

ADMINISTRATIVE TRIBUNAL OF THE AFRICAN DEVELOPMENT BANK

QUORUM :	Honourable Mohammed Bello	-	President
	Professor Maurice Glele Ahanhanzo	-	Vice - President
	Dr. Ahmed El Kosheri	-	Member
	Professor Christian Tomuschat	-	Member
	Justice Pio Marapi Teek	-	Member

APPLICATION N° 2001/03

Mr. J. N. N., Applicant
African Development Bank, Respondent

Judgment of the Tribunal - delivered on 19 July 2002

I. THE FACTS

1. The Applicant joined the services of the Respondent on April 1, 1992 as a messenger on grade M3 Step 9, following an offer made to him on March 13, 1992. He occupied successive positions in the telephone billing section as well as the mailroom of the Administration Department, and was transferred to the stock management section of the same Department by Inter-Office Memorandum, dated September 23, 1997. The Applicant resumed duty in this new position on October 1, 1997.
2. The precise duties of the Applicant were to act as Stock Controller. This involved handling inventories of various types of material in the Bank's different stores and warehouses, both at the Bank's Headquarters' building and in Zone 4, as well as maintaining proper records and files of such inventories.
3. A Bank audit conducted on October 21, 1998 revealed that a large amount of paper from stocks, at the warehouse in Zone 4, that the Bank had recently received in two containers had disappeared and could not be accounted for either through the records of exit of inventories for use at Headquarters or otherwise.
4. The audit exercise also revealed that the schedules and activities of the staff members that handled inventories in the Bank warehouses, including the Applicant, presented certain anomalies. Particularly in the case of the Applicant, the Auditor discovered that there were unexplainable and repeated absences by him during working hours. The Auditor also noted that these absences were particularly evident on days when the Applicant had to go to the warehouse at Zone 4. Given these anomalies a bailiff as well as a private investigator were retained by the Bank to further review the matter. The Bank's Internal Audit Department later confirmed that the Bank had lost a total of 5,605 reams of paper. During investigations, the bailiff discovered some of the missing paper on sale in the market at Plateau, in Abidjan.

5. The matter was then reported to the host country's police for investigation. The police began their investigations and arrested certain persons discovered to be selling the paper in the market. Following their preliminary interrogations of these individuals, the police confirmed the opinion that the theft was perpetrated with the complicity of people within the service of the Respondent. The authorities then requested that the diplomatic immunity of four (4) staff members, including the Applicant, be lifted in order to allow them carry out proper investigation.
6. Upon receipt of the request, the Bank was of the opinion that it was prudent and in the interest of staff for it to carry out its own internal investigations before acting on the request. Accordingly, on November 18, 1998, a Committee of Enquiry comprising senior officers of the Bank, one legal counsel and the private investigator retained by the Bank questioned the staff members concerned, including the Applicant, to determine if they could provide useful information that would shed light on the missing paper and their activities.
7. Accordingly, on November 25, 1998, and in the exercise of the prerogatives accorded to the President by the Staff Rules in paragraph 9.1(a) of Administrative Memorandum No. 02-83, the staff members concerned were suspended without pay pending further internal investigations. Their immunity from process of law in Côte d'Ivoire was lifted in order to allow the host country police to carry out their criminal investigations, as previously requested, without hindrance.
8. Further, the Bank, in accordance with its rules, the matter was referred to the Disciplinary Committee. On January 28, 1999 the Disciplinary Committee wrote to the Applicant requesting him to appear for hearings before the Committee in respect of the matter. The hearings were held from February 22-25 1999, in respect of the Applicant.
9. Having considered the Report of the Committee of Enquiry, the Respondent, in the exercise of the discretionary powers conferred on it by Regulation 6.11.1(ii) of the Staff Regulations, as well as in the interests of efficient administration, terminated the Applicant's services, by reason of their being unsatisfactory, on May 20, 1999.
10. On 27 June 1999, the Applicant instituted proceedings before the Tribunal. Three days later, on 5 August 1999, he signed a release which contained a waiver clause framed as follows:

"I agree that my acceptance of the termination allowance constitutes full and final settlement of my claims and demands against the African Development Bank. I hereby release and forever discharge the African Development Bank from all actions, proceedings, claims and demands that I might otherwise have or could have against the ADB arising out of, or in connection with, any further or additional claim or dispute over the interpretation or application of the provisions of my contract of service on or before the date of the acceptance."
11. In exercising its powers, the Respondent paid the Applicant all of the salaries and benefits in respect of the period of suspension from November 25 1998 to April 25, 1999, as well as the termination benefits to which he was entitled by virtue of Regulation 6.12.4 of the Staff Regulation.

12. In the previous Applications No. 1999/04-06, the Applicant and two other staff members concerned challenged the termination of their appointments in this Tribunal.
13. On account of the similarity of the Applications, the Tribunal decided to join them and considered them together. The Tribunal dismissed the Applications on 14 December 1999 as being inadmissible at that stage because the Applicants did not exhaust the administrative remedies available to them.
14. In consequence thereof, the present Applicant, Mr. J. N. N., proceeded to pursue the administrative remedies. He submitted a request dated 20 December 1999 for administrative review of his dismissal to the Vice-President. By his reply of 19 January 2000, the Vice-President confirmed the termination of the appointment.
15. The Applicant appealed against the decision of the Vice-President to the Staff Appeals Committee, which after hearing the appeal submitted its recommendation to the President of the Bank on 16 February 2001. The President has not notified the Applicant of his decision. Following the expiry of the 60 days period for the President to take a decision regarding the recommendations of the Appeals Committee as provided by Rule 103.6(d) of the Staff Rules, the Applicant has come back to the Tribunal challenging the decision of the Bank dismissing him on 20 May 1999 for poor performance.

II. ARGUMENT OF THE APPLICANT

16. The Applicant referred to Diaz case, Judgment No 232 (ILOAT) 1972, page 5, which laid down the circumstances upon which a Tribunal may interfere with the exercise of administrative discretion. He argued that in this case the Respondent had committed many irregularities and breaches of its internal rules of practice and procedure for which the Tribunal may interfere with the exercise of the discretion. In particular he invited the Tribunal to note the following :
 - (1) Since his appointment, the rating of the performance of the Applicant had been "very good" and "satisfactory". However, in 1998 the Director of Human Resources, who was not his supervisor, rated him "unsatisfactory". He relied heavily on the Audit report (ADB/IF/96/261) in which the Auditors pointed out lapses and deficiencies in the management of the stock. It is pertinent that the report was made in 1996 when the Applicant was not the Stock Controller.
 - (2) The Respondent did not comply with Presidential Instruction No 001/98, the Performance Management Processes and Performance Appraisal Meeting Guidelines which require his supervisor and the Applicant to meet and discuss matters relating to the 1998 evaluation. The supervisor did not furnish him with a copy of the appraisal.
 - (3) That the purported evaluation of "poor performance" was a violation of Rule 611.02 of the Staff Rules which empowered the President to terminate the appointment of a staff member upon the recommendation of the Vice-President or Director if satisfied, **in accordance with the performance evaluation system,** that the staff member's services had proved unsatisfactory. Respondent did not apply the system, contended the Applicant.

- (4) Again, Rule 101.02 provides that summary dismissal shall be imposed only upon determination by the President that the staff member is guilty of serious misconduct touching upon the financial or other important interest of the Bank.
 - (5) Having been acquitted of the theft of the reams of paper and cleared of negligence in connection with the theft by the Disciplinary Committee, the Respondent committed détournement de pouvoir and denial of due process by punishing him for the very offence he had been acquitted of.
 - (6) Moreover, in case of termination of the appointment of a staff member for unsatisfactory performance, Regulation 6.11.3 makes it obligatory for the President to establish an administrative machinery for the purpose, which the President failed to do.
17. The Applicant requested the Tribunal to grant him various monetary and other relief mentioned in the Application.

III. RESPONDENT SUBMISSION

18. The Respondent's response to the issues raised by the Applicant is as follows:
- (1) The Applicant had released and discharged the Respondent from all actions, proceedings, claims or demands, including those raised in the Application.
 - (2) The power to terminate a staff member's appointment for unsatisfactory performance is vested in the Respondent both under internal law and the rules of international administrative law.
 - (3) There were no procedural irregularities and the Respondent took all adequate care necessary to ensure that there were no such irregularities in handling the Applicant's case.
19. Counsel for the Respondent referred to the release document (annex 1 to the Respondent's Answer) and contended that in accordance with Decision No 25, WBAT Reports 1985 page 26 in Mr. Y case, which was followed by this Tribunal in B. I. AFBAT Application No 1998/02 and I. I. AFBAT Application No 1999/07, a release agreement is enforceable and discharges the Bank from all actions and claims that the Applicant might otherwise have or could have against the Respondent.
20. Counsel then proceeded to canvass all the issues raised by the Applicant on termination of the appointment. Counsel referred to the Judgment of this Tribunal delivered in the first Application on 14 December 1999 and submitted that the Tribunal decided with finality that the termination of the appointment was based on current administrative action and was not based on disciplinary measure as advocated by the Applicant. Accordingly, the principle of res judicata which estopped re-litigation afresh on any matter decided by a previous judgment of a tribunal, applies. The Applicant's allegations of irregularities on the basis of or related to procedure for disciplinary action cannot be re-litigated. The Applicant is estopped.

21. With respect to the termination in accordance with the rules and procedures of the Bank, reference was made to the letter of dismissal which indicated that the decision to dismiss was taken in accordance with Regulation 6.11.1(ii) of the Staff Regulations because the Applicant's services were found to be unsatisfactory. It was clearly established that the determination whether the services of a staff member were unsatisfactory is within the sole discretion of the Respondent (see Suntharalingam v. IBRD, WBAT Reports 1981 paragraph 27).
22. Counsel pointed out several inadequacies and lapses in the Applicant's performance and conduct, which according to Counsel amounted to poor performance, disclosed by the Committee of Enquiry and the Audit report. The evidence of poor performance was overwhelming and justified his termination.
23. In answer to the complaint of the Applicant that he was not invited to the performance appraisal meeting for 1998, Counsel argued that Presidential Instruction No 001/99 did not provide mandatory evaluations of staff members who were on suspension as the Applicant was in 1998.
24. Counsel also contended that the Applicant misinterpreted the internal law of the Bank, i.e. Rule 611.22, to mean that a decision to terminate for poor performance may only be taken on the basis of the annual performance system. Counsel asserted that the Rule was not in force at the material time and therefore inapplicable.
25. Furthermore, the allegation of lack of due process was not supported by the facts. The Applicant was given the opportunity to defend himself both at the Committee of Enquiry and at the Disciplinary Committee. In addition, the decision to terminate was submitted to the Vice-President, CMVP, for review. Due process was indeed complied with. It is transparent that the Respondent acted without détournement de pouvoir and in good faith.

IV. APPLICANT'S REPLY

26. The Applicant replied that he signed the release agreement under duress due to the non payment of his salary for six months, lack of money to pay the school fees of his children, traumatic miscarriage of his wife, loss of his job and disgraceful allegation of theft.
27. Furthermore, the Applicant drew the attention of the Tribunal to an endorsement 'WITH RESERVATIONS' at the bottom of the release agreement. The endorsement did not specify the reservations and did not state any particulars. However, the Applicant argued that the Respondent had noted the endorsement and signed the release agreement without any objection. He submitted that the endorsement qualified the release that the Applicant was entitled to seek remedies for any irregularities he subsequently discovered in the separation agreement.
28. The Applicant distinguished the case of Mr. Y where during the negotiation for the release agreement the applicant suggested an addendum "without prejudice" which the respondent rejected and the parties signed the release agreement without the addendum. He also cited I. case wherein the applicant released the Bank from any "further or additional claim over his contract subject to the full payment of all my termination benefits and entitlements", and where the Tribunal held that the phrase "subject to etc"

was not capable of having the meaning that it was a reservation for additional benefits to those previously identified. The Applicant also referred to Harrison v The World Bank, case No 23 WBAT(1987) page 9, where it was held that whether a release has been the product of duress or is otherwise unenforceable, or whether it does not embrace the claim at hand, are issues that are subject to consideration by the Tribunal and are not themselves extinguishable by the release.

29. The Applicant concluded that the release did not bar him from instituting proceedings against the Bank when he discovered new information or found that the Bank did not fulfill its part of the agreement in full. He stated that he discovered new facts when the Bank surrendered documents ordered by the Tribunal and there found that the Audit report quoted in the letter of his dismissal did not relate to him. Moreover, the Applicant stated that he had not been given the opportunity to negotiate the release.

V. RESPONDENT'S REJOINDER

30. In its Rejoinder, the Respondent argued that contrary to the Applicant's submission, no new facts or claims were discovered after the release had been signed. The Applicant was fully informed of the basis of his dismissal and the facts establishing his poor performance in the letter of his dismissal which he received on 20 May 1999, while he signed the release on 5 August 1999. His purported claim arose prior to the release and was covered by the release. Again, the letter of dismissal informed him that investigations done by the Bank were considered in reaching the decision to dismiss him for poor performance.
31. Relying on the case of Noel Lindsay v. IBRD, WBAT Decision No 92 (1990), Counsel contended that negotiation is not a prerequisite to the validity of a release. Counsel distinguished the case of Harrison, which dealt with provision for release prescribed generally in the Staff Rules while in the case at hand the release was individualized and related solely to the Applicant.
32. Further, Counsel submitted that the allegation of duress has not been substantiated as no evidence of any illegal act or coercion was shown. The Applicant only complained of economic pressure which, in accordance with the decision in B. I. case, does not constitute duress. Counsel also referred to Kirk v IBRD WBAT Decision No 29 (1986) to buttress his contention.
33. Finally, Counsel submitted that the Respondent had the option to take disciplinary action and to terminate the appointment under Regulation 10.1 but refrained from doing that and chose to terminate it by administrative decision with notice and benefits. He urged the Tribunal to dismiss the Application.

VI. THE LAW

34. The Tribunal must in the first place appraise the motion of the Respondent alleging non-admissibility of the Application. Although the Respondent speaks of a "fin de non-recevoir", which he seeks to distinguish from a motion alleging non-admissibility, the objection raised constitutes nothing else than such a motion. The Bank can prevent an Application from being examined as to its merit only by relying on Article XIV of the Rules of Procedure.

35. Pursuant to this provision, the Respondent may within thirty (30) days of receipt of an Application file a motion alleging that the Application is inadmissible. In the instant case, the Application was filed on 6 July 2001, and the Answer of the Bank reached the Tribunal not earlier than 17 September 2001, the day when it was signed. Accordingly, the requirements of Article XIV of the Rules of Procedure are not met. However, the Tribunal will not base its decision on the non-observance of the prescribed dead-line, this procedural flaw not having been raised by the Applicant. The issue of waiver will be determining greatly.
36. The Tribunal considers it necessary to decide the issue of release first. The main question for determination is whether the phrase "WITH RESERVATIONS" is capable of having the meaning given to it by the Applicant that the release did not cover any information or irregularity in respect of the termination of the appointment discovered by him after he had signed the release. He stated that he discovered the Audit report referred to in his letter of dismissal did not relate to him until when the Bank had surrendered to him the documents ordered by this Tribunal long after the release had been signed.
37. It is pertinent to set out the relevant extracts from the letter of dismissal and the release, which read :

"Subject : Termination of your Appointment for Poor Performance

Sir,

With reference to the various investigations conducted in connection with the theft of reams of paper from the Zone 4 warehouse, I would like to inform you that

Management, taking into account the Audit Report (ADB/BD/IF/96/261) and the report of the Committee of Inquiry, has decided to terminate your appointment for poor performance with effect from 26 April 1999, in accordance with provision 6.11.1(ii) of the Staff Regulations, which states that *"The President may terminate the appointment of a staff member : (ii) if it is established that the services of the staff member have proved unsatisfactory or that the staff member has failed to carry out his duties and obligations satisfactorily."*

In that regard, you will be paid terminal benefits, pursuant to provision 6.12.4 which states that : *"In the case of termination under Regulation 6.11.1 ii, 6.11.1 vi and 6.11.1 vii, a staff member on a temporary or permanent appointment shall be entitled to six months notice of termination and a termination benefit of one month's salary for each year of service, up to a maximum of twenty-four months' salary as determined in the Staff Rules."* You will be paid your salary suspended since 25 November 1998, up to 26 April 1999, exclusive.

Please find attached the benefits clearance forms that you should duly fill and return to Office 2.44 for your departure formalities and with a view to accelerating the payment of your end-of-service entitlements."

“RE : RELEASE OF THE “ADB” ACCEPTANCE OF PAYMENT OF TERMINATION ALLOWANCE AND SURRENDER OF ALL “ADB” DOCUMENTS

With reference to your letter dated 20-05-1999 on the above-mentioned subject, I wish to hereby signify that I have read, understood and freely accept the conditions contained in the above-mentioned letter and I have affixed my signature in acceptance thereof.

I agree that my acceptance of the termination allowance constitutes full and final settlement of my claims and demands against the African Development Bank. I hereby release and forever discharge the African Development Bank from all actions, proceedings, claims and demands that I might otherwise have or could have against the ADB arising out of, or in connection with, any further or additional claim or dispute over the interpretation or application of the provisions of my contract of service on or before the date of this acceptance.

.....	
Yours sincerely,	Witness
Signature	Signature
Full Name	Full Name
Date	Date

WITH RESERVATIONS”

- 38. It is clear from the reading of the two documents together, on the face of the documents such meaning cannot be given to the phrase. Counsel for the Applicant contended however, that such meaning could be implied from the circumstances of the case.
- 39. Since the discovery issue was not an expressed term of the release, would a reasonable Tribunal imply that such discovery was within the contemplation of the parties at the signing of the release? Such implication would certainly result in adding a new term to the release which was not agreed by the parties. The Tribunal holds it is unable to infer such meaning from the interpretation of the release as contended by the Applicant’s Counsel.
- 40. The next question is whether the release was voluntarily made or a product of duress. Counsel for the Respondent submitted that the Applicant signed it voluntarily after having three (3) months to consider it. He relied on the decisions of this Tribunal in **B.** case, **I.** case and the Judgment of the World Bank Tribunal in **Kirk** case .
- 41. On the other hand, Counsel for the Applicant argued that the release was induced by coercion as being the general practice of the Bank to cause such releases to be signed by the staff members in all cases of separation. Counsel stated that the Bank did not pay his benefits for three (3) months after delivering the release to sign. The Bank paid the benefits after he had signed. The Bank also signed the release with the endorsement “WITH RESERVATIONS” without any question. Counsel contended that the Tribunal should adopt the decision in **Mr. Y** not to give effect to the release. Giving effect to it would be tantamount to injustice and denial of due process to staff members.

42. The right to defend his/her right is granted to every member of the staff of the Bank by virtue of Article III.1 of the Statute of the Tribunal. This provision reflects Article 8 of the Universal Declaration of Human Rights and Article 14 (1) of the International Covenant on Civil and Political Rights pursuant to which everyone has a right to a judicial proceeding when a binding determination is to be made on his/her civil rights. Access to judicial protection belongs to the core rights of every human person.
43. Consequently, construction of a waiver clause under which a (former) staff member of the Bank renounces his/her right to defend any claims he/she may believe to have against the Bank must proceed with the greatest caution. It is true that the clause contained in the release which the Applicant signed on 3 August 1999 seems to be fairly broad in scope. But it does not state explicitly that the Applicant would be debarred from resorting to the institutional machinery established by the Bank for the purpose of settling disputes between itself and its staff members, and that, hence, he was under an obligation to withdraw the Application which he had filed a few days earlier, on 29 July 1999.
44. In fact, initially even the Bank did not interpret the waiver clause in that sense. During the first stage of the proceedings, which ended with the Tribunal's Judgment of 14 December 1999, the Bank did not argue that the Applicant had renounced his right to take his case to the Tribunal. Likewise, during the subsequent proceedings before the Staff Appeals Committee, that defense was not put forward by it. It is only after this Committee had handed down its conclusions and recommendations (16 February 2001) that the Bank, by requesting the re-opening of the proceedings, relied for the first time on the waiver clause in the release.
45. A cautious interpretation of that clause is even more imperative since it is contained in a form drawn up by the Bank. That form was not a negotiated instrument. Whoever relies on standard clauses established by himself bears a special responsibility to frame those clauses precisely and accurately so as to avoid any misunderstanding on the part of his partners with whom he is going to establish contractual commitments.
46. To be sure, in B. (Judgment of 17 December 1999, ADBAT Judgments 1999-2001, page 17) and I. (Judgment of 24 November 2000, *ibid.*, page 55) the Tribunal recognized the full validity of similar clauses which were intended to debar two former Staff members from instituting legal proceedings before the Tribunal. In I., the text was the same as in the instant case. However, the two Judgments must be seen within their specific context. In both cases, the Applicants had been charged with serious misconduct in the execution of their professional duties. Hence, serious doubts existed as to whether they were entitled to any termination benefits. By granting such benefits, the Bank did a considerable favor to the Applicants. A negotiated deal was struck. As return for that generosity, the Bank was legitimated to demand that the Applicants refrain from pursuing any additional claims which they might still believe to have against the Bank.
47. Indeed, according to the applicable law of the international civil service, it is in such circumstances that compromises providing for waiver of the right to introduce legal remedies may be validly concluded. In Mr. Y., the World Bank Administrative Tribunal¹ held (para. 26) :

¹ Judgment of 4 September 1985.

«It would unduly interfere with the constructive and efficient resolution of these claims if the Bank could not negotiate – in exchange for concessions on its part – for a return promise from the Staff member not to press his or her claims further.»

During the oral hearings, Counsel for the Bank themselves stated that the decision in Mr. Y reflected the law as it stands.

48. In the instant case, the Bank has not made any special concession to the Applicant. The signing of the release was just meant to expedite the payment of the termination benefits which the Bank in any event owed to the Applicant according to Article 6.12.4 of the Staff Regulation. Consequently, there was no reason for the Applicant to forego his right to judicial protection without any consideration. Waiver of the right to institute legal proceedings for the vindication of one's rights can not be presumed (see ILOAT, Judgment N° 592 of 20 December 1983 in Byrne – Sutton, para. 2). Accordingly, under the circumstances of the case, the motion must be rejected.
49. In view of the above considerations, the Tribunal need not definitively pronounce on the issue of whether the Bank may be entitled routinely to request every staff member leaving its services to subscribe to a waiver clause excluding access to the procedures established within the Bank for the settlement of legal disputes.

VII. EXERCISE OF DISCRETION

50. The law has long been established that an international administrative tribunal has no power to interfere with the exercise of discretionary power except on special circumstances which Diaz case stated as follows :

«The Tribunal may interfere with the impugned decision only if it was taken without authority, is irregular in form or tainted by procedural irregularities or by illegality, or based on incorrect facts, or if essential facts have not been taken into consideration, or, again, if conclusions which are clearly false have been drawn from the documents in the dossier, or finally, if authority has been exercised for purposes foreign to the Organization's interests'.»

It is also pertinent to point out the observation of this Tribunal in its judgment on Application N° 1999/06, which read.

«Thus, the Bank clearly manifested its will to handle the three cases as instances of termination of employment for unsatisfactory performance. It took no disciplinary sanctions against any of the Applicants. The fact that possibly such disciplinary sanctions might have been imposed does not detract from the fact that the dismissals were meant to be measures of current administration. It is another matter altogether whether separating the Applicants from the Bank was warranted in the circumstances.»

51. It is clear that the President exercised his administrative discretion to terminate the appointment. In his submission, the Applicant emphasized that he was not challenging the discretion of the President but the manner of its exercise in that he did not comply with the

internal law of the Bank or international administrative law. The issues will be considered *seriatim*.

Error of law : 1998 Evaluation

52. The Applicant made copious submissions of errors of law by the failure of the Bank to assess his performance for 1998 in accordance with the provisions of Presidential Instruction N° 001/1998 issued on 3 February 1998, Performance Management Process, Performance Appraisal Meeting, Guidelines for Management and Guide To Performance Evaluation and Staff Development Process. The Respondent replied that he was not evaluated because he was on suspension at the material time.
53. The Tribunal noted that the letter together with the afore listed documents were circulated by the Bank on 4 December 1998 with direction to start evaluation exercise for the 1998 performance in January 1999. Further, the Applicant was on suspension from 5 November 1998 to his dismissal on 20 May 1999. Accordingly, the Bank had a valid reason for not evaluating him and all the allegations of breaches of due process. Errors of law or facts on the 1998 evaluation issue were misconceived and untenable.

Errors of facts : 1996 Audit Report

54. The letter of termination in clear words indicated that the Audit report (ADB/BD/IF/96) and the report of the Committee of Inquiry were taken into account in the decision to terminate the appointment. In his letter dated 19 January 2000, Vice-President Boucher confirmed that the Applicant's services were found unsatisfactory in that he flouted the rules of stock management of the Bank's property in the warehouse in Zone 4 by not keeping proper inventory and stock filing and control in accordance with the recommendations of the Audit report (ADB/BD/IF/96) and the report of the Committee of Inquiry.
55. Moreover, at the hearing of this Application on 15 July 2000, Respondent's Counsel categorically asserted that reference to the 1996 Audit report in the letter of termination was an error and 1998 Audit report was intended. However, he denied making the said assertion at the resumed sitting of the Tribunal on 17 July. He contended that the Applicant had flouted the recommendation of the 1996 Audit report.
56. The Tribunal holds that the Audit report of 1996 was made before the Applicant became the Stock Controller and the Bank did not give him a copy of the report when he was made the Controller. He requested the Bank for a copy after he had received the termination letter. The Bank refused to give him. However, the Bank delivered a copy to him in compliance with the order of this Tribunal. The Tribunal finds no logical basis of accusing the Applicant of flouting the recommendations of a report he had never been given or seen.
57. It is clear that the finding by the Bank that his services were unsatisfactory was based on serious error of fact which affected the efficacy of the impugned decision. Consequently, the Tribunal should exercise its power of review over it.

Report of the Committee of Inquiry

58. The Bank also made serious error of judgment in construing the Report of the Inquiry against the Applicant. On the contrary, the evidence disclosed at the inquiry was an indictment against

the Management of the Bank. The evidence of Mr. Ghandi, the Applicant's Supervisor, showed there was no manual or written guidelines on stock management, no inventory and no clearly defined rules and regulations for the staff members. Mr. Sidibe, the Director of the Department, corroborated that evidence and amplified it that the storekeepers were unqualified and poorly supervised. They operated without any knowledge of rules, regulations or operational manual. However, Mr. Moesdijk, Director, CHRM who reviewed the report of the Committee disagreed with its findings. He relied on the 1996 Audit report extensively and concluded that the Applicant, including the two others, had been proven negligent by their disregard of the rules and procedures specified in the Audit report. He overlooked the evidence of Mr. Ghandi and Mr. Sidibe.

59. The Tribunal also holds that Mr. Moesdijk made serious error by relying on the Audit report to find the performance of the Applicant unsatisfactory. The impugned decision should also be set aside for that error.

1997 Evaluation Performance

60. Finally, the submission of Counsel to the Respondent that the Bank took into account his 1997 Evaluation Performance in reaching the impugned decision has no substance. Having assessed his 1997 performance as satisfactory, the Bank cannot just out of the blue reverse it now.

Remedies

61. The Tribunal concludes that this Application is well-founded. In pursuance of Article XIII.1 and 2 of the Statute of the Tribunal, in the exercise of the Tribunal's power to ascertain the financial consequences of the above established irregularities, and having regard to the circumstances of the case, the Respondent shall pay to the Applicant the equivalent of three years of his annual salary as compensation and \$ 3000 U.S. Dollars as legal costs. The Respondent shall also restore his personal effects.

CONCLUSION

The Tribunal orders as follows :

1. The motion of non- admissibility filed by the Bank is dismissed.
2. The impugned decision is set aside.
3. The Respondent shall pay the Applicant :
 - a) three (3) years of his annual salary as compensation;
 - b) \$ 3000 U.S for legal costs.
4. The Respondent shall restore the Applicant's personal effects, if any.

Honorable Justice Mohammed Bello - President

Albertine Lipou Massala - Executive Secretary

COUNSEL FOR THE APPLICANT :

- Effiba Amihere (Esq)
- Brefo John
- Peter Njang P.C. (absent)

REPRESENTATIVE OF THE RESPONDENT

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

COUNSEL FOR THE RESPONDENT

- Mr. George Aron
assisted by
- Ms. Cecilia Akitomide