

**ADMINISTRATIVE TRIBUNAL OF THE
AFRICAN DEVELOPMENT BANK**

QUORUM :	Justice Mohammed Bello,	President
	Justice Lombe Chibesakunda,	Member
	Dr. Ahmed El-Kosheri,	Member
	Professor Christan Tomuschat,	Member

APPLICATION N° 2000/10

M. A. B., Applicant
African Development, Respondent

Judgment of the Tribunal delivered on Wednesday 25 July 2001

I. THE FACTS

1. The Applicant, M. A. B., joined the staff of the African Development Bank (hereinafter: the Bank) in 1981 as an Accounts Clerk.
2. During the time of the occurrences giving rise to the present dispute, from 1991 to 1993, the Applicant was entrusted with the functions of a Disbursement Clerk in the Bank's Loan Administration Department. His main task was to verify the accuracy and completeness of documents submitted as support for requested payments and to confirm that such documents fulfilled the relevant requirements as prescribed by the rules of the Bank.
3. In the course of an investigation of the activities of an undertaking (SABAS Approtech Projects Limited) that had been working for the Bank as a consultant regarding projects in Nigeria, Mozambique and Seychelles, it was discovered that in February 1993 the Applicant had received two cheques in the amount of 2,000 and 7,000 USD respectively from Dr. V. Kaul, Management Director of SABAS. Subsequent to this discovery, the Bank on 19 May 1999 wrote a letter to the Applicant, requesting him to provide within seven days detailed, comprehensive and satisfactory explanation for accepting payments from a consultant working on Bank projects.

4. In a letter of 22 May 1999, the Applicant acknowledged that he had received the two payments in issue. However, he contended that he had served only as an intermediary. The monies had been sent to him for the settlement of outstanding payments due by Dr. Kaul to a Ghanaian business man, a Prince Opoku Agyemang, from whom Dr. Kaul a certain time ago had bought "Ashanti cultural emblems and symbols of great quality". At a common meeting, where the purchase was effected, it had turned out that Dr. Kaul did not have enough money with him. It was then agreed that the remainder of the sum, precisely an amount of 9,000 USD, was to be transferred to Prince Opoku through the Applicant.
5. In a further letter of 2 June 1999, the Bank again urged the Applicant to provide specific proof for his contentions regarding the use of the controversial amount. A new dead-line (8 June 1999) for the submission of all available documentary or other evidence was set.
6. The Applicant replied on 8 June 1999 that he could not provide any receipts. He alleged that Prince Opoku had told him that given the nature of his unique trade of works of art receipts were not required and had never been given. Attached to the letter were a few newspaper clippings describing activities of Prince Opoku in the United States as well as a letter dated 22 January 1994 by which Prince Opoku thanked the Applicant "for the payments in respect of the articles bought by Dr. Kaul".
7. Thereupon the President of the Bank on 10 June 1999 summarily dismissed the Applicant for serious misconduct. He noted that the payments had been received by the Applicant during a period when he was involved in processing disbursement requests for SABAS in respect of a project in Nigeria. To receive payments from a person with whom the Bank entertained commercial contacts was incompatible with his duty to conduct himself at all times in a manner befitting his status as an employee of an international institution. He had thus failed to uphold the standard of comportment and conduct prescribed by Regulations 3.2 and 3.5 of the Staff Regulations.
8. On 14 January 2000, the Applicant submitted a request for administrative review to the Bank. No response to this request was communicated to him.
9. On 13 March 2000, the Applicant then filed an appeal with the Staff Appeals Committee. He requested that the Committee recommend to the President of the Bank that he be :
 - (a) reinstated, or
 - (b) paid full compensation for material and moral damages as required by general principles of international administrative law and his salary and

benefits and allowances retroactively until the date of the decision on his appeal;

- (c) paid interest on the amount of his termination benefits for the period of time that payment of such funds was held by the Bank.
10. In a report of 2 May 2000, the Staff Appeals Committee concluded that it lacked competence to entertain the appeal. It referred to Article 4.7(a) (iii) of Presidential Instruction 07/98 of 10 April 1998 according to which “the Committee is not competent to hear any matter which is within the competence of the Disciplinary Committee”. It pointed out that although the Applicant had been dismissed directly by the President, this clause applied in the instant case since it was meant to cover all instances of disciplinary measures, irrespective of whether the Disciplinary Committee had actually been seized or not. The decision was handed over to the Applicant on 11 May 1999 by a covering letter dated 3 May 1999.
 11. On 10 August 2000, the Applicant filed an application with the Administrative Tribunal. As far as substance is concerned, he challenged the decision taken by the President of the Bank of 10 June 1999 to summarily dismiss him for serious misconduct. Additionally, on procedural grounds he challenged the decision of the Staff Appeals Committee that it was not competent to hear the appeal submitted to it. However, although contesting this latter decision, he requested that upon a finding in his favour on the procedural issue, the Administrative Tribunal hear the merits of the case without sending the case back to the Staff Appeals Committee.

II. ARGUMENTS OF THE PARTIES

12. The Applicant maintains that the Staff Appeals Committee had erroneously interpreted the relevant rules on its competence. Cases where the President had exercised its power to summarily dismiss an employee of the Bank were not within the competence of the Disciplinary Committee. Consequently, the Staff Appeals Committee was not barred from reviewing such cases.
13. The Bank is of the view that, in principle, all disciplinary matters are within the competence of the Disciplinary Committee. Therefore, even if the President had proceeded to a summary dismissal, as he was entitled to do under Regulation 10.2 of the Staff Regulations, the Staff Appeals Committee lacked jurisdiction to entertain an appeal. Disciplinary matters were generally excluded from the Staff Appeal Committee’s scope of competence. In any event, however, the issue had become moot since the Applicant did not request to remit the case to the Staff Appeals Committee. Accordingly, the Tribunal should pronounce on the merits of the case without determining whether the Staff Appeals Committee had been right in denying its power to hear the case.

14. The Applicant further maintains that in any event his summary dismissal was too harsh a sanction in view of the facts with which he had been charged and, above all, taking into account 18 years of unblemished service with the Bank.
15. As far as substance is concerned, the Applicant submits that the Bank violated the applicable rules of employment by dismissing him on the basis of a mere suspicion. First, he had been denied due process since he had not been given enough time to prepare his defence. The Bank had also overlooked essential facts. Because of the restricted scope of his responsibilities, he had never had any authority or opportunity of influencing decisions concerning disbursement payments in respect of the project in question. The actual decision on disbursement was invariably made by a disbursement officer who held overall responsibility. Second, in 1992 no disbursements were made in favour of SABAS. Such disbursements had occurred in 1991 and were again made in 1993, but at that time his unit was no longer responsible for relations with SABAS. Above all, the burden of proof was on the Bank to show that the payments received by him were improper. The Bank had not been able to demonstrate that these payments had been a gift or favour contrary to his allegation that he had received certain funds for delivery to a third person.
16. The Respondent submits that as a Disbursement Clerk the Applicant discharged an important role in the disbursement process by the screening of documents. Such screening was the basis for the final decision taken. Regarding the time element, it contends that contemporaneity between duties performed and favours received is not necessary to establish serious misconduct; furthermore, according to the Applicant's own admission in his letter to the Bank of 22 May 1999, he had worked on Nigeria projects in 1992. The Bank recalls that staff are prohibited from receiving payments which are "likely" to compromise decisions or to adversely reflect on the Bank. There was no need to establish that the payments made to the Applicant had actually had an impact on decisions taken. Staff had to avoid any conduct that would give rise to the appearance of corruption. Contrary to the view of the Applicant, in cases such as the instant one, the burden of proof rested with the person having received a gift or favour. Once the fact of a payment had been established, the recipient could reasonably be required to provide a credible explanation supported by satisfactory evidence. The Applicant had not succeeded in dispelling the prima facie evidence weighing against him.
17. The Applicant requests the Tribunal to :
 - (a) decide that the Staff Appeals Committee's decision that it has no competence over the subject-matter of the appeal is without merit;
 - (b) decide to hear the appeal on its merits;

- (c) set aside the decision taken by the Bank to summarily dismiss him and that he be granted the compensation flowing from the quashing of the decision and his other claims;
 - (d) order that the Applicant be reinstated or be paid full compensation for material and moral prejudice suffered by him and the procedural irregularities all as provided for under general principles of international administrative law;
 - (e) order that the Applicant's salary, benefits and allowances and the Bank's contribution to the pension fund be paid retroactively until the date of the Tribunal's decision on the Applicant's appeal;
 - (f) order that the Respondent pay interest to the Applicant on the amount of his termination benefits for the period of time that payment of such funds were withheld;
 - (g) award the Applicant costs;
 - (h) order that the summary dismissal letter and any other damaging information in connection therewith be expunged from all his records (personal and confidential files) at the Bank).
18. The Respondent requests the Tribunal to uphold the Respondent's decision to summarily dismiss the Applicant as a lawful and valid exercise of its disciplinary powers.

III. THE PROCEEDINGS

19. In the present case, oral hearings were held on 23 July 2001.

IV. THE LAW

20. The Applicant challenges in the first place the decision of the Staff Appeals Committee of 2 May 2000 to reject his appeal as lying outside its jurisdiction. In making this determination, the Committee relied on Article 4.7(a)(iii) of Presidential Instruction 07/98 of 10 April 1998 according to which "the Appeals Committee shall not be competent to consider ... any matter which is within the competence of the Disciplinary Committee".

The Applicant contends that whenever the President of the Bank makes use of the power of summarily dismissing a staff member under Regulation 10.2 of the Staff Regulations and paragraph 9.3 of Administrative Memorandum 02-83 of 30 November 1983 Relating to Misconduct and Disciplinary Measures in the Bank, the case ceases to be within the competence of the Disciplinary Committee. Consequently, under such circumstances the normal appeals procedure to the

Staff Appeals Committee must be deemed to be open to a staff member aggrieved by summary dismissal from the service of the Bank.

21. In addressing this argument, the Tribunal notes that pursuant to Rule 2.1 of Administrative Memorandum 03-83 of 30 November 1983 Relating to the Establishment of the Staff Disciplinary Committee all instances of misconduct, except for minor ones, come within the scope of competence of the Disciplinary Committee, irrespective of their gravity ("cases of serious or gross misconduct"). The power granted to the President to take summary action in case he feels it necessary to adopt urgent measures with a view to protecting the interests of the Bank does not derogate from that rule of competence although in such cases the Disciplinary Committee will in fact be prevented from exercising its responsibilities. This inference from a literal reading of the normative framework established by the Bank is buttressed by the object and purpose of excluding review by the Staff Appeals Committee. This Committee is an auxiliary body of the President of the Bank. It makes recommendations to the President who then takes the final decision on the appeal (Article 7.1 of Presidential Instruction 07-98). Where the President himself has already made a determination in the form of summary dismissal, it would make no sense to seize the Staff Appeals Committee whose recommendations would again come back to him. In such instances, an appeal to this Tribunal is the appropriate remedy. Before the Tribunal, any applicant receives a full hearing.
22. The decision of dismissal of 10 June 1999 is challenged by the Applicant on procedural and substantive grounds. Both must be examined by the Tribunal.
23. As far as procedure is concerned, the Applicant alleges that due process was not observed. He contends, in particular, that the Bank withheld important documents for his defence. The Tribunal notes that the Bank has to date abstained from enacting rules for investigations and procedures preceding summary dismissal of a staff member. The requirements to be complied with by the Bank must therefore be derived from principles of natural justice as evolved in the jurisprudence of international administrative tribunals. In this regard, it stands to reason that the staff member concerned must be unequivocally put on notice of the charges laid against him; additionally; he must be given a full and unrestricted opportunity to exonerate himself from the relevant charges.
24. The Tribunal notes that the Bank in its letter of 19 May 1999 informed the Applicant that in 1993 he had allegedly received payments of USD 2,000 and 7,000 respectively from a consultant of the Bank, SABAS Approtech Projects. It also made clear that such payments, if proven, would amount to a breach of several provisions of the Bank's internal law. There was no need for the Bank to disclose from what source it had obtained the information at its disposal. On the basis of the data indicated, the Applicant could organize his defence, and he was

formally invited to furnish explanations of his conduct capable of exonerating him from the suspicion of having received an improper favour or remuneration. By drawing the attention of the Applicant to the legal consequences of his actions, the Bank did not demonstrate any kind of bias, but simply made the Applicant aware of the serious consequences his alleged conduct might entail for him. Thus, the Bank acted in compliance with its duty to ensure due process as from the very outset of the proceeding it had set in motion.

25. After the Applicant had acknowledged three days later in his letter of 22 May 1999 that he had indeed received the two payments from SABAS, as suggested by the Bank, it was incumbent upon him to prove that his conduct was not tainted with any kind of impropriety. He had to show that he had indeed received the amount of USD 9,000 as an intermediary for delivery to the third person identified by him, Prince Opoku Agyemang. The Bank gave him detailed guidance in its letter of 2 June 1999 as to the evidence that would be likely to dispel the unfavourable suspicion that had arisen as a consequence of his admission to have in fact received the two payments. In the circumstances, the Bank could not reasonably be expected to do more than exhort the Applicant to supply the relevant evidence. It was not its responsibility to ring up the telephone numbers of Prince Opoku furnished by the Applicant.
26. It is true that the period between the first letter of 19 May 1999, which specified the allegations and set a (first) deadline of seven days, and the summary dismissal, which occurred on 10 June 1999, was relatively short, given the fact that the payments in issue were made six years earlier in 1993. But in his letter of 8 June 1999 the Applicant confined himself to stating that he could not provide any receipts suited to show that he had acted as an agent entrusted with delivering the monies concerned to a third person. He did not request any extension of the dead-line so that he might get hold of any missing pieces of evidence. In fact, up to the date of the oral hearing, more than two years later, the Applicant has not been able to produce any evidence to support his contentions.
27. The Tribunal concludes, therefore, that the Bank has fully satisfied the requirements of due process before dismissing the Applicant.
28. As far as substance is concerned, the Tribunal was furnished, at the oral hearing on 23 July 2001, with an excerpt from the books of SABAS Approtech Limited, established by the accountants' firm of Price Waterhouse, showing that the two cheques provided to the Applicant had been recorded as "business promotion". The Tribunal therefore finds that the allegations of the Applicant that he only acted as an intermediary without any personal interest in the matter have been refuted. This conclusion is also confirmed by the fact that the Applicant has never attempted to show in a substantiated manner how, in what form, where and when he had delivered the amount of USD 9,000 to Prince Opoku as contended by him.

29. As the Respondent pointed out in its first letter to the Applicant of 19 May 1999, a staff member who accepts payments from a person who entertains business contacts with the Bank breaches the obligation incumbent upon him under Regulations 3.5 and 3.7 of the Bank's Staff Regulations and other provisions of its internal law. The impropriety of such conduct does not depend on the existence of a proven link between the favour or remuneration received and some actual act of wrong-doing in the discharge of the employee's duties. It is the acceptance of a favour or remuneration as such which constitutes a breach of the statutory duties of the staff member concerned. The Tribunal, hence, does not have to inquire whether specifically in 1993 the Applicant handled a dossier that was related to business interests of SABAS.
30. The Tribunal rejects the contention of the Applicant that, taking into account his good record of 18 years of service with the Bank, summary dismissal was way out of proportion with the offence committed by him. The integrity of its staff belongs to the paramount interests of the Bank. If the Bank, which is committed to a policy of good governance, fell into disrepute for acts of corruption of its employees, it would be unable to fulfil its functions properly. Thus, the President could not act otherwise than to impose a harsh sanction once it had been discovered that the Applicant had engaged in gross misconduct.

V. THE DECISION

19. The appeal by the Applicant is hereby dismissed.

Honorable Justice Mohammed Bello - President

Mrs. Albertine Lipou Massala - Executive Secretary

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