

## **ADMINISTRATIVE TRIBUNAL OF THE AFRICAN DEVELOPMENT BANK**

<b>QUORUM:</b>	Honourable Mohammed Bello	-	President
	Professor Maurice Glele Ahanhanzo	-	Vice - President
	Dr. Ahmed El Kosheri	-	Member
	Professor Christian Tomuschat	-	Member
	Judge Pio Marapi Teek	-	Member

### **APPLICATION No. 2001/04**

Mr. Christophe Kossi Komlan, Applicant  
African Development Bank, Respondent

Judgment of the Tribunal - delivered on 19 July 2002

#### **I. THE FACTS**

1. The Applicant, Mr. Kossi Christophe KOMLAN, was recruited by the African Development Bank (hereinafter known as "the Bank") on 2 May 1974 as a supervisor, Grade G1, and assigned to the maintenance of Cité BAD. From 1983 to his departure from the Bank in November 1998, he was the assistant to the Store Manager. In this capacity, he was alternately assigned to the keeping of stock sheets in the supplies store and to the receipt of goods. Furthermore, he had access to the keys of the Bank's main store located in Zone 4C, Abidjan.
2. On 21 October 1998, an internal control by the Bank revealed that a huge quantity of reams of paper had disappeared from the main store. The paper had been supplied in August 1998 in two (2) containers. The loss could not be explained either by the stock outgoing records or by any other means.
3. An investigation was therefore initiated. According to the findings of the Internal Audit Department (AUDT), five thousand six hundred and five (5,605) reams of paper were lacking. An inspection of the store by the Bank's services and later by the Judicial Police and the expert appointed by the Bank's insurers revealed no trace of burglary. Furthermore, reams of paper of the same quality as those delivered to the Bank were discovered on sale in the market in Plateau, Abidjan.
4. The Ivorian Police subsequently arrested some of the people selling the paper in the market. After interrogating them, the Police confirmed the opinion that the theft had been carried out with the complicity of some Bank staff members. The Ivorian authorities then requested the Bank to lift the immunity of four (4) staff members, including the Applicant, to enable them to carry out their own investigations.

5. The Bank was of the opinion that it would be prudent and in the interest of the persons alleged to be involved in the theft to conduct its own internal investigations before lifting their immunity. Consequently, on 18 November 1998, a Committee of Inquiry comprising senior Bank staff, a legal counsel and a private investigator recruited by the Bank interrogated the staff members concerned, including the Applicant, to determine if they could provide useful information that would throw light on the disappearance of the reams of paper and on their activities. The report of the Committee has never been communicated to the Applicant.
6. In the light of the findings of the investigation, the persons concerned were suspended without salary on 25 November 1998, pending further regular internal procedure in accordance with the provisions of paragraph 9.1 (a) of Administrative Memorandum No. 02/83 of 30 November 1983. Their immunity, which barred criminal proceedings in Côte d'Ivoire, was lifted in order to enable the Police of the host country to conduct its investigations without impediments, as requested earlier.
7. Furthermore, the case was referred to the Disciplinary Committee. By letter of 28 January 1999, the Applicant was summoned to appear before the Committee. The hearings took place from 15 to 18 February 1999. The Disciplinary Committee finalized its report on 24 April 1999. The Applicant was not, at that time, informed of the conclusions of the report.
8. The conclusions were clearly in favour of the three (3) staff members, including the Applicant, who worked in the Stocks Section. The Disciplinary Committee report read as follows:

“The Disciplinary Committee was unable to establish negligence leading to, or culpability or involvement in, the theft of the paper on the part of any of the three staff members. The Disciplinary Committee concludes, therefore, that the charges brought against the staff members cannot be sustained on the basis of the evidence before it, and recommends that the charges should not stand.”
9. Despite this assessment exonerating the Applicant from any suspicion, the Bank informed him by letter of 20 May 1999 that he had been dismissed for poor performance with effect from 26 April 1999. To justify this decision, the Bank cited the provisions of Regulation 6.11.1 (ii) of the Staff Regulations. The Bank also specified that it had taken into account not only the report of the Committee of Inquiry, but also a 1996 Audit Report (ADB/BD/IF/96/261).
10. On 29 July 1999, the Applicant referred the matter to the Administrative Tribunal, contesting the Bank's dismissal letter of 20 May 1999. The other two (2) staff members concerned, who had been dismissed along with the Applicant, also filed applications with the Tribunal. The Applicant's application was transmitted to the General Counsel of the Bank on 2 August 1999.

11. The following day (3 August 1999), the Applicant signed a "Release Form" intended to clarify the legal relations between the parties. According to the dismissal letter, completing the form "would speed up the payment of your termination benefits". The main clause of the form signed by the Applicant on 3 August 1999 read 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 and/or application of the provisions of my contract of service on or before the date of this acceptance."

No mention was made in the Release of the Application already pending before the Tribunal.

12. Subsequently, the Bank paid the Applicant all the salaries and benefits for the suspension period from 25 November 1998 to 25 April 1999, as well as the termination benefits to which the Applicant was entitled by virtue of Regulation 6.12.4 of the Staff Regulations.
13. In view of the similarity of the three (3) Applications, the Tribunal decided to put them together and consider them as belonging to the same category. By its judgment of 14 December 1999, the Tribunal rejected the Applications as inadmissible at that stage, since the Applicants had not yet exhausted the internal administrative remedies within the Bank.
14. Consequently, the Applicant, by letter of 30 December 1999, submitted a request to the Bank for a review of the dismissal decision. He contended that the decision was unjust, and should therefore be repealed. However, the Vice-President Corporate Management (letter of 24 January 2000) refused to grant the request, and gave three reasons for his refusal: (1) the Applicant did not comply with adequate stock inventory, management and control practices; (2) through his negligence in keeping stock records and receiving supplies, the inventory and materials in the store in Zone 4C were in a deplorable state; and (3) the failure to report the abnormal reduction in the stock of paper from August to October 1998 was a very serious breach of duty.
15. The Applicant filed an appeal against this decision with the Staff Appeals Committee. The Respondent participated actively in this procedure. The Committee transmitted the following conclusions and recommendations to the President of the Bank on 16 February 2001:
- (i) pay each of the Appellants one (1) month salary as compensation for the prejudice suffered, in accordance with paragraphs 23 and/or 22 of the conclusions and recommendations of the Appeals Committee;
  - (ii) pay each of the Appellants at least six (6) months salary as compensation. This corresponds to the six (6) months additional salary which each of the Appellants would have received in a mutually acceptable separation;
  - (iii) urge the Respondent to ensure in future that dismissals for poor performance comply with the Bank's internal rules so as to avoid any miscarriage of justice as suffered by the Appellants in question; and

- (iv) reject all the other claims made by each of the Appellants.
16. The Bank's request to reopen the procedure concerning the three cases on grounds that some essential elements had been omitted (letter of 8 May 2001) was rejected by the Staff Appeals Committee on 21 June 2001. After the procedure before the Committee, the Bank cited the Release signed by the Applicant on 3 August 1999. The Committee pointed out that the Bank had been aware of the existence of the Release for a long time, and that consequently the Bank ought to have presented it as an argument during the regular procedure. Reopening of the procedure applied only to new, unforeseeable and decisive circumstances occurring after the decision has been rendered.
  17. Since the President of the Bank did not react to the conclusions and recommendations of the Staff Appeals Committee, the Applicant filed the present Application on 6 July 2001 after the expiry of the time limit of sixty (60) days stipulated in Rule 103.6 (d) of the Staff Rules, for a decision to be taken.

## **II. THE ARGUMENTS PRESENTED BY THE PARTIES**

18. The Applicant contends that the dismissal decision was vitiated in many respects:
  - (a) the Bank misused its power in accusing him of poor performance, whereas the real motive for the decision was the charge of his involvement in the theft of reams of paper. After this charge collapsed, the Bank simply replaced the initial performance with "poor performance";
  - (b) his professional conduct had always been appreciated by his supervisors who had constantly awarded him good ratings. It was only in 1997 that for the first time his performance evaluation became negative with the arrival of a new manager. It was unjust to conclude from this that his performance was generally poor;
  - (c) The charge of his involvement in the theft of reams of paper was groundless.
19. The Bank took no decision on the merits of the case; rather, it raised a motion to dismiss.

## **III. MOTION OF NON-ADMISSIBILITY ("MOTION TO DISMISS")**

20. In fact, in its Answer, the Bank contended that the Application was non-admissible. Referring to the waiver clause in the Release signed by the Applicant on 3 August 1999, it affirmed that the clause, according to the jurisprudence of the Administrative Tribunal itself, barred access to the legal procedures.
21. The Applicant contested this motion raised by the Respondent. He first of all contended that the motion raised by the Bank was late. Since it was already in existence at the time of the first hearing of the case by the Tribunal, it was supposed to have been raised at that time. The judgment of the Tribunal on 14 December 1999 noted that the case was inadmissible "at that stage", "pending exhaustion of all the prescribed administrative remedies by the Applicants". This conclusion had the force of *res judicata*.

22. The Release was non-consensual. It had been imposed on the Applicant by the Bank. To obtain what he was fully entitled to, the Applicant was deceived to sign the form drawn up by the Bank.
23. Finally, the claims were not included in the Release. The waiver concerned additional claims and legal action with respect to the interpretation and/or application of the clauses of the Applicant's employment contract. However, most of the Applicant's claims concerned prejudices suffered as a result of the charge of theft and/excluding compensation for lack of motive for the dismissal decision.

#### IV. CLAIMS BY THE PARTIES

24. The Applicant requested that:
- (1) the motion of non-admissibility raised by the Respondent should be rejected and the merits of the Application considered;
  - (2) the Applicant should be granted the following amounts as compensation for the prejudice suffered:
    - (a) compensation for lack of motive for the dismissal decision:  
CFAF 35,850,888
    - (b) compensation for groundless charge of theft:  
CFAF 23,900,592
    - (c) damages for moral prejudice:  
CFAF 35,850,888
    - (d) damages for financial prejudice:  
CFAF 23,900,592
    - (e) leave: CFAF 1,410,571
    - (f) reimbursement of legal fees: CFAF 1,150,000
25. The Respondent requested that:
- the Application be declared non-admissible.

#### V. THE LAW

26. 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 "motion to dismiss", which it seeks to distinguish from a motion of non-admissibility, it is really a motion of non-admissibility. The Bank can object to an Application being considered as to its merits only by relying on Rule XIV of the Rules of Procedure.

27. Pursuant to this Rule, the Respondent may file a motion within thirty (30) days of receipt of an Application alleging non-admissibility of the Application. In the present case, the Application was filed on 6 July 2001, and the Bank's Answer was dated 17 September 2001. Consequently, the requirements of Rule XIV of the Rules of Procedure were not fulfilled. However, the Tribunal will not base its decision on the non-compliance with the prescribed time limits, since this procedural flaw has not been raised by the Applicant.
28. Nonetheless, given the circumstances of the case, the motion must be rejected. The right for each Bank staff member to defend his/her rights is guaranteed by 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 judicial proceedings when a binding determination is made on his/her civil rights. Access to judicial protection is one of the core rights of every human being.
29. Consequently, the construction of a waiver clause under which a (former) staff member of the Bank waives 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. However, 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 he was therefore under the obligation to withdraw the Application which he had filed a few days earlier on 29 July 1999.
30. 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. Similarly, during the subsequent proceedings before the Staff Appeals Committee, that argument was not raised by the Bank. It was only after the Committee had handed down its conclusions and recommendations (16 February 2001) that the Bank, on requesting the re-opening of the proceedings, relied for the first time on the waiver clause in the Release.
31. 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 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.

32. To be sure, in Barry (Judgment of 17 December 1999, ADBAT Judgments 1999-2001, page 17) and IHEME (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 IHEME, the text was the same as in the present 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 performance of their professional duties. Hence, serious doubts existed as to whether they were entitled to any termination benefits. By granting financial benefits, the Bank did a considerable favour to the Applicants. A deal was struck. In return for that generosity, it was legitimate for the Bank to demand that the Applicants refrain from pursuing any further claims, which they might still believe to have against the Bank.
33. 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 proceedings may be validly concluded. In Mr. Y, the World Bank Administrative Tribunal held (para. 26):

“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, Counsels for the Bank themselves stated that the decision in Mr. Y reflected the law as it stands.
34. In the present 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 pursuant to Regulation 6.12.4 of the Staff Regulations. 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 cannot be presumed (see ILOAT, Judgment N° 592 of 20 December 1983 in Byrne – Sutton, para. 2).
35. In view of the above considerations, the Tribunal need not definitively pronounce on the issue of whether the Bank is entitled to routinely 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.

**VI. THE DECISION**

- 1) The motion of non-admissibility raised by the Bank in its Answer of 17 September 2001 is dismissed.
- 2) The Tribunal fixes the time limits for filing the briefs of the parties as follows:
  - a) The Respondent shall file its Answer on the merits of the case by 20 September 2002.
  - b) The Applicant may file a Reply by 20 October 2002.
  - c) The Respondent may file a Rejoinder by 20 November 2002.
- 3) The Tribunal reserves its decision on the costs of the parties for its judgment on the merits of the case.

Honourable Mohammed BELLO - President

Albertine LIPOU MASSALA - Executive Secretary

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