

**ADMINISTRATIVE TRIBUNAL OF THE
AFRICAN DEVELOPMENT BANK**

QUORUM :	Justice Mohammed Bello,	President
	Professor Maurice Glélé Ahanhanzo,	Vice - President
	Justice Lombe Chibesakunda,	Member
	Dr. Ahmed El-Kosheri,	Member
	Professeur Christian Tomuschat	Member

APPLICATION N° 2000/08

W. B. O. – O., Applicant
African Development, Respondent

Judgment of the Tribunal – delivered on July 25th, 2001

I. THE FACTS

1. The facts of the case are basically simple but they have been magnified by the introduction of matters which are not relevant for the determination of the case. Accordingly, the Tribunal will confine itself to the materials and salient facts.
2. The Applicant was employed by the Respondent Bank as an Agricultural Economist in 1980 and at the material time he was the Chief Agricultural Economist of the Bank. Throughout his career with the Bank, he had been rated very good or excellent and had never committed any disciplinary offence.
3. As a result of a complaint received by the Bank, the Vice-President CMVP of the Bank sent a letter on 11 January 1999 to the Applicant informing him that in accordance with section 9.1 Administrative Memorandum 02-83 he was suspended from duty with pay and with immediate effect on ground of "*certain allegations which have been made concerning you and others in*

connection with the conduct of projects financed by the Bank assigned to you”.

The particulars of the allegations and the projects were not specified.

4. In spite of the suspension the Applicant had access to his office until he was locked out and prevented from having access to the office and any part of the Bank premises.
5. On 31 March and 1 April 1999 the Representatives of Price Water House Cooper Investigations, an investigation panel employed by the Bank, who according to the Applicant interrogated him on the procurement procedure, his relationship with Dr. Kaul and if he had received “*anything of value*” from the Doctor, to which he replied in the negative. However, he stated that when he understood the question later he acknowledged receipt of several loans from the said Doctor as friendly loans and US \$20,000 remained unpaid. He said the panel did not inform him of the charges for which he was being interrogated. By his letter dated 13 April 1999 he urged the Vice - President of the Bank to furnish him with the specific charges for his suspension in order to defend himself.
6. The Director CHRM replied the Applicant by letter dated 16 April 1999 as follows :

“Management retained the services of a reputable external firm Price Waterhouse Coopers Investigations (“PWC-I”) to conduct the investigations into these allegations and has just received PWC-I’s report on their findings, including interviews held with you on Wednesday 31 March, 1999 and Thursday 1 April, 1999.

The report contains detailed information of alleged direct payments made to you by SABA Approtech Projects Limited (SABA), a Consultant to Bank projects in Nigeria, Mozambique and Seychelles, in a manner that is likely to influence the impartial performance of your duties as an employee of the Bank contrary to the provisions of the Staff Regulations and the Staff Rules of the Bank. Specifically, it is alleged that you received directly from SABAS between January 8, 1992 and September 1, 1994 total amount equivalent to US \$ 41, 570. Some of these payments were made to your account(s) with Barclays Bank Plc in London, and to your account(s) with Riggs National Bank in Washington D.C. In addition to the allegations of improper payments made to you directly, the report contains detailed evidence regarding payments made by or on behalf of SABAS to cover the education expenses

for your children, namely C. O. O., B. O. and V. O. These payments, which were made at your request (the relevant correspondences are detailed in the report of PWC-I), were made to Seaford College and St Teresa's School in the United Kingdom.

Management has reviewed the findings of the PWC-I main report, as well as the report of the two interviews which you held with PWC-I investigators on 31 March, 1999 and 1 April, 1999. Management has noted that you did not deny receiving these payments, but that you were evasive, inconsistent and provided contradictory statements to the investigators.

You are hereby given seven (7) days within which to provide a detailed, comprehensive and satisfactory explanation, with supporting documentation, for accepting payments, directly or indirectly, from a Consultant working on Bank projects assigned to you in contravention of Staff Regulations 3.5 and 3.7, Staff Rule 2.8 and CHRM Circular N° 016/1996 on standards of conduct for Bank Staff members”.

7. On 22 April, the Applicant was permitted to have access to his office and he went therein in company of Mr. Palme CADM.2 and prepared a list of the Bank's properties which he handed over to Mr. Palme.
8. On 23 April, he answered in writing the query of Director CHRM. He explained in the letter that he had borrowed money from Dr. Kaul, a close personal friend, and submitted documents showing the payments that he had made for the loans. He explained the role he had played in the selection of consultant for the projects in question to demonstrate that his role in the process would not have influenced him in any manner. The letter continued to state :

“ in view of the fact that I did not have adequate time to contact my banks and family to furnish me with the documentary evidence, the deadline of seven days given to me, did not permit me to submit as many documents in evidence of the statements that I have made in this letter. I hope that I shall be granted the possibility of submitting more documents as soon as I receive them. Additionally, I would like to mention that I requested permission to have access to my office in order to consult my documents. When I entered my office, escorted by Mr. Palme from the Administration Department, it was noted that my office had been entered and all the diskettes in my office had been removed, except one which belongs to another colleague, my files containing my children's education had also been removed. I was informed

that the official project files had been removed from the Division Manager's office and I was informed by the Vice - President CMVP, during a telephone conversation while I was in my office with Mr. Palme, that the project files were in his custody and were not relevant to my case therefore I could not have access to them".

9. On 23 April, the Applicant also wrote to the Director requesting for additional time within which to prepare the Annexes to his responses in a more orderly fashion. Again, on 27 April he addressed a letter to the Vice - President CMVP expressing his concern over the break in to his office, the removal of his files and documents particularly those relating to Seychelles Integrated Agricultural Development Project, the Mozambique Massingir Dam Rehabilitation and the files on his children and his banking transactions. He requested an investigation. By letter of 28 April 1999 the Director CHRM gave the Applicant two (2) days extension.
10. It is note worthy that the Applicant received the letter of extension of time on 3 May 1999, which was the very day the President addressed to him the letter of summary dismissal on the ground of serious misconduct. The particulars of the misconduct were set out in the letter as follows :

"We have received your letter (and Annexes) dated 23 April 1999 and carefully examined the contents. I have noted that you do not deny receiving payments from Dr. Vijay Kaul, Managing Director of the Consultant, but that you have attempted to explain the payments away as loans which were made to you by Dr. Kaul, whom you described as a close personal friend. I have also noted from the documents attached to your referenced letter, that payments were indeed made to you by SABAS, as documented by several correspondences on the letterheads of SABAS and certain cheques drawn on SABAS's Account(s) with the Royal Bank of Canada.

In your correspondence of April 23, 1999 you also admitted to participating in the selection process for consultants for two Bank projects in Seychelles and Mozambique, in which SABAS was among the shortlisted firms. You did not recuse yourself from the process in spite of the obvious conflict of interest.

As you are aware, the receipt of such payments by you whether from SABAS directly or from its principal officer Dr. Kaul, is in violation of Staff Regulations 3.5 and 3.7, Staff Rule 2.8 and CHRM circulars 91/13 and 016/1996. As a staff member, you are required to conduct yourself at all times in a manner

befitting your status as an employee of an international institution. You are not to engage in any activity that is incompatible with the proper discharge of your duties and should avoid any action which may adversely reflect on the Bank or on your status, integrity, independence, or impartiality and neutrality. You have therefore failed to uphold the standard of comportment and conduct prescribed by Regulation 3.5 of the Staff Regulations.

Furthermore, you have violated the provision of Regulation 3.7 which prohibits staff members from accepting from any government or person, any gift, favour, remuneration, honour or decoration which may be regarded as likely to influence the impartial performance of the staff member's duties as an employee of the Bank. Your conduct also violates the provisions of Rule 2.8 of the Staff Rules which requires a staff member to promptly report to the President any gift, remuneration or other favour which the staff member has actually received in the course of, or in connection with, the performance of his duties.

Both AHRM Circular N° 91/13 date 24 July 1991 and CHRM Circular N° 016/1996 dated 25 October, 1996 reminded staff members of the standards of conduct required from Bank staff and clearly established that any staff member found to be violating the relevant Staff Rules and Regulations would be severely disciplined.

Your overall conduct in accepting payments over a period of time, directly or indirectly, from a Consultant (and its Managing Director) selected, or under consideration to be selected, to work on Bank projects is in violation of the high standards of conduct, integrity, neutrality and impartiality prescribed by the Bank's Staff Regulations and Rules. Evidence that certain payments were purportedly made by you to Dr. Kaul have been noted, but cannot be considered in mitigation of these patent breaches of personnel rules and regulations.

Your conduct, as substantiated by the Report of the external firm of investigators (Price Waterhouse Coopers Investigations) and the documents annexed to your corresponded of 23 April 1999 is a punishable serious misconduct within the meaning of the provisions set forth in Sections 3 and 4 of Administrative Memorandum N° 02-83 relating to Misconduct and Disciplinary Measures in the Bank".

11. Between 10 May 1999 and 21 January 2000 the Applicant, for the purpose of lodging appeal, made several requests to the Bank to permit him to have access to some specified documents which were in the possession of the Bank but the Bank did not meet the requests until on 18 October 1999 when the Bank invited him to come and collect two (2) cartons containing his documents. He went with a Huissier de Justice who drew up Procès - verbal of the documents collected.
12. The Applicant applied to the President for administrative review of the decision dismissing him on 15 December 1999, which was refused on 22 December 1999. He thereafter appealed to the Staff Appeals Committee on 21 January 2000 and the Committee dismissed the appeal for lack of jurisdiction to hear the case on 1 May 2000. The Applicant then filed this application on 10 July 2000 before this Tribunal challenging the decision of the President dismissing him summarily on 3 May 1999.

II. RELIEFS SOUGHT

The Applicant prays the Tribunal

1. To review and order rescission of the President's decision.
2. To order the Bank to expunge the President's letter of dismissal from the records of the Bank.
3. To order his re-instatement in the service of the Bank and make all such consequential orders as the Tribunal may think fit,
4. in the alternative to order payment of compensation, general and special damages for defamation, denial of due process and illegal confiscation of his property, and
5. in the further alternative to remit the case to the Staff Appeals Committee to hear his appeal, and
6. award of costs to him.

III. APPLICANT'S SUBMISSION

13. The submission of counsel for the Applicant in his application and his reply to the Respondent's answer is very comprehensive and meticulous in details. It would suffice to state the submission in substance only under the following heads :

1. The Staff Appeals Committee erred in law in holding that it was incompetent to hear the appeal;
 2. The President misdirected himself in deciding to take summary disciplinary action;
 3. The President erred in law in dismissing the Applicant for serious misconduct by relying on evidence which was unreliable;
 4. The President erred on the fact in not giving sufficient weight to the facts adduced by the Applicant in his explanation of the complaints made against him;
 5. The Applicant was subjected to a consistent denial of due process.
14. Applicant's counsel referred to paragraphs 4.6 and 4.7(a)(iii) of Presidential Instruction 07/98 which prescribed the jurisdiction of the Appeals Committee to include any question brought on appeal by a staff member and such appeal may include "any separation from the Bank's service", which is summary dismissal in this case, and submitted that the Appeals Committee appeared to have over-looked the underlined words of paragraph 4.6. He further submitted that the phrase "any matter which is within the competence of the Disciplinary Committee" in paragraph 4.7(a)(iii) of the said Instruction relied on by the Appeals Committee to disqualify itself was misconceived. He contended that upon the correct interpretation of the said two Paragraphs and the fact that the President did not seek the advice of the Disciplinary Committee, the Appeals Committee has jurisdiction to hear the Appeal.
15. It is the Applicant's contention that the President has no power of summary dismissal for serious misconduct without having sought the recommendation of the Disciplinary Committee. He distinguished *Andreski*, (1962) ILOAT Judgment N° 63, which was based on Regulations that were not in *pari materia* with the Regulations of the Bank.
16. Counsel referred to the Administrative Memoranda 02-83 and 03-83 of the Banks which categorized misconduct as "minor misconduct" "serious misconduct" and "gross misconduct" as defined by paragraph 4.4 of the Memorandum 02-83. He also drew the attention of the Tribunal to paragraph 6.1 of Memorandum 03-83 which provided "any complaint against a staff member for serious or gross misconduct shall be lodged with the Disciplinary Committee by the Director of Personnel and Training". Paragraph 9.3 of the said Memorandum empowered the President to dismiss a staff member summarily for *gross misconduct* only.

17. From the foregoing, Counsel concluded that the President lacked the power to dismiss summarily for serious misconduct. As laid down by *Andreski* case “summary dismissal” means a termination which had not been preceded by a recommendation made by the administrative organ on which the staff is represented. The President therefore erred in law in taking decision on serious misconduct without recommendation of the Disciplinary Committee.
18. Counsel further submitted that the President made another error of law by relying on the allegations made by one Mr. Kumar, a former staff of SABAS and the report of Price Waterhouse Cooper of the investigation on the said allegations. According to counsel Mr. Kumar was an accomplice and as such the allegations were unreliable while the report was also unreliable because the Applicant had asked for a copy and he was not given.
19. Moreover, counsel argued there was glaring denial of justice, fairness and due process in that the Applicant was not given ample opportunity to defend himself. The President hurriedly took the decision after the Applicant had been notified of the charges when he needed time to collect materials to answer the charges from America, Canada and Kenya. The Bank denied him access to documents including copy of Cooper’s Report in their possession, which he had requested for his defence on the ground of confidentiality. The Bank also denied having in its possession his personal files on banking transactions and his children’s education which had been removed from his office and surprisingly were returned to him by the Bank at the late hour.
20. Again, Counsel continued, the President did not have the advantage of seeing the affidavit of Dr. Kaul dated 23 November 1999 corroborating the Applicant’s explanation that all the payments were friendly loans. If he had seen it, the President would not have concluded in his letter of dismissal that the Applicant’s explanation was an attempt to show the payments to be loans.
21. Finally, Counsel conceded that the Applicant’s conduct might be misconduct under the Bank’s Regulations. Nevertheless, the presumption that the loans might have influenced him in dealing with the projects in which SABAS were involved was rebutted by the fact that in the only three of such projects the Applicant had participated, he made adverse recommendations against SABAS’ interest , to wit in the Kagera Sugar Rehabilitation Project, while in the Masingir Dam Project he disqualified himself for being technically incompetent to deal with the matter. In the Seychelles Agricultural Development Project he only vetted and endorsed the assessment of the

Project made by his colleague. Counsel concluded that these mitigating factors were not taken into account by the President in passing the sanction of summary dismissal.

IV. RESPONDENT'S ARGUMENT

22. In response, Respondent's Counsel submitted that the Staff Appeal Committee was competent under Rule 8 of the Rules of Procedure of the Committee to determine its competence or jurisdiction as a preliminary issue before going into the merits of the appeal before it. The Committee did so and held upon the interpretation of paragraph 4.7 of Presidential Instruction N° 07/98 of 10 April 1998 it was not competent to hear any matter which is within the competence of the Disciplinary Committee. The dismissal of the Applicant was certainly a disciplinary measure within the competence of the Disciplinary Committee, and consequently the Appeals Committee had no jurisdiction.
23. However, the powers of the Disciplinary Committee were not exclusive as Regulation 10.2 of the Staff Regulation provides as follows :

"The President shall establish administrative machinery which with staff participation shall deal with disciplinary matters but without prejudice to his powers to dismiss a staff member summarily for serious misconduct".

Counsel submitted that the foregoing power was derived from Article 37(2) of the Agreement establishing the Bank which empowered the President, among others, to employ and dismiss a staff of the Bank in accordance with the Rules and Regulations made by the Bank. Paragraphs 3 and 4 of Administrative Memorandum 02-83 reinforced Regulation 10.2. Counsel indicated that the Applicant sought to create confusion by mis-citing Memorandum 03.83.

24. Contrary to the submission of the Applicant, the Applicant's rights to due process were adequately protected and respected throughout the period leading to his summary dismissal and beyond. The suspension letter of 11 January 1999 notified him of the investigations which were being conducted in relation to allegations made against him and others. On 31 March and 1 April 1999, the Applicant appeared before the Investigation Panel to discuss the substance of the allegations. He was not charged until after the

investigation when on 16 April 1999 the allegations of the specific misconduct were sent to him and he was given 7 days to explain.

25. The Respondent contended that the President's imposition of disciplinary action was not based merely on the information from an anonymous source but from detailed investigation including the admissions of the Applicant thereof and the documents furnished to the Bank by him that he received favours or payments from Dr. Kaul. The Bank took the view that those payments were made in breach of the duty of good faith required of the staff members in exercise of their duties to the Bank and that the Applicant had failed to live up to the ethical obligations as a member of the staff enshrined in Regulations 3.5 and 3.7 of the Staff Regulations and Rule 2.8 of the Staff Rules which defined the standard comportment and conduct that staff members are required to observe and prohibits them from accepting any gift, favour or remuneration respectively. Rule 2.8 requires a staff member to promptly report to the President such gift or favour.
26. On the totality of the evidence, Counsel contended the Applicant received payments or favours and did not promptly report to the President. The Respondent denied breaking into his office.
27. Counsel prays the Tribunal to dismiss the application or if the application succeeds to grant the Applicant the prayers he has sought.

V. THE LAW AND DECISION

28. The evidence is overwhelming that on several occasions the Applicant received payments from SABAS, a consultant of the Bank, when the Applicant was dealing with projects financed by the Bank and in which SABAS was involved. The Bank considered the payments to be corrupt enrichment but Applicant's case was that the payments were friendly loans given to him by Dr. Kaul, the Managing Director of the consultant and that most of the loans had been repaid.
29. In the letter summarily dismissing the Applicant, the President of the Bank observed that evidence of " certain payments purportedly made by the Applicant to Dr. Kaul " was noted, but the President did not consider it as mitigating the patent breaches of the Bank rules and regulations.

30. Now, Regulation 3.7 of the Staff Regulations of the Bank provides: " No Staff member shall accept any government or individual gift, favor, remuneration or honour which may be regarded as likely to influence the impartial performance of his duties as an employee of the Bank ".
31. The test for determining likelihood of influence in such cases is not subjective but objective. Would it surprise a reasonable man if it is said such gift or loan was capable of influencing such a staff member in the impartial performance of his duties ? The answer is certainly in the negative.
32. The Tribunal is satisfied that it is irrelevant whether the payments were gifts or loans within the purview of the Regulation. If they were loans they constituted favour which carried the same sanction under the Regulation as gift. Accordingly, acceptance of the payments was in breach of Regulation 3.7.
33. Furthermore, Rule 2.8 of the Staff Rules requires a Staff member to "promptly report to the President any gift, remuneration or other favour which the staff has actually received in the course of or in connexion with the performance of his duties ". The Applicant also committed breach of this Rule by failing to report the payments.
34. With respect to the powers of the President to dismiss a staff member summarily for serious misconduct, Staff Regulation 10.2 provides as follows: " The President shall establish administrative machinery which, with staff participation, shall deal with disciplinary matters, but without prejudice to his powers to dismiss a staff member summarily without notice or benefits for serious misconduct ".
35. The contention that the President has no power to dismiss a staff member summarily for serious misconduct was based on the provisions of Administrative Memorandum N° 02-83 para 8.1.1 and para 8.1.4 which read as follows:
" 8.1.1 Minor disciplinary sanctions shall be taken by summary Administrative decision:
(a) of the President or a Vice – President: in matters concerning staff members of category D or staff members exercising permanently or temporarily the duties of Head of Organizational Unit, under his direct supervision;

(b) of the Director of Personnel and Training, on the initiative of the Supervising Head: in matters concerning staff members of the P, S, G and M categories.

8.1.4 Serious disciplinary sanctions shall be taken by the President or the Vice – President (Administration) pursuant to the recommendations of the Disciplinary Committee and shall be notified to the staff member concerned by the Director of Personnel and Training or any other duly authorized person.”

36. The Tribunal considered the contention as misconceived. Indeed Regulation 10.2 appears to be inconsistent with Administrative Memorandum para 8. However, the Staff Regulations made by the Board of Directors are superior to the Administrative Memoranda which were made by the President. Consequently if there is inconsistency between a provision of the Regulations and a provision of Memoranda, the provision of the Regulations prevails to the extent of the inconsistency. The Tribunal holds the President has the power to dismiss summarily for serious misconduct.
37. On the issue relating to the jurisdiction of the Appeals Committee, the Tribunal is satisfied that the Committee was incompetent to hear the Applicant’s Appeal. Para 4.7 (a) (iii) of the Administrative Memorandum 07/98 imposed the limitations of the Appeals Committee, *inter alia*, to include:
- “ (iii) any matter which is within the competence of the Disciplinary Committee”.
- By virtue of Staff Regulation 10.2 and Administrative Memorandum 03-83, disciplinary matters, including summary dismissal, are within the competence of the President and the Disciplinary Committee. It would be ridiculous for the Appeals Committee to adjudicate on a decision of the President to whom the Committee is an advisor.
38. The Tribunal has carefully and meticulously considered the complaints relating to due process that the Bank denied the Applicant access to documents in its possession and which he required for his defence of the charges against him. This Tribunal stated the right of access to documents for their defence by staff members in O. and 2 others, Applications N° 1999/04-05-06 delivered on 14 December 1999 as follows:

- “ In case the Applicants should choose the administrative review procedures prescribed by Presidential Instruction N°07/98, it is essential for an effective defence of the right they claim to have been affected by the Bank, to granted full access to all the documents pertinent for the case. The report of the Disciplinary Committee, although it is primarily intended to enlighten the President of the Bank on the appropriate consequences to be given to a case dealt with within the context of professional discipline, cannot be hidden from a staff member against whom disciplinary charges had been brought. The findings contained in such a report will deeply affect the career of the person concerned. It is obvious, furthermore, that the Tribunal could not validly exercise its function to uphold the law in force in the Bank if those reports were withheld from its cognizance. To be sure, there may be matters that should not be disclosed, such as commercial secrets of the Bank. The relationship between the Bank and its staff members does not come within the scope of this exceptional category”.
39. The Tribunal noted that up to the time of his dismissal on 3 May 1999, the Applicant did not request any information from the Bank which he was denied. The only request he had made was on 23 April 1999 when he wrote the Director requesting additional time to prepare the annexes to his responses in a more orderly fashion. He was given two days extension.
40. The Tribunal is fully satisfied there was no breach of due process by the Bank before his summary dismissal.
41. However, between 10 May 1999 to 21 January 2000, the Applicant applied to the Bank to have access to some documents, which he identified, for the prosecution of his appeal against the decision of the President before the Appeals Committee but the Bank refused access. However the documents were finally released to him on 18 October 2000 in the company of a “Huissier de Justice”.
42. It is pertinent to observe that the denial of access constituted breach of due process, nevertheless the Tribunal holds no miscarriage of justice has been occasioned. During the processing and hearing of the appeal before the Tribunal the Applicant has had access to all the relevant documents for the prosecution of his appeal: see *Triblex*, Judgment N° 539, WHO, 19 November 1992.

43. Finally, the Applicant has made no case to warrant interfering with the discretion of the President of the Bank and the Application is dismissed.

VI. CONCLUSION

44. The Tribunal declares the Application dismissed.

Honorable Justice Mohammed Bello - President

Albertine Lipou Massala - Executive Secretary

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- Maître Kaba Mohamed Jr.

REPRESENTATIVE OF THE RESPONDENT

- Mrs. Ninon Omérine, Representative of Human Resources Department (CHRM)

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- Mr. Dotse Tsikata