report to the Ivorian Law Enforcement Agency and the suspects were arrested on 25 September 1996. In order to facilitate the effective investigation of the criminal offence by the Ivorian Authority, the President of the Bank exercised his power under Art.19 of the Head quarters Agreement between the Bank and the Government of the Ivory Coast and waived the immunity of the Applicant against criminal proceedings accorded to the Applicant by Articles 15 to 17 of the said Agreement. On the 25th of September 1996 he was arrested in the premises of the Bank and detained for 8 hours. He was handed over by Bank staff to the Ivorian Authority. This was possible because his immunity was lifted on the same day, the 25th of September 1996. He was arrested and detained first at the Gendarmerie from 25th of September 1996 to 2nd of October 1996. Then, he was held at the Abidjan prison from 9th of October to the 15<sup>th</sup> of January 1997 - a total number of 106 days. The Defendant stated that the waiving of the diplomatic immunity was to facilitate the Investigation. On the 26th of September 1996 a search was conducted by two gendarmes at his residence in the presence of his family and the Applicant. Then he was informed that the Defendant had lodged a complaint for fraud, forgery and forgeries against four people (non member of staff) and six members of staff including him. They informed him that he and others were accused of holding a meeting with an American national on a Saturday (unspecified).

On the 27th of September 1996 the Defendant wrote a circular CHRM 14-96 to all Members of Staff informing them why the Applicant was suspended. The Applicant was then suspended with a full salary. In 15th

of January 1997 the Applicant was released on bail. He then applied to join the Defendant Voluntary Separation Programme. On 21<sup>st</sup> of January

1997, this was accepted. In response to the letter by the Applicant, dated 11<sup>th</sup> of December 1997 to the Defendant - the Defendant informed the Ivorian Authorities that they would have no objection to the non suit being filed in the criminal investigations involving him. The judge handed down the 'Ordonnance de non lieu' on the 25<sup>th</sup> of March and on 30<sup>th</sup> of March 1998 the Applicant received the 'Ordonnance de non lieu' filed by the Ivorian Tribunal.

The Applicant petitioned the Defendant to grant him damages for having initiated the criminal investigation and also for the inhuman treatment he received in prison. He received no response. Finally he appealed to the former Appeals Committee which sat in January 1999 and handed down the decision which is subject of the Application before us on the 5<sup>th</sup> of March 1999, and communicated to him on the 30<sup>th</sup> of March 1999.

### **RELIEF SOUGHT**

N°	Description	Amount (CFAF)
1.	<b><u>Character Deformation</u></b> <ul style="list-style-type: none"> <li>• Complicité et tentative d'escroquerie</li> <li>• Faux et usage de faux</li> <li>• Association des malfaiteurs</li> </ul>	100,000,000
2.	<b><u>Unlawful detention</u></b> Deprivation of liberty for 106 days, damage to my reputation, humiliation and distress caused to my Household.	250,000,000
3.	<b><u>Moral prejudice</u></b> Improper internal investigation	417,172,164
4.	<b><u>Financial prejudice</u></b> Loss of salary and allowances for the education of my dependent children	50,000,000
5.	<b><u>Duress</u></b> Forced termination of appointment	870,172,164
6.	TOTAL	870,172,164

## **SUBMISSION BY COUNSEL FOR THE DEFENDANT**

Before us the Defendant Counsel has urged this Tribunal to rule on the inadmissibility or otherwise of the Applicant's Application. Citing Articles XVII and III of the Statute, he has canvassed 3 grounds for his motion. The first ground is that the 'Administrative decision' whose legality is being challenged or whose illegality is being asserted pre-dated the establishment of the Tribunal.

In his view, this Tribunal must first decide which 'administrative decision' the Applicant is basing his claim. Then it should decide whether or not such decision pre-dated the Tribunal. He submitted that this was necessary because the Applicant has not made it clear as to which decision he is basing his claim on. He has argued that the Applicant has made references to the waiving of the immunity of the Applicant on the 25<sup>th</sup> of September 1996, and also the initiating of the criminal investigation. He has referred to the Judge's order of non suit. He has mentioned also the Appeals Committee's decision . So there is some confusion about which of the 3 decisions he is basing his claim. He has argued that should the Tribunal decide that the cause of action is the lifting of the immunity dated 25<sup>th</sup> of September 1996 then that predated the establishment of the Tribunal. He should have complied with the Executive Instruction 005/92 of February for such a claim to come before other internal organs for remedy before coming to the Tribunal. The Applicant should have filed for such remedy 30 days before the lifting of immunity.

If on the other hand, the Tribunal holds that the basis of his action was the non suit ordered by the judge on the 25<sup>th</sup> of March 1998, then this Tribunal should accept that decision of the former Appeals Committee not because the decision postdated the end of the Committee's Jurisdiction, but because that decision of the judge was not an 'Administrative decision' as defined in Art. II of the Statute. His third argument is that should this Tribunal hold that the cause of action was based on the decision of the former Appeals Committee, received by the Applicant on the 30<sup>th</sup> of March 1999, then he would submit that this Tribunal has no competence to hear this Application pursuant to Art. III of the Statute. He has supported this argument by submitting that

1) firstly, the decision of the Appeals Committee does not fall within the definition of an ‘Administrative decision’ as defined in Art. II of the Statute.

2) secondly, since the Applicant applied voluntarily to leave the employment of the Bank and the Application was accepted on the 20<sup>th</sup> of January 1997, he is no longer a member of staff and therefore has no locus standi.

### **SUBMISSION BY COUNSEL FOR THE APPLICANT**

Counsel has briefly argued in response that this Tribunal should hold that Articles XVII of the Statute does not apply to the Applicant’s case, and that even if it did apply, this Tribunal should use its discretion and hear the application. He has gone into details of the Defendant’s role in arresting his client. He has pointed to the fact that before internal investigation were done the Defendant waived the immunity of the Applicant thus prejudicing him. Thus he cited example which occurred recently where the Authority of a country made a request to UNESCO to lift the immunity of its employee. It is his argument that the Defendant initiated the whole judicial inquiry culminating in the arrest of his client for 106 days. He has argued that during the time his client was incarcerated he was not able to make his claim. According to him, the cause of action arose after the lifting of the immunity, which was supported by the receipt of the judges order of non suit. In his view the lifting of immunity was an ‘Administrative action’ within the definition of Art. II of Statute.

### **THE LAW**

#### **INADMISSIBILITY AND TIME LIMIT**

Counsel for the Defendant has sought this Tribunal’s decision on the cause of action. The considered view we hold is that the basis of the Applicant’s action is what is stated at page 2 of the record that is the decision by the former Appeals Committee which was subsequently approved by the President and communicated to him in a letter dated on March 1999, reference N° CTR- CHRM2-JPA-OMM-CA128-99 .

It follows in our view that the cause of action arose after the establishment of the Tribunal. It is pertinent to quote Art XVII of the Statute which prescribes the effective date of our Jurisdiction:

1. The present Statute shall enter into force on 1 January, 1998.”
2. Notwithstanding any provision contained in this Statute, the Tribunal shall not be competent to hear or pass judgement upon any application contesting an ‘Administrative decision’ where the cause of such application arose prior to the establishment of the Tribunal. This shall be the case, irrespective of whether or not such an application is pending as of 1 January 1998 at any level of the administrative review process or the Staff Appeals Committee.”

The next question we have to resolve is whether or not the decision by the former Appeals Committee was an ‘Administrative Decision’ as defined in Art. II. i. An ‘Administrative decision’ means :

“determination by the Bank concerning the terms and the conditions of employment of staff member.”

In our view the important element for any decision of the Defendant to come within this definition is that the decision has to be in connection with terms and conditions of employment of a member staff. Art. II. 1. ii. defines a member of staff as:

*“any person whose current or former letter of appointment or similar instrument provides that he shall be a member of the staff of the Bank, any person who is entitled to claim upon a right of a staff member as a personal representative or successor in interest by reason of the staff member’s death and any person designated or otherwise entitled to receive a payment under any provision of the Staff Retirement Plan”*

This definition of member of staff includes current and former employees. Our decision therefore is that the decision by the former Appeals Committee was an ‘Administrative decision’ as it concerned the terms and conditions of employment of the Applicant. It is also our conclusion that the Applicant had locus standi.

The leading Counsel for the Defendant has also made references to the point that this Tribunal may not have the competence to hear this matter pursuant to Art. III of the Statute because the Applicant did not exhaust

all the internal procedures in the Bank before coming to the Tribunal. As there is no dispute that the Applicant after his period of incarceration made several appeals to the defendant and finally appealed to the former Appeals Committee which decision is the subject matter of this Application before us, in our view he exhausted all internal procedures

the final of which is the appeal to the former Appeals Committee. The Presidential Instructions N° 07- 78 confers the right of final appeal to this Tribunal. It says :

*“ The Appeals Committee, for the purpose of proceeding with an appeal, shall decide its own competence in cases of doubt. Such a decision shall be subject to direct appeal to the Administrative Tribunal”.*

### Conclusion

In conclusion we find that this Application was lodged after first of January 1998, and that decision complained of is an ‘administrative decision’. Therefore this Tribunal has Jurisdiction and competence to hear and determine the Application.

Honourable Justice Mohammed Bello - President.

Albertine Lipou Massala - Executive Secretary.

### **COUNSEL FOR THE APPLICANT :**

- Maître Eugène Yapo

### **REPRESENTATIVE OF THE RESPONDENT**

- Mr. H. Van De Moesdijk, Director, Human Resources Department, (CHRM)

### **COUNSEL FOR THE RESPONDENT :**

Mr. Adesegun Akin – Olugbade.

With him

- Mr. Dotse Tsikata.

And

- Ms. Almaz Tadesse.