

ADMINISTRATIVE TRIBUNAL OF THE AFRICAN DEVELOPMENT BANK

QUORUM:	Honorable Mohammed Bello, Professor Maurice Glélé Ahanhanzo, Justice Lombe Chibesakunda, Professor Christian Tomuschat, Justice Pio Marapi Teek,	President Vice President Member Member Member
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APPLICATION N° 2002/02

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

Judgment of the Tribunal – delivered on December 19, 2003

I. THE FACTS

1. The Applicant, a former staff member, joined the service of the African Development Bank, the Respondent [The Bank], on 16 November 1982 as a Bilingual Clerk in the Personnel Department on grade G4/5.
2. At the time of the termination of his employment on 17 March 1995, following a strongly contested audit report, the Applicant held a position of Administrative Assistant in charge of Staff Benefits and Allowances in the Human Resources Department.
3. The Applicant in terms of Rule II (b) of the Administrative Rules of Staff Retirement Plan [The Plan] completed and filed with the appropriate section in the Bank, the procedure forms for the payment of his personal portion of the contributions to the Pension Plan indicating the mode of payment and his addresses.
4. On 25 June 1999, more than four years since the Applicant's termination of his services, the Respondent confirmed to the Applicant that his contributions amounted to UA 14,632.39 but that according to the Administrative Rules of the Plan, he was not entitled to accrued interests on his contributions. On 4 August 1999, the contributions in the amount of UA 15,686.331 were paid minus the accrued interests.

5. On 30 August 1999, the Applicant signed a Release Instrument acknowledging receipt of his withdrawal settlement as full and final payment and discharging the Respondent from further claim or obligation in respect of his pension contributions, which reads as follows:

“I acknowledge that the amount represents the total amounts due by the ADB in liquidation of my pension plan entitlements. I understand this payment constitutes the final and full payment and in accepting it I discharge the ADB from all obligations.”

6. The Applicant noted a qualification on the herein above referred to release document which reads as follows:

“This disclaimer is signed by me to attest that I have received full payment (subject to formal handing over of cheque to me) of my pension contributions withdrawal and this does not discharge the ADB of my claims for payment of 4 years accrued interests due on the contributions in accordance with Article 5.11 of SRP Regulations and Rule 5 (c) and Rule 5 (d) of its Administrative Rules”.

7. On 19 November 1999, the Applicant filed claims with the Administrator of the Plan namely, accrued interests and damages in the amount of CFA 100 000 000 for the hardship suffered as a result of the delay in the payment of his contributions. This claim went unanswered and on 7 January 2000, the Applicant appealed to the Vice President in Charge of Administration.
8. On 24 January 2000, the Bank informed the Applicant that the 5 % accrued interests were available in the sum of CFA 3,105,694 but not the damages claimed.
9. On 24 March 2000, the Applicant sent a reminder to the acting Administrator of the Staff Retirement Plan, who in a reply dated 17 April 2000, informed the Applicant that the claim for damages was baseless and without substance.
10. On 5 June 2000, the Applicant was informed that his dossier was forwarded to the Staff Retirement Appeals Committee. On 11 September 2000 and 6 November 2000 the Applicant sent reminders to the latter. On 20 November 2000 the Administrator of the Plan informed the Applicant that the file was still with the Appeals Committee and that he would be informed in due course of the Committee decision. Since then the Applicant has heard nothing of the fate of his file.

II. DECISION BEING CHALLENGED

11. It is against this aforesaid decision of the Administrator of the Plan dated 17 April 2000 that this Application is brought before this Tribunal.

III. **THE PARTIES' SUBMISSIONS**

On the Admissibility of the Application:

12. Applicant's Submissions

That the Applicant has exhausted all other administrative review remedies relevant to the Staff Retirement Plan within the Bank pursuant to Article III of the Statute and Rules of Procedure of the Administrative Tribunal.

That he has done all that could be expected of him to speed up the procedure but to no avail and in the circumstances the Pension Appeals authority failed to make a ruling within a reasonable time. Eventually, his case was submitted to the Retirement Appeals Committee; but for two years, despite several reminders by the Applicant, these went without any reply.

That the internal difficulties within the Bank in running its appeals procedure afford no excuse for denial of justice. Therefore, the Application which he filed on 8 August 2002 before the Tribunal is admissible, because the situation has caused two wrongs to him to wit: A moral suffering and a material one, i.e. the loss of the opportunity to make several millions in profit for which he claimed CFA 100 000 000 in damages and refund of the sum of CFA 1,500,000 for legal fees and expenses pursuant to Article IX (4) of the Statute of the Administrative Tribunal.

13. Respondent's Submissions:

The Respondent on 16 September 2002 filed a Motion to dismiss the Application on the grounds of non-admissibility on two grounds namely:

That the Tribunal lacks jurisdiction as set out in Article XVII (2) of the Statute of the Tribunal in that the basis of the Applicant's claim occurred prior to the establishment of the Tribunal; and

That the effect of the release signed by the Applicant absolved the Respondent from any further claims against it, since any outstanding obligations in respect of his pension contributions were fully and finally dealt with upon payment on 4 August 1999 of the full and total amount of UA 15,686,331 representing his withdrawal settlement as well as a total of UA 3,469,41 in January 2000 being accrued interests from July 1995 to August 1999 in accordance with the Staff Retirement Plan.

14. Applicant's Reply to the Non-Compliance with the Time Bar

The Applicant in his reply raised the issue of non-compliance with the time bar pursuant to Article XIV (i) of the Rules of Procedure which provide that the Respondent should submit a motion of non-admissibility of an application within a period of thirty (30) days following the receipt of the application as the application was received by the Tribunal on 8 August 2002 and the Respondent's reply was made on 16 September 2002. Therefore, as the time limit prescribed by the said Article XIV has been exceeded the Motion should be denied.

15. The Legal Effect of the Protocol dated 30 August 1999

That the Respondent is unable to produce clear and unequivocal evidence showing that the Applicant has undertaken to abandon any further action against the Bank with a view to receiving his entitlements as such waiver clause entailing the renunciation of his fundamental right cannot be presumed. The clause must be precise and the Bank must have made a special concession, relying on the judgment rendered on 19 July 2002 in the case of Komlan vs the ADB, Application N° 2001/04.

IV. PARTIES' PRAYERS:

16. In conclusion, the Respondent prayed for the dismissal of the Application as it is inadmissible pursuant to Rule XIV of the Statute and Rules of Procedure of the Administrative Tribunal. Whereas the Applicant, on the other hand, requested the Tribunal to declare that:

- a) The protocol of 30 August 1999 is of no legal effect and not applicable to him;
- b) the originating circumstances of the present Application for payment of damages is the late payment received on 24 January 2000, and
- c) the Application should be declared admissible and a suitable date be fixed for dealing with the merits of the case.

V. THE FOLLOWING FACTS ARE COMMON CAUSE:

- 17. a) The Applicant was dismissed from his employment with the Respondent on 17 March 1995;
- b) the Statute governing the proceedings of the Administrative Tribunal came into effect on 1 January 1998;
- c) on 4 August 1999 the Applicant received the full amount of UA 15,686.331 being the total amount of his withdrawal settlement;

- d) on 30 August 1999 the Applicant signed the release Instrument acknowledging receipt of his withdrawal settlement with the reservation of the outstanding of the accrued interests;
- e)
- e) in January 2000 an amount of UA 3,469.41 being the accrued interests in respect of pension contributions was paid to the Applicant;
- f) on 24 March 2000 the Applicant requested payment of CFA 93,962,535 as damages for the delayed payment of his withdrawal entitlements;
- g) by letter dated 17 April 2000 the acting Administrator of the Staff Retirement Plan rejected the Applicant's claim;
- h) on 5 June 2000 the Applicant sought a review of the decisions of the Acting Administrator of the Staff Retirement Plan and the Staff Retirement Plan Steering Committee not to pay him any damages;
- i) the Applicant's appeal was forwarded to the Pension Appeals Committee for consideration, whose decision is still pending as it has not yet pronounced itself on the appeal; and
- j) on 8 August 2002 the Applicant filed the Application with the Tribunal.

VI. PRELIMINARY OBSERVATION

18. The nature of the matter before the Tribunal entails two issues, to wit:
- a) Whether the Tribunal is competent to hear the application and
 - b) whether by executing the release instrument the Applicant discharged the Respondent from further claims or liability.

A negative answer to the first enquiry will finalise the matter and there will then be no need to deal with the second question. However, a positive answer will require an enquiry of the issues raised in the second question.

VII. THE LAW

19. Article XVII of the Statute of the Tribunal provides as follows:

"Effective Date of Jurisdiction

1. The present Statute shall enter into force on 1 January 1998.
 2. Notwithstanding any provision contained in this Statute, the Tribunal shall not be competent to hear or pass judgment upon any application contesting an administrative decision where the cause of such application arose prior to the establishment of the Tribunal. This shall be the case, irrespective of whether or not such an application is pending as of 1 January, 1998 at any level of the administrative review process or Staff Appeals Committee.“
20. Rule XIX sets out the calculation of time limits as prescribed by the Rules of Procedure in this instance Rule XIV (i). Rule XIX reads as follows: “The calculation of time limits prescribed in these Rules, all of which refer to calendar days, shall not include the day of the event from which the period runs, and shall include the next working day of the Bank when the last day of the period is not a working day”; and Rule XIV (i) provides, in part, as follows: “The Respondent may file a motion within thirty (30) days of receipt of an Application alleging non-admissibility of the Application”. By virtue of Rule XIX all time limits refer to “calendar days” but do not include the day of the event from which the event runs, (i.e. the day of service in this instance), and shall include the next working day of the Bank when the last day of the period is not a working day.
21. Upon request from the Tribunal, the Respondent provided further submissions in clarification of the time limit bar issue, *inter alia*, raised by the Applicant in his Reply. Initially, the Respondent supplied the wrong date on which it received the Application, namely 2 September 2002. Upon further queries from the Tribunal it was established that the Respondent received the Application on 16 August 2002 as this is apparent from the date stamp on the internal memorandum document within the Bank which was availed to the Tribunal. In the circumstances, the Respondent contended that it complied with the provisions of the Rule and its motion seeking dismissal of the Application on the grounds of non-admissibility having been filed with the Tribunal on 16 August 2002 was not time barred.
22. Upon the computation of the calendar days pursuant to the provisions of Rule XIX, the 16 August 2002 fell on a Friday, and as this was the day on which the event occurred, i.e. the day on which the Respondent received the Application is excluded, because this is the day from which the event runs. As the last day of the computation of the period, 15 September 2002 fell on a “not working day”, a Sunday, the count falls on the “next working day of the Bank”, which is a Monday. In other words, the Sunday is not counted. In the circumstances, a simple count of the calendar days, excluding 16 August 2002 and 15 September 2002 gives us exactly thirty (30) days, which means the Respondent just beat the deadline.
23. In the circumstances, the Tribunal is satisfied that the Respondent has shown on a preponderance of probabilities, that it received the Application on 16 August 2002 and it is therefore found that the Application was received on the 16 August 2002.

It must be pointed out here that apart from statutory power given to the Tribunal pursuant to Article III (4) to waive the time limits in exceptional circumstances, it is trite law that the Tribunal has an inherent jurisdiction to condone its own Rules upon good cause shown.

VIII. NON-ADMISSIBILITY PURSUANT TO ARTICLE XVII (2)

24. In his Reply the Applicant submitted that his claims are not based on any objections to the administrative act of dismissal but on the negligence on the part of the Respondent. As he put it: "The originating factor of the present Application is the wrongful conduct characterized by negligence on the part of ADB in relation to his Pension Fund settlements". This denial which materialized on the date of payment on 24 January 2000, caused the denial of a legitimate entitlement which would warrant compensation and these circumstances occurred long after the establishment of the Tribunal, alas the Applicant. In other words, the negligence which led to a lengthy delay until payment on 24 January 2002 created a new cause of action on that date and the Tribunal was long established then. Therefore, the Tribunal had jurisdiction to hear the Application.

The Applicant's contentions are quite ingenuous and innovative but of no relevance to the factual and substantial issue raised by the Respondent.

25. It is abundantly clear from the facts enumerated herein above that the cause of action that led to the claim for damages on the ground of negligence is the delay in the payment of the termination benefits, originated in the Applicant's dismissal in 1995.
26. The Applicant in his Reply states that: " the present application for the payment of the damages arise from the fault committed by the Bank, with regard to the fulfillment of its obligations under the Staff Pension Scheme" and further that: "the originating factor of the present application is the wrongful conduct characterized by negligence on the part of the ADB in relation to his Pension Fund entitlements". This clearly is an acknowledgement that the root cause of his claim for damages stemmed from the delay in the payment of his pension benefits since 1995 upon his separation from the Bank. This delay continued beyond the establishment of the Tribunal in 1998. In other words, the "wrongful conduct" on the part of the Respondent started in 1995 and continued beyond 1998 the date when the Statute of the Tribunal came into effect, and the consequences of the alleged "wrongful conduct" continued to be felt by the Applicant until he brought the Application before the Tribunal on 8 August 2002: " the fact that the decision of 1986 produces consequences for Mr. X now, can have no effect on the extent of the jurisdiction of the Tribunal: if it were otherwise, then the limitation on the commencement date of the Tribunal's jurisdiction would be meaningless since the effects of innumerable pre-October 1992 acts may will be felt years after the date when the Tribunal's Statute came into force." Mr. X vs IMF; (judgment IMF Administrative Tribunal, No 1994.1 – 31 August 1994).

27. Although the Applicant submitted that the facts of the case of Mr. X vs IMF have no bearing on the present case and are distinguishable, the underlying ratio of the citation *supra* is relevant and applicable.

IX. CONCLUSION

28. For the foregoing reasons it is found that the impugned wrongful conduct which led to the claim for damages was pending before the Pension Retirement Plan's acting Administrator and/or Pension Appeal Committee on the date when the Statute of the Tribunal came into force on 1 January 1998. Therefore, the Application before the Tribunal falls squarely within the ambit of the provisions of Article XVII (2). In the circumstances, the Tribunal lacks jurisdiction to be seized with and to hear the merits of the case and the Application to dismiss the motion should therefore, be refused.

In view of the conclusion reached herein there is no need to deal and rule on the rest of the issues raised by the parties. The Tribunal, thus, refrains from doing so.

X. THE DECISION

29. In the result the following orders are made:
- 1) The Respondent's motion to dismiss the Application, on the grounds of inadmissibility pursuant to Rule XIV, is not time barred; therefore, the motion to dismiss the application succeeds, and the Application to dismiss the motion should therefore fail;
 - 2) the Application is dismissed.

XI. COMMENT

30. Incidentally, it is only apt, in the interest of the justice, to urge the Pension Appeals Committee to attend to the matter referred to it, if it has not done so already, in order to bring finality to the issue in all fairness to the parties concerned.

Honorable Justice Mohammed Bello - President

Albertine Lipou Massala - Executive Secretary

COUNSEL FOR THE APPLICANT:

- Mr. Souleymane Traore (Esq) - Absent

COUNSEL FOR THE RESPONDENT:

- Mr. George Aron

assisted by

- Ms. Alikem Adadevoh